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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: April 12, 2005
Decided: May 2, 2005

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Re: *Belanger v. Fab Indus., Inc., et al.*
Civil Action No. 054-N

Dear Counsel:

Having carefully considered the parties' written submissions, together with the oral argument on April 12, 2005, I conclude that the Plan of Liquidation and Dissolution of Fab Industries, Inc. (the "Plan") is valid in its entirety as explained below.[1]

In November 2003, plaintiff brought this action challenging, *inter alia*, the validity of the Plan. I previously ruled in an Order dated December

[1] The Plan is part of Ex. A (together with the definitive proxy statement) and all of Ex. B to the Transmittal Aff. of Paul A. Fioravanti, Jr. in Supp. of Pl.'s Mot. For Decl. J. on Counts III and IV. Ex. A to that same affidavit shall be referred to as the "Proxy Statement."

29, 2004, that certain of the claims asserted in the complaint were not meritorious when filed, and that others were ripe for review. The motions currently pending will dispose of the remaining claims except for part of Count II relating to the transfer of certain life insurance policies from Fab to its founder and CEO, Samson Bitensky.

At this time, plaintiff seeks a declaration that: (1) defendants have violated 8 *Del. C.* § 275 by failing to file a certificate of dissolution in a reasonable time; (2) the Plan is void in whole or in part; (3) the Plan is invalid to the extent it purports to authorize Fab's board of directors to delay indefinitely the filing of a certificate of dissolution; and (4) the Plan is invalid to the extent it purports to authorize Fab to consummate a sale of all or substantially all assets prior to effecting a dissolution, absent compliance with 8 *Del. C.* § 271. Plaintiff also prays for an injunction in accordance with their requested declaratory relief. Defendants have moved for summary judgment, and plaintiff has opposed that motion by filing an affidavit pursuant to Court of Chancery Rule 56(f).

Defendant Fab Industries, Inc. is a distressed manufacturer of textile products. Its stock was publicly traded on the American Stock Exchange ("AMEX") until AMEX halted trading on March 15, 2005. In 2002, Fab's

board of directors approved the Plan, and on May 30, 2002, Fab's shareholders approved the Plan.

I shall first address the issues raised by Count III of the complaint relating to whether the Plan permits Fab to sell all or substantially all of the corporation's assets without a further shareholder vote. Plaintiff has argued that even though Fab is operating under a plan of dissolution, Fab is still an operating corporation because a certificate of dissolution has not yet been filed with the Delaware Secretary of State and, therefore, § 271 (and not § 275 and the Plan) governs Fab's ability to sell all or substantially all of its assets.

In order for an operating (non-dissolved) corporation to legally consummate a sale of all or substantially all of its assets, that corporation must comply with the requirements of § 271, as interpreted.[2] Fab is currently an operating corporation, but has adopted by proper shareholder vote, a plan of dissolution pursuant to § 275 that contemplates the sale of all of the corporation's assets without a further shareholder vote.[3] This allows

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[2] In comparing § 271 with § 275, it is clear that § 271 enables a corporation to sell all or substantially all of its assets ("Every corporation *may* … sell, lease or exchange all or substantially all of its property and assets.…") (emphasis added), whereas § 275 deals exclusively with the act of formal dissolution, which is an act separate and distinct from a sale of the corporation's assets in the process of winding up and liquidation.

[3] *See* Plan at ¶ 4(a) ("The Company shall determine whether and when to (i) collect, sell, exchange or otherwise dispose of all of its property and assets in one or more transactions

Fab the ability to sell all or substantially all of the corporation's assets once a certificate of dissolution has been filed with the Secretary of State and has become effective pursuant to 8 *Del. C.* § 103. Fab may, in the sole discretion of the board of directors, negotiate and agree to such a sale before the certificate of dissolution is filed, but the sale cannot be consummated until the certificate of dissolution has become effective. Once the certificate of dissolution becomes effective, however, Fab may sell all or substantially all of its assets without a shareholder vote immediately thereafter. But, if Fab wishes to sell all or substantially all of its assets before the certificate of dissolution is filed and becomes effective, it must first comply with the requirements of § 271.

I now turn to the issues raised by Count IV. Plaintiff alleges in Count IV that the defendants have violated § 275 by failing to file a certificate of dissolution within a reasonable time following shareholder approval of the plan, and that therefore the Plan is invalid. It is undisputed that § 275 does not on its face contain a provision requiring a certificate of dissolution to be

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upon those terms and conditions as the Board, in its absolute discretion, deems expedient and in the best interests of the Company and the Stockholders … without any further vote or action by the Stockholders."). Although the Plan is clear that stockholders were consenting to a sale of assets without further vote, nowhere does the Plan indicate that the stockholders were consenting to a sale of Fab as a going concern without a further vote. *See* Plan at ¶ 10 ("Stockholder Consent to Sale of Assets"). *But see* Proxy Statement at 3 ("[S]tockholder approval of the Plan will also constitute stockholder approval of the sale of our business."); *id.* at 12 ("Approval of the Plan by the stockholders will constitute approval to sell our business and/or assets to one or more third parties.").

filed within a reasonable period of time. Because of the plain language of the Plan, I conclude that even if § 275 does contain an implied provision that the certificate must be filed in a reasonable time, and I express no opinion on the issue, the failure to yet file a certificate of dissolution in this case is reasonable as a matter of law.[4] Furthermore, because the delay in filing the certificate of dissolution in this case is reasonable as a matter of law, additional discovery would not be relevant to Count IV.

The Plan and the accompanying Proxy Statement are clear that Fab intended to try and sell itself as a going concern, and that if it was unable to do so within three years, that Fab's assets would be placed in a liquidating trust.[5] The Proxy Statement indicates that the filing of the certificate of dissolution will only occur *after* Fab and its assets are sold.[6]

Therefore, the Plan explicitly contemplated that at least three years might expire before the certificate of dissolution would be filed. It was also in the corporation's best interest to delay the filing of the certificate, because upon so doing, Fab's stock would cease to be transferable upon the

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[4] Other decisions have assumed, without expressly deciding the issue, that a certificate of dissolution filed long after shareholder approval is still valid. *See In re Citadel Indus. Inc.*, 423 A.2d 500 (Del. Ch. 1980) (three years between the shareholder vote and the filing of the certificate); *Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451 (Del. 2000) (one year between the vote and the filing).

[5] *See* Plan at ¶¶ 2, 8; Proxy Statement at 6 and 13.

[6] Proxy Statement at 10 ("If the Plan is approved by our stockholders, we expect to complete the sale of our business *and then* to file a Certificate of Dissolution….") (emphasis added); *id.* at 12.

company's books.[7] Furthermore, Fab's board expressly reserved to itself the right to abandon the Plan pursuant to § 275(e).[8] That right would be worth very little if, as plaintiff has argued, the corporation was required to file the certificate of dissolution within ninety days of shareholder approval of the plan of dissolution. For these reasons, Fab's failure to file a certificate of dissolution is reasonable as a matter of law, if such reasonableness were to be required. Accordingly, the Plan is valid notwithstanding the fact that the certificate of dissolution has not yet been filed.

In conclusion, Fab may not sell all or substantially all of its assets without a shareholder vote unless it first files a certificate of dissolution with the Secretary of State. The Plan is valid in its entirety, and the defendants have not violated § 275 by not yet filing a certificate of dissolution.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:amf

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[7] Plan at ¶ 5.

[8] Plan at ¶ 14. I also note that Fab's directors must, of course, comply with their fiduciary duties in making any decision to alter or amend the Plan.