

**FLORIDA DERIVATIVE LITIGATION IN THE  
CONTEXT OF CONDOMINIUM ASSOCIATIONS,  
AND THE COURT’S DEFERENCE TO THE BEST  
INTERESTS OF THE CORPORATION**

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## I. INTRODUCTION

As succinctly stated by the Florida Supreme Court,

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of *the majority* of the unit owners since they are living in such close proximity and using facilities in common, *each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.* Condominium unit owners comprise a little *democratic sub society* of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.<sup>1</sup>

In Florida, Chapter 617, Florida Statutes, governs not-for-profit corporations, which include condominium associations.<sup>2</sup> Unit owners within condominium associations are members and shareholders of their not-for-profit corporation by virtue of their ownership of a unit within the condominium association, and can therefore bring derivative lawsuits in the right of the condominium association.<sup>3</sup> The interplay of community associations, when coupled with the intricate landscape of shareholder derivative actions and corporate governance, often gives rise to complex disputes, as exemplified by the case of *Ezer v. Holdack*.<sup>4</sup> In this case, a condominium association member and shareholder tested the boundaries of Florida's corporate statutes, creating a profound impact on the deference given to internal investigative committees appointed by independent board members of a condominium association pursuant to section 617.07401 of the Florida Statutes.<sup>5</sup> This Comment discusses the multifaceted proceedings of *Ezer*, offering an in-depth analysis of the pivotal role of independent investigation committees appointed by independent board

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1. *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 350 (Fla. 1979) (emphasis added).

2. FLA. STAT. § 617.01401 (2023). Chapter 617 Condominiums are also governed by Chapter 718, Florida Statutes. FLA. STAT. § 718.102 (2023). Chapter 617 likewise governs Florida homeowners' associations, which are also governed by Chapter 720, Florida Statutes. FLA. STAT. § 617.01401(13); FLA. STAT. § 720.302(1) (2023). To that end, for the purposes of this Comment, all law and analysis applicable to Chapter 617 Condominiums, is likewise applicable to Chapter 720 Homeowners' Associations. FLA. STAT. § 617.01401(13); FLA. STAT. § 720.302(1).

3. *See* FLA. STAT. § 617.07401(1) (2023).

4. *See* 358 So. 3d 429, 430 (Fla. 4th Dist. Ct. App. 2023).

5. *See id.*; FLA. STAT. § 617.07401(3)(b).

members of corporations pursuant to Chapter 617, and their impact on non-profit corporate governance in the State of Florida.<sup>6</sup> Specifically, this Comment seeks to shed light on the evolving legal landscape surrounding shareholder derivative actions in the context of condominium associations, the ramifications on corporate decision-making, and overall democracy within the democratic subsociety of condominiums, by focusing on what is required by the plain language of Chapter 617, while viewing same in conjunction with Delaware law.<sup>7</sup>

## II. FACTS OF CASE

On or about October 12, 2020, pursuant to Chapters 617 and 718 of the Florida Statutes, Tara Ezer (“Ezer”), a member and shareholder of the Hollywood Station Condominium Association, Inc. by virtue of her ownership of a unit within the condominium, initiated a shareholder derivative action in the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County on behalf of Hollywood Station Condominium Association, Inc. (the “Association”), initially naming three former and three current members of the Association’s board of directors (i.e., six individual directors in total) (“Board Member Defendants”), and the Association, as defendants.<sup>8</sup> Two days later, on October 14, 2020, Ezer filed a Verified Amended Complaint.<sup>9</sup> The Association, a Florida not-for-profit corporation, operates as a Florida condominium association within the meaning of section 718.103(3) of the Florida Statutes.<sup>10</sup> The lawsuit stemmed

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6. See discussion *infra* Part V.

7. See discussion *infra* Part V.

8. See Complaint at 1–2, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Oct. 12, 2020) [hereinafter *Ezer* Complaint]. “This is a shareholder derivative action brought by TARA EZER, as a member of the Association.” *Id.* at 2. “This action is brought pursuant to Fla. Stat. § 617.0740 . . . .” *Id.* “This action is further brought pursuant to Fla. Stat. § 718.303 . . . .” *Id.* Section 617.0740(2) provides:

A complaint in a proceeding brought in the right of a domestic or foreign corporation must be verified and alleged with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for at least 90 days after the date of the first demand unless, before the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

FLA. STAT. § 617.0740(2) (2023). However, Ezer claimed that the Association would suffer irreparable injury without action within 90 days. See *Ezer* Complaint, *supra* note 8, at 2.

9. Verified Amended Complaint at 1, *Ezer v. Holdack*, No. CACE-20-016861, 2020 WL 13730022, at \*1 (Fla. 17th Cir. Ct. Oct. 14, 2020) [hereinafter *Ezer* Amended Complaint].

10. FLA. STAT. § 718.103(3) (2023); *Hollywood Station Condominium Association, Inc.*, SUNBIZ.ORG,

from a disagreement between Ezer and the Association based on purported violations of the Association’s Declaration of Condominium; namely, allegations relating to “certain material alterations, modifications, and improvements to the Common Elements at the Condominium Property . . . .”<sup>11</sup> Specifically, Ezer alleged that,

- a. Defendants may have failed to obtain the approval of the majority of *all* unit owners to make material alterations and substantial additions to the Common Elements, and fraudulently induced Unit Owners to vote for same;
- b. Defendants . . . failed to obtain the approval of the majority of all unit owners at [a] meeting to spend in excess of \$100,000.000 in the aggregate in any calendar for additions, alterations and improvements to the Common Elements, and entered into a construction contract with a contractor in the amount of \$434,098.26;
- c. Defendants . . . procured a \$800,000.00 loan from a bank for the modifications and improvements without obtaining unit owner approval of the loan.<sup>12</sup>

Ezer requested equitable relief by way of a declaratory judgment, an injunction and appointment of a receiver (Counts I–III).<sup>13</sup> In response to Ezer bringing the derivative action on behalf of the Association, the independent board members of the Association, who were not named as defendants in the *Ezer* lawsuit, decided to pursue a reasonable investigation of the allegations in Ezer’s complaint, as authorized pursuant to section 617.07401(3)(b) of the Florida Statutes, to determine whether maintenance of the derivative suit was in the best interests of the corporation, i.e., the Association.<sup>14</sup>

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<http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=HOLLYWOODSTATIONCONDOMINIUMASS%20N040000059530&aggregateId=domnp-n04000005953-6bfaff4e-0e6f-4d9d-aff7-7cccfb3dddf&searchTerm=hollywood%20station%20condominium&listNameOrder=HOLLYWOODSTATIONCONDOMINIUMASS%20N040000059530> (last visited Nov. 18, 2023); *see* Defendants, Jacqueline Holdack, Dan Tubridy, Victor Rocha, Patricia Gutierrez, Maria Paula Diaz and Frank Colon’s Motion to Dismiss Plaintiff’s Second Amended Complaint with Incorporated Memorandum of Law at Ex. D, *Ezer v. Holdack*, No. CACE-20-016861, 2021 WL 11108795 (Fla. 17th Cir. Ct. May 3, 2021) [*Ezer* Board Members’ Motion to Dismiss].

11. *Ezer* Amended Complaint, *supra* note 9 at 2.

12. *Id.* at 2–3. Notably, Plaintiff excluded two individual board member defendants from her allegations regarding approval to spend in excess of \$100,000.00 and procuring an \$800,000.00 loan. *Id.* at 3.

13. *Id.* at 8–13.

14. Meeting Minutes, Bd. of Dirs., Hollywood Station Condo. Ass’n (Dec. 7, 2020) (on file with author) [hereinafter Dec. 7, 2020 Mins.]; FLA. STAT. § 617.07401(3)(b) (2023).

To that end, on December 5, 2020, in accordance with Chapter 718, Florida Statutes, notice was given that a meeting of the board of directors of the Association would be held on Monday, December 7, 2020:

[F]or the purpose of selecting and appointing a Committee consisting of two or more independent Directors to make a reasonable investigation as to whether the maintenance of a derivative suit filed by a Unit Owner of the Association [namely, Ezer] on October 12, 2020, is in the best interest of the Association, all in accordance with Florida Statute 617.07401 (3)(b).<sup>15</sup>

On December 7, 2020, pursuant to section 617.07401(3)(b) of the Florida Statutes, a majority of independent directors, *who were not named as defendants in the Ezer lawsuit*, voted to appoint a committee consisting of two independent directors to: (1) “make a reasonable investigation of the allegations in the derivative lawsuit;” (2) “to make a good faith determination whether said lawsuit is in the best interest of the . . . Association;” and (3) “prepare a detailed report for submission to the Court concerning the Committee’s findings related to its investigation and its determination as to whether said lawsuit is in the best interest of the . . . Association.”<sup>16</sup> Two board members, *who were not named defendants in the Ezer lawsuit*, were appointed to the independent investigation committee.<sup>17</sup>

Pursuant to section 617.07401(2) of the Florida Statutes, “[i]f the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.”<sup>18</sup> Consistent therewith, on December 14, 2020, the Association and Board Member Defendants filed a Motion to Stay Derivative Proceedings, requesting the action be stayed for all purposes for sixty days pending the committee’s investigation of Ezer’s claims.<sup>19</sup> On January 6, 2021, Ezer opposed the Motion to Stay, arguing, *inter alia*, that Defendants delayed in appointing a committee, and that the committee could not be considered independent because

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15. Memorandum from Victor Matos, Prop. Manager, Hollywood Station Condo. Ass’n Inc. on Notice of a Meeting of the Board of Directors (Dec. 5, 2020) (on file with author); FLA. STAT. § 617.07401(3)(b).

16. Dec. 7, 2020 Mins., *supra* note 14; *see* FLA. STAT. § 617.07401(3)(b); *see also* Defendant, Hollywood Station Condominium Association, Inc.’s Motion to Stay Derivative Proceedings at 3, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Dec. 14, 2020) [hereinafter *Ezer Defendant’s Motion to Stay*].

17. *See* Dec. 7, 2020 Mins., *supra* note 14; FLA. STAT. § 617.07401(3)(b); *Ezer Defendant’s Motion to Stay*, *supra* note 16 at 3.

18. FLA. STAT. § 617.07401(2).

19. *Ezer Defendant’s Motion to Stay*, *supra* note 16, at 4.

it consisted of directors that have liability due to their participation in the actions giving rise to Ezer's claims.<sup>20</sup> Notably, however, along with filing the Response in Opposition to the Motion to Stay, Ezer filed a Motion for Leave to Amend Complaint.<sup>21</sup> Specifically, pending the investigation by the appointed committee, which consisted of two board members who, again, *were not named defendants* in Ezer's derivative lawsuit and were appointed pursuant to section 617.07401(3) of the Florida Statutes, Ezer moved for leave to amend her Complaint to include, *inter alia*, the two committee members as defendants to the lawsuit, and an additional claim of breach of fiduciary duties; a litigation tactic which Defendants would later argue was nothing but an ill-founded attempt to try to destroy the independence of the committee.<sup>22</sup>

One week after Plaintiff filed her Motion for Leave to Amend, on January 13, 2021, the Association filed a Notice of Filing in Further Support of Motion to Stay Derivative Proceedings.<sup>23</sup> Attached to the Association's filing was the notice of the December 7, 2020 meeting, along with verified declarations of the independent committee members conducting the investigation into Ezer's claims, attesting to their independence.<sup>24</sup> In response, on January 29, 2021, Ezer filed an Amended Motion for Leave to Amend, again attempting to add, *inter alia*, the committee members as defendants in the action, and setting forth a claim for breach of fiduciary duties.<sup>25</sup> This time, Ezer also proposed setting forth claims for civil conspiracy and aiding and abetting.<sup>26</sup>

Since Ezer's action was a shareholder derivative action and the amount in controversy exceeded \$150,000.00, the Association and Board Member

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20. See Plaintiff's Response in Opposition to Defendants' Motion to Stay at 6, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 6, 2021).

21. *Id.*; Motion for Leave to Amend Complaint at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 6, 2021) [hereinafter *Ezer Motion to Amend Complaint*].

22. See *Ezer Motion to Amend Complaint*, *supra* note 21, at 2, 10; Defendant, Hollywood Station Condominium Association, Inc.'s Motion to Dismiss Verified Second Amended Complaint Pursuant to Section 617.07401, Florida Statutes at 6, *Ezer v. Holdack*, No. CACE-20-016861, 2021 WL 11108793, at \*3-4 (Fla. 17th Cir. Ct. May 3, 2021) [hereinafter *Ezer Association's Motion to Dismiss Second Amended Complaint*].

23. Defendant, Hollywood Station Condominium Association, Inc.'s Notice of Filing in Further Support of Motion to Stay Derivative Proceeding at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 13, 2021).

24. *Id.* at Notice to All Association Members of a Meeting of the Board of Directors, Verified Declaration of George Partain, Verified Declaration of Scott Granger.

25. Amended Motion for Leave to Amend Complaint, at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 29, 2021); Verified Second Amended Complaint at 15, *Ezer v. Holdack*, No. CACE-20-016861, (Fla. 17th Cir. Ct. Mar. 17, 2021) [hereinafter *Ezer Second Amended Complaint*].

26. *Ezer Second Amended Complaint*, *supra* note 25, at 16, 17.

Defendants filed and succeeded in a motion seeking transfer to the complex litigation division—a division presided over by Chief Judge Jack Tuter.<sup>27</sup>

On January 26, 2021, in accordance with section 718.112 of the Florida Statutes, all of the members of the Association were provided notice of a special meeting, informing that a telephonic meeting would be held on February 11, 2021.<sup>28</sup> The notice of the special meeting also specified that “[t]he purpose of the Special Meeting is for the Members to consider and vote on the issue of whether continuation of the derivative lawsuit brought by Tara Ezer [is] in [the] best interest of the Association.”<sup>29</sup> Enclosed with the notice was a letter to the unit owners, and the factual findings of the Committee.<sup>30</sup> The letter informed the unit owners that the detailed findings of the Committee (i.e., consisting of directors who were appointed as independent directors to determine whether a derivative lawsuit brought by Ezer was in the best interests of the Association) were enclosed with the notice, and requested that all unit owners review the committee’s findings carefully and to notify the Committee of any relevant facts that were not indicated in the Committee’s findings by Friday, February 5, 2021.<sup>31</sup> The letter further provided an email address for unit owners to provide any information by email to the independent committee prior to the meeting.<sup>32</sup> Google Drive links to both the Plaintiff’s Operative Verified Amended Complaint and Proposed Verified Second Amended Complaint were included within the letter to the Association membership to review.<sup>33</sup> Notably, the Verified Second Amended Complaint that was circulated to the Association membership included the independent Committee members as named defendants to the lawsuit.<sup>34</sup> Reminder emails regarding the February 2021 special meeting were provided to the Association’s members on February 4, 2021, February 5, 2021, and February 9, 2021.<sup>35</sup>

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27. Motion Requesting Transfer of Business Case or Tort Case from General Civil Division to a Complex Litigation Division at 1, 2, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Feb. 12, 2021); Order Transferring Case to Division 07 at 1, *Ezer v. Holdack* No. CACE20-016861 (Fla. 17th Cir. Ct. Feb. 25, 2021).

28. Letter from Victor Matos, Prop. Manager, Hollywood Station Condo. Ass’n, to Unit Owners (Jan. 26, 2021) (on file with author).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Letter from Victor Matos to Unit Owners, *supra* note 28.

34. *Id.*; *Ezer* Second Amended Complaint, *supra* note 25, at 1.

35. *Ezer* Association’s Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8.



At the February 11, 2021 meeting, 101 members were present by electronic vote or by written proxy.<sup>36</sup> The 101 members present exceeded the one-third requirement of the Association's 224 unit owners under the Association's governing documents to constitute a quorum; thereby establishing a quorum for the meeting.<sup>37</sup> At the meeting, a vote was taken on whether the continuation of the instant derivative lawsuit was in the best interests of the Association.<sup>38</sup> Out of the 101 members present at the meeting, ninety-three members voted that the continuation of Ezer's derivative lawsuit was *not* in the best interests of the Association.<sup>39</sup> In other words, by an overwhelming majority (about ninety-two percent of the members present), the Association's membership determined that Ezer's derivative lawsuit *was not* in the best interests of the Association.<sup>40</sup> Thereafter, the Committee prepared a detailed report outlining Plaintiff's claims, detailing their investigation the facts surrounding those claims, and ultimately concluding that the Board of Directors acted in good faith and in the best interests of the Association's unit owners while carrying out their duties with respect to Ezer's allegations.<sup>41</sup>

On March 17, 2021, over the Association's objection, the trial court granted Ezer's Motion for Leave to Amend, deeming the Amended Complaint as filed on March 17, 2021.<sup>42</sup> After consideration of the parties' respective filings and after hearing argument of counsel, however, the Court abated service of process on the defendants Ezer sought to add to the lawsuit (i.e., the committee members) until resolution of any challenges to the newly amended Complaint.<sup>43</sup> Thereafter, Ezer filed a Motion to Bifurcate and Motion for Partial Summary Judgment; the Defendant Board Members filed their own Motion to Dismiss; and the Association filed a Motion to Dismiss Verified Second Amended Complaint Pursuant to section 617.07401 of the Florida Statutes.<sup>44</sup> The Association's

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36. Meeting Minutes, Bd. of Dirs., Hollywood Station Condo. Ass'n (Feb. 11, 2021) (on file with author) [hereinafter Feb. 11, 2021 Mins.]. "[I]n order for a Special Meeting to take place, presence in person, or by limited proxy, of persons entitled to cast 33 1/3% of votes is necessary to establish a quorum in order for business to be conducted." *Ezer Association's Motion to Dismiss Second Amended Complaint*, *supra* note 22, at 8.

37. Feb. 11, 2021 Mins. *supra* note 36; *Ezer Association's Motion to Dismiss Second Amended Complaint*, *supra* note 22, at 8.

38. Feb. 11, 2021 Mins. *supra* note 36.

39. *Id.*

40. *See id.*

41. Independent Directors Committee's Fla. Stat. 617.07401(3)(b) Report, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Feb. 12, 2021).

42. Order Granting Motion to Amend Complaint at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Mar. 17, 2021) (No. 20-16861).

43. *Id.*

44. Plaintiff's Motion to Bifurcate Plaintiff's Declaratory Judgment Claim For Resolution Prior to the Remaining Claims at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th



Motion to Dismiss the Second Amended Complaint, pursuant to section 617.07401 of the Florida Statutes, is the focus of this Comment.<sup>45</sup>

In its Motion, the Association moved to dismiss the action, in its entirety, on the basis that, pursuant to section 617.07401(3) of the Florida Statutes, an independent Committee “made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of . . . [the] derivative [suit]. . . is not in the best interests of the Association.”<sup>46</sup> In support of its position, the Association argued that the Committee always was, and remained, independent, and made a good faith determination after conducting a reasonable investigation that the maintenance of Ezer’s derivative suit was not in the best interests of the corporation.<sup>47</sup> The Association incorporated the final written report of the Committee within its Motion to Dismiss.<sup>48</sup>

Ezer opposed the Association’s position and continued to question the Committee’s independence, good faith, and reasonableness.<sup>49</sup> The Association filed a reply to Ezer’s response, arguing, *inter alia*, that the Committee’s investigation was reasonable, conducted in good faith, and that the Committee members were independent.<sup>50</sup> The Association further relied on the business judgment rule, and moreover, argued that Ezer’s position was motivated by self-interest and did not adequately represent the interests of the majority, let alone all, of the members of the Association.<sup>51</sup>

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Cir. Ct. Mar. 29, 2021); Plaintiff’s Motion for Partial Summary Judgment on Count I of Plaintiff’s Second Amended Complaint For Declaratory Judgment at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Mar. 29, 2021); *Ezer* Board Members’ Motion to Dismiss, *supra* note 10, at 1; *Ezer* Association’s Motion to Dismiss Second Amended Complaint, *supra* note 22, at 1. The board of directors and the Association separately moved to dismiss Ezer’s Second Amended Complaint. *Id.*

45. See discussion *infra* Parts IV–VI.

46. *Ezer* Association’s Motion to Dismiss Second Amended Complaint, *supra* note 22, at 1; see also FLA. STAT. § 617.07401(3)(b) (2023).

47. *Ezer* Association’s Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8, 9.

48. *Id.* at Ex. “G”.

49. Plaintiff’s Verified Response in Opposition to Defendants’ Motion to Dismiss Second Amended Complaint at 17, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. May 14, 2021) [hereinafter *Ezer* Plaintiff’s Response in Opposition to Motion to Dismiss].

50. Nominal Defendant, Hollywood Station Condominium Association, Inc.’s Reply to Plaintiff’s Response in Opposition to Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint, with Incorporated Memorandum of Law at 8, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Aug. 11, 2021) [hereinafter *Ezer* Association’s Reply to Plaintiff’s Response].

51. *Id.* at 25, 28.

On August 12, 2021, a special set hearing was held on the Association's Motion to Dismiss, during which the court heard argument of counsel.<sup>52</sup> During the hearing on the Association's Motion to Dismiss, the trial court acknowledged that there were three things the court needed to determine; namely, whether the members of the Committee were: 1) independent; 2) acting in good faith; and 3) had a reasonable and objective basis for the Committee's report.<sup>53</sup> At the conclusion of the hearing, the court requested both parties submit proposed orders on the Association's Motion to Dismiss and requested that counsel for the Association provide the court a copy of the transcript.<sup>54</sup>

### III. TRIAL COURT'S DECISION

Ultimately, the trial court entered a detailed twelve page order granting the Association's Motion to Dismiss, and dismissing Ezer's derivative lawsuit pursuant to section 617.07401(3) of the Florida Statutes.<sup>55</sup> Within the Order, the court discussed section 617.07401(3) in detail.<sup>56</sup> First, the court found that while Ezer argued that the Association's motion was "devoid of any evidence that refutes that the Defendants committed material violations of the Declaration, . . . this *is not* to be considered under Chapter 617."<sup>57</sup> Next, noting that

[t]he corporation [i.e., the Association in this case] has the burden of proving the independence and good faith of the group making the determination and reasonableness of the investigation, *not* the burden of 'refuting' [Ezer's] allegations. . . . Accordingly, this Court finds that [Ezer's] arguments regarding the merits of this case such as violations of the declaration are of no consequence in determining the dismissal of this action under section 617.07401, Florida Statutes.<sup>58</sup>

The court further stated that "[t]he investigative Committee was appropriately appointed pursuant to section 617.07401(3)(b)" and found that, in compliance with the statute,

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52. See Transcript of Motion to Dismiss Hearing at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Aug. 13, 2021) [hereinafter *Ezer* Transcript of Motion to Dismiss].

53. *Id.* at 3.

54. *Id.* at 49.

55. Final Order Dismissing Plaintiff's Derivative Lawsuit Pursuant to Section 617.07401(3), Florida Statutes, at 12, *Ezer v. Holdack*, No. CACE-20-016861 (07), 2021 WL 11486153, at \*6 (Fla. 17th Cir. Ct. Nov. 24, 2021) [hereinafter *Ezer* Final Order Dismissing Derivative Suit].

56. *Id.* at 2-3.

57. *Id.* at 6 (emphasis added).

58. *Id.* at 6-7.

a majority of independent Directors, who *were not* named Defendants in this case voted to appoint a committee consisting of two independent directors to: (1) conduct a reasonable investigation of the allegations in this derivative lawsuit; (2) make a good faith determination whether maintenance of this derivative lawsuit is in the best interest of Hollywood Station Condominium Association, Inc.; and (3) prepare a detailed report [for submission to the court] concerning the committee’s findings [related to its investigation].<sup>59</sup>

The court noted that “despite Plaintiff’s argument to the contrary that appointing two of the Association’s own Board Members is really to ‘short-circuit challenges to business judgment,’ [the] appointment of the investigative Committee complied with the statutory authority.”<sup>60</sup> The trial court further found that the Committee prepared a final report and, upon a cursory review of the report, the reasonableness and independence of the Committee’s investigation was evident, as the Committee recognized Ezer’s claims, investigated the facts surrounding those claims, applied the facts to the claims, and formed good faith and reasonable conclusions.<sup>61</sup>

The trial court discussed the case of *Atkins v. Topp Communications Inc.*,<sup>62</sup> i.e., a case both parties referenced, and a written opinion issued by the Fourth District Court of Appeal of Florida.<sup>63</sup> In *Atkins*, the appellate court importantly recognized that “trial courts in this state *are not* required to evaluate the reasonableness of an independent investigator’s final recommendation . . . .”<sup>64</sup> To that end, the trial court in *Ezer* further relied on *Atkins*, stating that, “[i]nstead, the trial court must determine whether the investigative committee was independent, acted in good faith, and conducted a reasonable investigation.”<sup>65</sup> As a result, the trial court in *Ezer* found,

[S]ection 617.07401 is devoid of any indication that a corporation moving to dismiss a derivative lawsuit under this Section must refute the plaintiff’s allegations. To that end, while Plaintiff argues that Defendant’s Motion is completely devoid of any evidence that refutes

59. *Id.* at 2, 7 (citing FLA. STAT. § 617.07401(3)(b) (2021)).

60. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 7 (FLA. STAT. § 617.07401(3)(b)).

61. *See id.* at 10–12.

62. 874 So. 2d 626 (Fla. 4th Dist. Ct. App. 2004).

63. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 6; *Ezer* Plaintiff’s Response in Opposition to Motion to Dismiss, *supra* note 49, at 9; *Ezer* Association’s Reply to Plaintiff’s Response, *supra* note 50, at 10.

64. *Atkins*, 874 So. 2d at 627 (emphasis added); *see Ezer* Transcript of Motion to Dismiss, *supra* note 52, at 6–7.

65. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 6 (citing *Atkins*, 874 So. 2d at 628).

that the Defendants committed material violations of the Declaration, this Court finds this is not to be considered under Chapter 617.<sup>66</sup>

Although Ezer argued that the Association failed to provide any evidence refuting an alleged violation of its declaration, the trial court deemed these arguments to be inconsequential in its decision to dismiss the lawsuit.<sup>67</sup> As to the Committee, the trial court further found that the Committee was appropriately appointed pursuant to the Chapter 617.<sup>68</sup>

Moreover, the trial court found the “Committee was and remains independent.”<sup>69</sup> Notably, the trial court distinguished *Ezer* from *De Moya v. Fernandez*.<sup>70</sup> Specifically, the committee members in *Ezer* were not appointed by the court “*in lieu* of a special litigation committee,” the committee members in *Ezer* had “*not* been served with this lawsuit,” and moreover, the committee members in *Ezer* provided sworn testimony as to their good faith and independence.<sup>71</sup> Additionally, the trial court found the Committee’s independence was further evidenced “by its lack of any financial interest and personal liability in this litigation.”<sup>72</sup> After careful review, the trial court determined that,

[Ezer’s] allegations that the members of the special Committee lacked independence and impartiality fail as a matter of law. The allegations asserted by [Ezer] do *not* support that the members of the special Committee could not independently consider the Investigation. Contrary to [Ezer’s] assertion that the members of the special Committee were not disinterested, because of participation in violations of the Declarations, a review of the Committee report and Committee Declarations reveals strong evidence to the contrary.<sup>73</sup>

The trial court found that the Association met its burden in establishing the independence of the Committee.<sup>74</sup> Notably, the trial court also ruled that the detailed report and exhibits demonstrated a “timeline of facts that are specific and narrowly tailored to the allegations set forth by [Ezer] and derive[d] from

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66. *Id.*

67. *Id.* at 7.

68. *Id.*

69. *Id.*

70. 559 So. 2d 644 (Fla. 4th Dist. Ct. App. 1990); *see Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 8.

71. *See Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 8.

72. *Id.*

73. *Id.* at 9–10 (emphasis added).

74. *Id.*

document analysis.”<sup>75</sup> “The Committee use[d] dates, quotations, and references to Association meetings, votes, budgets and other specific information displaying the facts set forth after the investigation into [Ezer’s] claims.”<sup>76</sup> Ultimately, the trial court found that the Committee’s investigation was conducted in good faith, and dismissed Ezer’s entire action pursuant to section 617.07401(3) of the Florida Statutes, because an independent investigation determined that pursuit of Ezer’s derivative claims was not in the Association’s best interests.<sup>77</sup>

Ezer quickly appealed the trial court’s final dismissal with prejudice, challenging the independence of the Committee appointed, pursuant to section 617.07401(3) of the Florida Statutes.<sup>78</sup> Specifically, Ezer claimed that the trial court erred in determining that the investigation was reasonable and made in good faith and maintained that the trial court was required to address the accuracy of the report’s substantive findings.<sup>79</sup> The Fourth District Court of Appeal, however, affirmed the trial court’s dismissal of Ezer’s lawsuit by way of a six page opinion, agreeing “that the committee was appropriately appointed [by the Association], [was] independent, and conducted a good faith investigation.”<sup>80</sup> The Fourth District Court of Appeal rejected Ezer’s argument that the trial court was required to independently assess the validity of the report’s conclusions.<sup>81</sup> In applying *Kaplan v. Wyatt*,<sup>82</sup> the Fourth District Court of Appeal held that “the trial court’s determination that the committee was composed of independent board members is supported by competent substantial evidence,” noting that “two members were not on the board when the transactions in question in the original complaint were approved” and the “filed affidavits attest to their lack of involvement in the transactions and their independence.”<sup>83</sup> Further, the Fourth District Court of Appeal held that Ezer’s Amended Complaint merely alleged limited involvement from the committee, with the role of the two members being at most one of approval, and as stated by the court in *Kaplan*, “even a director’s approval of a transaction may not necessarily show a lack of independence.”<sup>84</sup>

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75. *Id.* at 10.

76. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 10.

77. *Id.* at 11; *see also* FLA. STAT. § 617.07401(3) (2023).

78. Initial Brief of Appellant at 16, *Ezer v. Holdack*, 358 So. 3d 429 (Fla. 4th Dist. Ct. App. 2022) (No. 21-3528), 2022 WL 1252616 at \*8 [hereinafter *Ezer* Appellant Initial Brief].

79. *Id.* at 17–18.

80. *Ezer v. Holdack*, 358 So. 3d 429, 430 (Fla. 4th Dist. Ct. App. 2023).

81. *Id.* at 433.

82. 499 A.2d 1184 (Del. 1985).

83. *Ezer*, 358 So. 3d at 433.

84. *Id.* (citing to *Kaplan*, 499 A.2d at 1189).

## IV. ROADMAP

This Comment establishes that the Fourth District Court of Appeal, most correctly, affirmed the trial court's dismissal of the Ezer lawsuit which has, and will, have an unprecedented impact on community association and corporate law in Florida moving forward.<sup>85</sup> First, this Comment reviews information essential to understanding the *Ezer* ruling, specifically Chapter 617 and specific sections within relating to members' derivative suits, i.e., section 617.07401 of the Florida Statutes.<sup>86</sup> Second, this Comment explains how the decision in *Ezer* has, and will, significantly impact community association law and non-for-profit corporation law moving forward.<sup>87</sup> Third, this Comment explains why the Fourth District Court of Appeal, most correctly, affirmed the trial court's decision to dismiss Ezer's case, with prejudice, based on the Committee's reasonable investigation that ultimately concluded the maintenance of the derivative suit was *not* in the best interests of the corporation, i.e., was *not* in the best interest of the Association membership as a whole.<sup>88</sup>

## V. ANALYSIS

The Fourth District Court of Appeal's analysis in *Ezer* focused on section 617.07401(3) of the Florida Statutes and Delaware law in order to determine a committee's independence, good faith, and reasonableness.<sup>89</sup> In Florida, condominium associations, such as the Defendant in the *Ezer* case (i.e., Hollywood Station Condominium Association, Inc.), are organized under Chapter 617, Florida Statutes, which governs nonprofit corporations.<sup>90</sup> To that end, unit owners within condominium associations, such as Ezer, are members of the corporation by virtue of their ownership of a unit within the condominium association and, therefore, have the right to bring derivative proceedings on behalf of the condominium association.<sup>91</sup> Section 617.07401 of the Florida Statutes prescribes the requirements for a member of a corporation to maintain a derivative suit.<sup>92</sup> Specifically, and at a minimum, the purported derivative plaintiff must: (1) be "a member of the corporation when the transaction complained of

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85. See discussion *infra* Section V.A.

86. See discussion *infra* Part V.

87. See discussion *infra* Section V.B.

88. See discussion *infra* Part V.

89. *Ezer*, 358 So. 3d at 432.

90. *Collado v. Baroukh*, 226 So. 3d 924, 927 (Fla. 4th Dist. Ct. App. 2017); FLA. STAT. ch. 617 (2023); *Hollywood Station Condominium Association, Inc.*, *supra* note 10.

91. FLA. STAT. § 617.07401(1) (2023); *Ezer* Amended Complaint, *supra* note 9, at 2.

92. FLA. STAT. § 617.07401(1)–(2).

occurred . . . unless the person became a member through transfer by operation of law from one who was a member at that time;” (2) verify their complaint; and (3) “allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for at least [ninety] days after the date of the first demand” (unless the demand is rejected in writing before the expiration of the demand or waiting the ninety day expiration period would result in irreparable injury to the corporation).<sup>93</sup>

Section 617.07401 also provides a trial court with guidelines for dismissing derivative suits commenced under the pertinent section.<sup>94</sup> First, pursuant to section 617.07041(2) of the Florida Statutes, to the extent the “corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding” pending the outcome of the investigation.<sup>95</sup> Next, and most importantly,

[t]he court may *dismiss* a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in paragraphs (a)-(c) has made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation has the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:

- (a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;
- (b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or
- (c) A panel of one or more independent persons appointed by the court upon motion by the corporation.<sup>96</sup>

In deciding *Ezer*, both the trial court and the Fourth District Court of Appeal discussed section 617.07401(3), and the investigation’s independence,

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93. *Id.*

94. *Id.* § 617.07401(3).

95. *Id.* § 617.07401(2).

96. *Id.* § 617.07401(3) (emphasis added).



good faith, and reasonableness.<sup>97</sup> Florida law is clear that it is the corporation's burden to prove that the committee is independent, acted in good faith, and had a reasonable objective basis for the report.<sup>98</sup> Chapter 617 (and Florida caselaw, for that matter) does not define "independence," "good faith," or "reasonableness."<sup>99</sup> As a result, "[w]here Florida law has not spoken as to a *corporate* term or statute, courts often look to Delaware law."<sup>100</sup> Courts "rely with confidence upon Delaware law to construe Florida corporate law. The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines."<sup>101</sup> With no Florida law available, the courts handling Ezer's claims most correctly looked to Delaware and New York law when determining the "independence" and "good faith" of the committee appointed, and the "reasonableness" of its investigation.<sup>102</sup>

To that end, in determining the independence of an investigative committee, which recommended the dismissal of a shareholder derivative suit, the Delaware Supreme Court stated,

[a director's] presence on the Board does not establish a lack of independence on the part of the Committee. The mere fact that a director was on the Board at the time of the acts alleged in the complaint does not make that director interested or dependent so as to infringe on his ability to exercise his independent business judgment of whether to proceed with the litigation. Even a director's approval of the transaction in question does not establish a lack of independence.<sup>103</sup>

The Fourth District Court of Appeal, applying *Kaplan*, determined that "the trial court's determination that the committee was composed of independent board members is supported by competent substantial evidence."<sup>104</sup> The court

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97. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 2; *Ezer v. Holdack*, 358 So. 3d 429, 433 (Fla. 4th Dist. Ct. App. 2023).

98. FLA. STAT. § 617.07401(3).

99. FLA. STAT. ch. 617 (2023); *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 5–6; *Ezer*, 358 So. 3d at 432.

100. *Ezer*, 358 So. 3d at 432. "To date, no Florida court has had occasion to interpret the governing provisions of section 607.1202 in its 2003 form. As is often true, however, Delaware case law provides guidance to our construction of the statute." *Id.* (quoting *Williams v. Stanford*, 977 So. 2d 722, 727 (Fla. 1st Dist. Ct. App. 2008)).

101. *Int'l Ins. v. Johns*, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989).

102. *See Ezer*, 358 So. 3d at 432; *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 5–6; *Atkins v. Topp Comm, Inc.*, 874 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 2004).

103. *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985) (citations omitted).

104. *Ezer*, 358 So. 3d at 433 (citing *Kaplan*, 499 A.2d at 1189).

reasoned that: (1) “[t]he two members were not on the board when the transactions in question in the original complaint were approved;” (2) the committee’s affidavits attested to their “lack of involvement in the transactions and their independence;” and (3) Ezer’s “amended complaint only allege[d] their limited involvement.”<sup>105</sup> The trial court recognized the limited involvement, including that “[o]ne of the two members signed off on the unapproved contract as the board’s treasurer, and both members were on the board when it approved material alterations to the common elements and . . . draws from the [alleged] improper line of credit.”<sup>106</sup> The trial court, however, concluded that said actions by the two committee members “was at most approval, and as in *Kaplan*, even a director’s approval of a transaction may not necessarily show a lack of independence.”<sup>107</sup> The Fourth District Court of Appeal noted that the record was devoid of anything to show any relationship between the members of the appointed committee and the named board member defendants that would suggest control over the committee.<sup>108</sup> Looking at Ezer’s attempt to amend her complaint and add the Committee members, the trial court did not recognize it as impacting their independence.<sup>109</sup>

A. *The Court Is Not Required to Apply Its Own Business Judgment*

While the Fourth District Court of Appeal did not directly discuss *Zapata Corp. v. Maldonado*<sup>110</sup> in the *Ezer* opinion, it is worth discussion in this Comment and is certainly pertinent to subsequent rulings by Florida courts, including both the trial court’s dismissal of the *Ezer* lawsuit and the Fourth District Court of Appeal affirming said dismissal.<sup>111</sup> In 1981, the Supreme Court of Delaware decided *Zapata Corp. v. Maldonado*.<sup>112</sup> In *Zapata*, a stockholder initiated a derivative suit on behalf of the corporation, thereby triggering the corporation to create an investigative committee to determine whether the lawsuit should continue.<sup>113</sup> The *Zapata* committee, following its investigation, concluded that the lawsuit was not in the best interests of the corporation, and thus, the corporation moved for dismissal or summary judgment.<sup>114</sup> The trial court denied the motions because Delaware law did not sanction such motions, and the

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105. *Id.* at 433.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Ezer*, 358 So. 3d at 433.

110. 430 A.2d 779 (Del. 1981).

111. *See Ezer*, 358 So. 3d at 432.

112. *Zapata Corp.*, 430 A.2d at 779.

113. *Id.* at 780, 781.

114. *Id.* at 781.

business judgment rule did not grant the authority to dismiss derivative actions.<sup>115</sup> On appeal, the Supreme Court of Delaware reversed the trial court's order, and the matter was remanded.<sup>116</sup> The Supreme Court of Delaware focused on the corporation's power to speak for itself as to whether a derivative lawsuit—a lawsuit brought on behalf of the corporation—should be continued or terminated, specifically focusing on the following inquiry: “[w]hen, if at all, should an authorized board committee be permitted to cause litigation, properly initiated by a derivative stockholder in his own right, to be dismissed?”<sup>117</sup> In doing so, the Supreme Court of Delaware turned to the Delaware Statutes, which allow boards to delegate all of the board's authority to a committee, which, in turn, means that the committee has the power to seek the termination of a derivative suit.<sup>118</sup> The Supreme Court of Delaware found that the committee, so long as its power was properly delegated, could act for the corporation to move to dismiss derivative litigation that is believed to be detrimental to the corporation's best interest.<sup>119</sup> In submitting to the trial court that a derivative suit is not in the best interest of the corporation, a committee would then file such pre-trial motions based on the committee's findings after conducting an investigation, setting forth the committee's written record of the investigations, as well as findings and recommendations.<sup>120</sup> The Delaware Supreme Court then found that the trial court deciding such a motion filed by the committee should then apply a two-step analysis.<sup>121</sup> First, the trial court would “inquire into the independence and good faith of the committee and the bases supporting [the committee's] conclusions.”<sup>122</sup> If the trial court is satisfied, then, in its discretion, the court would proceed to apply its own business judgment in determining whether the evidence supported the committee's recommendation.<sup>123</sup> If the court is then satisfied, it may proceed to dismiss the derivative suit.<sup>124</sup> The *Zapata* approach, however, was ultimately *rejected* in *Atkins v. Topp Comm, Inc.*, and does not apply in Florida.<sup>125</sup>

In deciding *Ezer v. Holdack*, the Fourth District Court of Appeal, consistent with its prior rulings, correctly recognized that the corporation has the

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115. *Id.*

116. *Id.* at 789.

117. *Zapata Corp.*, 430 A.2d at 785.

118. *Id.*

119. *Id.* at 786.

120. *Id.* at 788.

121. *Id.*

122. *Zapata Corp.*, 430 A.2d at 788.

123. *Id.* at 789.

124. *Id.*

125. 874 So. 2d 626, 628 (Fla. 4th Dist. Ct. App. 2004); *Zapata Corp.*, 430 A.2d at 788–89.

burden of proving that the committee is independent, acted in good faith, and has a reasonable and objective basis for its report, citing to section 617.07401(3) and *De Moya v. Fernandez*.<sup>126</sup> In *De Moya v. Fernandez*, decided prior to the enactment of section 617.07401 (as well as its predecessor, i.e., Section 607.07401), the Fourth District Court of Appeal reasoned that “a trial court must make a determination that the committee recommending the dismissal is independent, acting in good faith and has a reasonable and objective basis for its report.”<sup>127</sup> The *De Moya* case involved an appeal of an order dismissing a corporate derivative lawsuit after the trial court accepted a report prepared by a trial court-appointed receiver.<sup>128</sup> The Fourth District Court of Appeal reversed the trial court’s order “because the record reflect[ed] insufficient evidence upon which to evaluate the thoroughness of the report or the independence of the [appointed] receiver” as well as “inadequate sworn testimony.”<sup>129</sup> In *De Moya*, though the court relied on *Zapata* in discussing the trial court’s burden, it *did not* determine whether the *Zapata* two-step analysis was required.<sup>130</sup>

A few years later, the United States District Court for the Southern District of Florida, applying Florida law, acknowledged that the trial court must apply its judgment based on the record created by the investigation, relying on the plain language of section 607.07401 and declining to rule on *Zapata*.<sup>131</sup> The following year, however, the Fourth District Court of Appeal took a stance on the application of *Zapata* to section 607.07401, in *Atkins v. Topp Comm, Inc.*<sup>132</sup> In its written opinion in the *Ezer* case, the Fourth District Court of Appeal cites *Atkins v. Topp Comm, Inc.* to support that “[s]ection 617.07401(3)(b)’s plain language *does not* require courts to question a special committee’s recommendation as long as the court found that the committee was independent and conducted its investigation reasonably and in good faith.”<sup>133</sup>

In *Atkins*, the Fourth District Court of Appeal affirmed the dismissal of a shareholder derivative lawsuit based on the findings of an investigator appointed pursuant to section 607.07401(3) of the Florida Statutes, which

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126. *Ezer v. Holdack*, 358 So. 3d 429, 432 (Fla. 4th Dist. Ct. App. 2023) (citing FLA. STAT. § 617.07401(3) (2023); *De Moya v. Fernandez*, 559 So. 2d 644, 645 (Fla. 4th Dist. Ct. App. 1990)).

127. *De Moya*, 559 So. 2d at 645; see FLA. STAT. § 617.07401; FLA. STAT. 607.07401 (2003), *repealed by* FLA. STAT. § 607.07401 (2019).

128. *De Moya*, 559 So. 2d at 644.

129. *Id.* at 645.

130. *Id.*

131. See *Klein v. FPL Group, Inc.*, No. 02-20170-CIV, 2004 WL 302292, at \*15, n.40 (S.D. Fla. Feb. 5, 2004).

132. *Atkins v. Topp Comm, Inc.*, 874 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 2004).

133. *Ezer v. Holdack*, 358 So. 3d 429, 433 (Fla. 4th Dist. Ct. App. 2023); *Atkins*, 874 So. 2d at 627.

parallels the language of section 617.07401(3).<sup>134</sup> In *Atkins*, the corporation (with all the parties in agreement) appointed a retired circuit court judge as the investigator, who, after conducting witness interviews, reviewing documents, seeking input from both sides and presenting a lengthy report to the trial court, concluded that the lawsuit was not in the best interest of the corporation.<sup>135</sup> The trial court concluded that the independent investigators acted reasonably and in good faith in conducting their investigation and dismissed the lawsuit.<sup>136</sup> One of the issues on appeal was whether the trial court was required to engage in the *Zapata* two-step analysis.<sup>137</sup> The Fourth District Court of Appeal rejected *Zapata* and took a different approach based on the plain language of section 607.07401(3).<sup>138</sup> In doing so, the court determined that the trial court was “not required to evaluate the reasonableness of [the] independent investigator’s final recommendation.”<sup>139</sup> Indeed, the court in *Atkins* emphasized that had the legislature intended to mandate such a two-step analysis, it would have likely specified so in the body of the statute.<sup>140</sup>

In *Cornfeld v. Plaza of the Americas Club, Inc.*,<sup>141</sup> a shareholder brought a derivative lawsuit against a condominium club and its directors.<sup>142</sup> The plaintiff owned one of the condominium units in the not-for-profit corporation and brought a shareholder derivative action pursuant to section 617.0740 of the Florida Statutes.<sup>143</sup> The plaintiff alleged that “the Club breached its fiduciary duty to the unit owners and [sought] injunctive relief.”<sup>144</sup> The Club then filed a motion to dismiss in which it argued that Cornfeld did not have standing to bring a derivative lawsuit because he did not serve a pre-suit demand pursuant to section 617.07401, the business judgment rule barred Cornfeld’s claims, that Cornfeld had failed to join RK Centers, LLC as an indispensable party; and that Cornfeld did not state a cause of action for injunctive relief.<sup>145</sup>

Following “the hearing on the motion to dismiss, the trial court deferred ruling [on the motion], and asked the parties how they wanted to proceed, tracking section 617.07401 . . . to determine whether the maintenance of the

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134. See *Atkins*, 874 So. 2d at 627. Compare FLA. STAT. § 607.07401(3) (2003), with FLA. STAT. § 617.07401(3) (2023).

135. *Atkins*, 874 So. 2d at 627.

136. *Id.* at 628.

137. *Id.* at 627.

138. *Id.* at 628.

139. *Id.* at 627.

140. *Atkins*, 874 So. 2d at 628.

141. 273 So. 3d 1096, 1097 (Fla. 3d Dist. Ct. App. 2019).

142. *Id.* at 1097.

143. *Id.*

144. *Id.*

145. *Id.*

derivate action is in the best interest of the corporation.”<sup>146</sup> The Club chose to proceed with the trial court appointing (by unopposed order) an independent investigator to conduct an investigation under the statute.<sup>147</sup> Notably, the independent investigator was an attorney.<sup>148</sup>

After the five-month investigation concluded, the independent investigator filed a forty-four-page report with the trial court.<sup>149</sup> The investigator concluded,

[T]hat maintaining the derivative action is not in the best interest of the Club. [And further, the investigator] recommended the trial court dismiss the action because: (1) Cornfeld does not adequately represent the interests of the Club’s unit owners because of his personal motivation for filing the suit, which is contrary to the interests of the Club membership generally; (2) the Board members’ decisions were reasonable, were guided by legal advice throughout, and are protected by the business judgment rule, and the board members are thus immune from the lawsuit; and (3) the litigation is barred because Cornfeld failed to serve a statutorily required pre-suit demand on the Board.<sup>150</sup>

In response, Cornfeld filed objections to the report asserting, *inter alia*, that it “was biased . . . conducted in bad faith, . . . [and] improperly focused on Cornfeld’s personal business motivations for filing the derivative suit.”<sup>151</sup> Following a one-hour specially set hearing, the trial court determined that the investigation was conducted independently, reasonably, and in good faith.<sup>152</sup> The court adopted the investigator’s findings and legal conclusions and dismissed the matter.<sup>153</sup> The trial court “dismissed the amended derivate complaint with prejudice as to Cornfeld.”<sup>154</sup>

Cornfeld appealed the decision of the trial court to the Third District Court of Appeal:

Cornfeld [did] not challenge the independence of the investigator; rather, he argue[d] that there [were] material issues of disputed fact regarding the reasonableness and good faith of the investigation. He assert[ed] that his personal interest . . . [was] irrelevant to the

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146. *Cornfeld*, 273 So. 3d at 1097–98.

147. *Id.* at 1098.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Cornfeld*, 273 So. 3d at 1098.

152. *Id.*

153. *Id.*

154. *Id.*

interests of the Club's unit owners. However, [the Third District Court of Appeal's] review of the record evidence[d] self-interest.

On the issue of the Club's immunity from liability by virtue of the business judgment rule, [the Court found] no error in the trial court's acceptance of the facts and legal conclusions contained in [the investigator's] independent report . . . [T]he independent investigator in this case, as did the investigator in *Atkins*, examined the merits of the proposed claims and concluded that the derivative suit was not in the corporation's best interest. The record . . . reflect[ed] that [the investigator] conducted numerous witness interviews, reviewed relevant documents, sought input from the attorneys for both sides, kept both sides advised as to the investigation progressed, and presented a lengthy report to the court."<sup>155</sup>

In conclusion, the Third District Court of Appeal held that "[t]he trial court did not abuse its discretion by adopting . . . [the investigator's] factual findings and legal conclusions, and [found] that the report was reasonable and conducted in good faith."<sup>156</sup> The dismissal, with prejudice, was affirmed.<sup>157</sup>

In *Ezer*, discussing the trial court's efforts relating to the evaluation of the reasonableness of an independence committee, the Fourth District Court of Appeal correctly held that "[t]he court *is not* required to apply its own business judgment to assess the merits of the committee's conclusions."<sup>158</sup>

#### B. *Following the Ezer Decision*

On July 5, 2023, the very same trial court that decided *Ezer* once again entered an order dismissing a shareholder's derivative lawsuit brought by multiple unit owners within a community association on behalf of the

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155. *Id.* at 1097, 1098, 1099–100 (citing *Atkins v. Topp Comm, Inc.*, 874 So. 2d 626, 627) (Fla. 4th Dist. Ct. App. 2004) (affirming dismissal of the derivative suit, finding that the dismissal was based on the trial court's conclusion that the independent investigator acted reasonably and with good faith in conducting his investigation).

156. *Cornfeld*, 273 So. 3d at 1100.

157. *Id.*

158. *Ezer v. Holdack*, 358 So. 3d 429, 434 (Fla. 4th Dist. Ct. App. 2023) (emphasis added).



association.<sup>159</sup> In *Sherman v. Condo. Ass'n of Parker Plaza Estates, Inc.*,<sup>160</sup> like in *Ezer*, the derivative plaintiffs initiated a lawsuit in 2021 against a community association and several individual board members alleging mismanagement of a condominium or its assets.<sup>161</sup> Much like in *Ezer*, the association in *Sherman* “appointed an independent committee [pursuant to section 617.07401 of the Florida Statutes] to conduct a reasonable investigation into plaintiffs’ allegations” and the association filed a motion to dismiss based on the committee’s report.<sup>162</sup> “Two days before the hearing on the motion to dismiss, [the derivative] plaintiffs sought leave to amend the complaint to include additional allegations and name three more directors as defendants;” of these three, two were members of the first committee, much like in *Ezer*.<sup>163</sup> The trial court once again abated service on the three new defendants and allowed the derivative plaintiffs to file their Verified Second Amended Derivative Complaint against the prior individual defendants as well as the association.<sup>164</sup>

In response, the association, once again, appointed a second committee and, after conducting a good-faith investigation into the allegations of the derivative plaintiffs, found that the plaintiffs’ allegations were unfounded.<sup>165</sup> “[T]he Second Committee determined that the maintenance of the lawsuit was not in the best interests of the Association. Thus, Defendants [once again] move[d] to dismiss the complaint pursuant to section 617.07401, Florida Statutes.”<sup>166</sup> Ultimately, the trial court granted the association’s motion to dismiss and entered an order citing *Ezer*, finding that the maintenance of the derivative suit in *Sherman*, much like in *Ezer*, was not in association’s the best interest.<sup>167</sup>

### C. *The Florida Supreme Court Denies Review*

Undeterred by the Fourth District Court of Appeal’s opinion affirming the trial court’s dismissal of her case, *Ezer* petitioned the Florida Supreme Court

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159. See Final Order on Defendants’ Motion to Dismiss at 1, 5, *Sherman v. Fagan*, No. CACE-21-020261 (Fla. 17th Cir. Ct. July 5, 2023) [hereinafter *Sherman* Final Order on Defendants’ MTD].

160. Verified Derivative Complaint at 1, *Sherman v. Condo. Ass’n of Parker Plaza Ests., Inc.*, No. CACE-21-020261, 2021 WL 5273160 (Fla. 17th Cir. Ct. Nov. 9, 2021).

161. *Id.* at \*2.

162. *Sherman* Final Order on Defendants’ MTD, *supra* note 159, at 1.

163. *Id.*

164. *Id.*; Agreed Order Granting Plaintiffs’ Ore Tenous Motion for Leave to File Second Amended Complaint at 1, 2, *Sherman v. Fagan*, No. CACE-21-020261 (Fla. 17th Cir. Nov. 23, 2022).

165. *Sherman* Final Order on Defendants’ MTD, *supra* note 159, at 2.

166. *Id.*

167. *Id.* at 4–5.

to review the dismissal of her case as a matter of great public importance.<sup>168</sup> The Florida Supreme Court, however, denied Ezer's petition, and the Association and the volunteer board member defendants are currently seeking entitlement to their attorneys' fees and costs against Ezer.<sup>169</sup>

## VI. CONCLUSION

As explained above, the dismissal of *Ezer v. Hollywood Station Condominium Association, Inc.* at the trial court level, and the Fourth District Court of Appeal's written opinion affirming said dismissal, and the Supreme Court's denial of Ezer's petition, all serve as a significant milestone in the realm of shareholder derivative actions and corporate democracy in the state of Florida.<sup>170</sup> Indeed, a unit owner should be very hesitant to file any claim against their association that may not be in the best interest of their association *as a whole*, and the holdings in *Ezer* further underscore the critical importance of adhering to statutory requirements and trusting the sound judgment of independent committees.<sup>171</sup> The decision to dismiss the *Ezer* lawsuit based on the findings of the independent committee raised questions about the court's role in evaluating the investigations, and it is clear that the court need not exercise its own business judgment in evaluating same.<sup>172</sup>

In analyzing the *Ezer* case, the intricate interplay between statutory provisions, judicial discretion, and the protection of shareholder interests, have come to the forefront.<sup>173</sup> *Ezer* highlights the delicate balance between shareholder rights and the authority vested in independent committees appointed by independent directors of a corporation.<sup>174</sup> As corporate law in Florida continues to evolve, legal practitioners, scholars, and shareholders must consider the implications of *Ezer* as a precedent-setting case—not only for immediate parties, but for the broader future of corporate governance.<sup>175</sup> *Ezer* serves as a reminder of the complexities inherent in shareholder derivative actions and the

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168. Petitioner's Brief on Jurisdiction at 1, *Ezer v. Holdack*, No. SC2023-0676, 2023 WL 3843518, \*1 (Fla. May 22, 2023).

169. Defendants' Motion for Entitlement to Attorneys' Fees and Costs with Incorporated Memorandum of Law at 1, *Ezer v. Holdack*, No. CACE-20-016861 (Fla. 17th Cir. Ct. Dec. 16, 2021); *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 1.

170. See discussion *supra* Part V.

171. See discussion *supra* Part V.

172. See discussion *supra* Parts III, V.

173. See discussion *supra* Parts III, V.

174. See discussion *supra* Parts III, V.

175. See discussion *supra* Section V.B.

ongoing need to defer to the sound decisions of independent committees, guiding future disputes in the ever-evolving world of corporate law.<sup>176</sup>

Indeed, the purpose of the multiple conditions precedent and safeguards set forth in Chapter 617 governing derivative actions clearly was to ensure that any actions pursued on behalf of a corporation/association are in the best interests of the corporation, and Chapter 617's statutory requirements of a pre-suit demand and verification, coupled with the option of committee investigations, should serve to keep community association matters out of court. For example, where a single unit owner, or even a group of unit owners, are unsatisfied within the way in which a community association is being operated, Chapter 617 and this *Ezer* precedent establishes that despite their dissatisfaction, if a committee finds that their claims are not in the best interests of the community as a whole . . . too bad, too sad; the majority rules. Simply stated, such claims should never be litigated in the first place, and by virtue of living within a community association, unit owners agreed to a democracy, and the majority will, and should, always carry the day.

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176. See discussion *supra* Parts II, III, V.