

Case No. C082786
Nevada County Superior Court Case No. CU12-078702

**IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT**

**Andy and Maryclaire Daus,
Appellants**

v.

**Paula Howser, Brian Howser and Vaughn Warriner,
Respondents.**

**Appeal from the Superior Court for Nevada County
The Honorable Thomas M. Anderson, Judge**

APPELLANTS' SUPPLEMENTAL BRIEF

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November 20, 2017

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I. Introduction

As shown below, the trial court's overruling of Respondents' objections to the Hall declaration was correct. However, even if the objections are now sustained on appeal, there is ample evidence in the existing record of excessive compensation (i.e., damages)¹ that the trial court did not overtly rely upon, but could have, in reaching its decision. Thus, a triable issue of fact was raised by Appellants' opposition to Respondents' Motion ("Opposition") with regard to excessive compensation.

Respondents' Motion was based upon legal theories supporting the creation and operation of the special compensation committee in violation of the prohibitions against self-dealing by interested directors in the Bylaws and California corporate law. Their Motion did not have any section directly challenging Appellants' damage claims. Indeed, Respondents did not put a single piece of financial information into the record that challenged Appellants' allegations in the Third Amended Complaint ("TAC").

Facing Respondents legal arguments about the special compensation committee and finding no opposing financial evidence on damages, Appellants' Opposition was correctly focused on the legal arguments raised by Respondents' Motion. If Appellants had been put on notice by Respondent's Motion that they needed to make a more substantial evidentiary presentation on the amount of excessive compensation, Appellants could have readily done so.

¹ Appellants' claim is that profits of the company that should have been paid out as dividends were, instead, paid by Respondents to themselves as improper bonuses and/or excess salary. These funds can be characterized as excessive compensation or as damages. Appellants will use the terms interchangeably.

In addition, the trial court's tentative ruling, which overruled the objections to the Hall Declaration, further supported Appellants' decision at the time not to seek leave under §437c(h) to file additional damage evidence. Finally, there was no discussion of the evidence for excessive compensation at oral argument, and thus, Appellants saw no need to request leave of the trial court at oral argument to supplement the record.

If this Court does not sustain the trial court's overruling of the objections to the Hall Declaration, and further, if this Court does not find that the evidence already in the record is sufficient, then Appellants believe that §437c(m)(2) must be followed and Appellants be allowed to submit to the trial court the extensive evidence they already have on the amount of excessive compensation.

II. The Trial Court's Overruling of the Objections to the Hall Declaration was Correct

On June 17, 2016, Appellants filed the Motion to Compel the production of electronic copies of the company's Quickbooks files so that their expert could have access to the same financial information as Respondents in a format that would allow proper expert evaluation of the company's finances. AR10-49; CT917-949. Included as an exhibit to the Motion to Compel was the CV of Appellants' expert witness, Wallace Valuation, that established the extensive credentials of Appellants' expert on the subject of excessive compensation to Respondents. AR46-48.² This Motion was heard on June 20, 2016, *just four days before oral argument on the Motion for Summary*

² The Clerks' Transcript on Appeal inexplicably did not contain some of the key documents in support of the Motion to Compel, including the Declaration of Kristoffer M. Hall, Appellants' expert. Appellants added these documents by Motion to Augment on March 7, 2016.

Judgment. CT 916.

The trial court, having just reviewed the CV of Appellants' expert, was obviously aware at the time of drafting its tentative ruling that Appellants' expert was overly qualified to analyze the evidence and then render an opinion on the amount of damages supported by the evidence. That is the likely reason why the trial court did not sustain Respondents' objection regarding the qualification of Kristoffer Hall to render his opinion.

A review of the Hall declaration reveals that it specifically details the facts that he relied upon in reaching his decision. It also included the summary exhibit showing the specific dollar amounts that were found to be excessive.

As already noted, Respondents did not put any financial evidence into the record when they replied to Appellants' Opposition. Further, Respondents did not object to the documentary evidence of excessive compensation submitted by Appellants (see Sections III-IV, below). The trial court certainly noticed the lack of any evidence supporting Respondents, and faced with substantial evidence in the record supporting Appellants, the trial court reasonably concluded that the Hall declaration had sufficient foundation.

III. The Amount of Excessive Compensation Was Only Incidentally Raised Under the Conversion Claim

The only mention of damages in the Motion was a very brief, unsupported sentence in the section on the Conversion claim where Respondents asserted that Appellants cannot ascertain the "specific amount they [Appellants] are owed", citing to SSUF 58. CT383:24-25. However, Respondents' factual support for this statement, SSUF 58, has nothing to do

with the Appellants' damage claims, but instead refers to an unrelated affirmative defense.

In their Opposition, Appellants provided uncontradicted evidence in support of the \$179,600 amount they alleged was converted for 2011 in the TAC at ¶27. CT 485, 498. See Plaintiffs' PSUF 71, 77-80, CT 462, 464-465, which cite, *inter alia*, to P. Ex. 17, CT 669.

Plaintiffs' Ex. 17 is a chart prepared by Respondent's accountant, Mr. Philips (see the facsimile time stamp on the edge), that summarizes the compensation paid to all shareholders for years 2009 through 2011. For the year 2009 the salaries for Andy Daus, Brian Howser, and Vaughn Warriner were almost the same and no bonuses were paid. Instead, the shareholders received the net profits as dividends on a *pro rata* basis.³

For year 2010, the salaries are comparable, except that Andy Daus' salary was prorated for having only worked through May. There were no bonuses and no dividends because of the lower net company income.

2011 is the first year for which Appellants claim Respondents breached their fiduciary duty and paid themselves all of the company's profits. The chart shows substantial, unexplained salary increases for the Respondents, *plus* huge bonuses totaling \$142,000. For Paul Howser it shows a salary increase \$8,050 for 2011 over 2010. For Vaughn Warriner, it shows a salary increase of \$24,040 for 2011 over 2010. For Brian Howser, it shows an increase of \$32,540.

There was no objection by Respondents to this evidence. However, the trial court presumably did not cite to this exhibit because it had overruled the

³ Dividends are called "distributions" on this document. The sum of the "distributions" for the shareholders is \$48,772.

objection to the Hall declaration. Plaintiffs' Ex. 17 is more than sufficient to raise a triable issue for the jury about the amount of excessive compensation, especially in view of the Respondents failure to put *any* contrary financial evidence into the record.

IV. There is Other Ample Evidence of Excessive Compensation in the Record

Assuming, *arguendo*, that the objection to the Hall declaration is sustained on appeal, there is even more specific evidence than P. Ex. 17 in the record that shows specific and substantial amounts of company profits that Respondents paid themselves as excessive compensation.

A. Plaintiffs' Exhibits 26, 29 -30 (CT 697, 703-707)

These emails between Respondents shows how Respondents came to pay themselves the bonuses shown on Plaintiffs' Exhibit 17 without any referral to the Board and without any discussion of paying out these company profits as dividends *pro rata* to all shareholders. The specific bonus amounts mentioned in these documents were part of the excessive bonuses paid to Respondents for all of 2011 as shown on P Ex. 17.

B. Plaintiffs' Exhibits 31-32 (CT709-711)

These emails discuss specific bonus amounts for Respondents without any referral to the Board and without any discussion of paying out these company profits as dividends *pro rata* to all shareholders.

C. Plaintiffs' Exhibits 34-37 (CT715-721)

These emails show how Respondents took a net profit of \$85,000 for 2014 and funneled it into an IRA account for themselves without any referral to the Board and without any discussion of paying out these company profits as dividends *pro rata* to all shareholders. There are related emails at

Plaintiffs Exhibits 38-40 (CT 723-727).

V. Appellants Request Adequate Opportunity to Present Evidence Under CCP §437c(m)(2)

As discussed above, Appellants did not have adequate notice that they needed to include additional evidence on the amount of excessive compensation in their Opposition. Moreover, they reasonably relied upon the tentative ruling of the trial court (plus, the lack of any argument by Respondents at oral argument) on the Hall declaration. Understandably, Appellants did not file an *ex parte* application for an OST to hear a motion to grant leave to submit additional evidence under CCP §437c(h).

It is clear from the language of CCP §437c that the legislature wanted to provide a full and fair opportunity for each side to present their respective evidence for summary judgment. At this juncture, it appears that CCP §437c(m)(2) provides the appropriate mechanism to correct the summary judgment record, if this Court deems it necessary to supplement the record.⁴

A good example of the application of CCP §437c(m)(2) is set out in *Greystone Homes v. Midtec, Inc.*, 168 Cal App 4th 1194, 1221 (2008)

⁴ CCP §437c(m)(2) provides as follows:

(2) Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party.

(“*Greystone*”). Here, the Court of Appeal found that the motion for summary judgment was focused upon a legal contention that the economic loss rule precluded the action, and thus, Greystone Homes “was not called upon, nor required, to present evidence regarding the degree to which the non-failed fittings were defective ...” The Court of Appeal held that the factual record was “undeveloped” and that it would not be appropriate to affirm the judgment based upon that incomplete record.

As shown above, the facts in this case are substantially parallel to those in *Greystone*. Accordingly, it would be appropriate for this Court to apply §437c(m)(2) and have the evidentiary record on Appellant’s damage (i.e., excessive compensation) claims supplemented in the trial court.

VI. **Good Cause, Fairness and Conclusion**

Although this supplemental briefing is being conducted pursuant to §437c(m)(2) and not § 437c(h), Appellants believe that the concepts of good cause and fundamental fairness as they pertain to decisions under §437c(h) are applicable. See e.g., *Denton v. City and County of San Francisco*, 2017 WL 4873259 pp. 7-9 (2017 Court of Appeal, First App. Dist., Division 2); *Chavez v. 24 Hour Fitness USA, Inc.*, 238 Cal. App. 4th 632, 643-644 (2015).

Based upon the foregoing, Appellants request this Court to sustain the trial court’s ruling on the Hall Declaration, or in the alternative, to find that there was sufficient evidence already in the record and/or that Appellants will be allowed to supplement that record pursuant to §437c(m)(2).

Respectfully Submitted,

Dated: November 20, 2017

/s/ Patrick H. Dwyer
Patrick H. Dwyer, Counsel for Appellants

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellants' Supplemental Brief in the matter of Andy and Maryclaire Daus v. Paul Howser, Brian Howser, and Vaughn Warriner, Case No.CU12-078702 , appeal No. C082786 was served via electronic email to:

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And by U.S. First Class mail, postage prepaid, upon the following:

1. The Superior Court for the County of Nevada,
201 Church Street
Nevada City, California 95959.

I declare under penalty of perjury under the laws of California that the foregoing certification is true and correct.

/s/ Patrick H. Dwyer
Patrick H. Dwyer,

Date: November 20, 2017

Location: Penn Valley, CA 95946