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Re: *In re Fuqua Industries, Inc. Shareholders Litigation*
Civil Action No. 11974

Dear Counsel:

This is my decision on defendants' motions for summary judgment. For the reasons described briefly below, I grant defendants' motions with respect to plaintiffs' lost time value of money claim, plaintiffs' current compensatory damages claim, and with respect to defendants Warner and Scott regarding Count V. I deny all other motions for summary judgment.

I. BACKGROUND

Fuqua Industries, Inc. ("Fuqua") was a Delaware corporation with principal lines of business in sporting goods, lawn and garden equipment, and photofinishing. In 1993, Fuqua changed its name to The Actava Group, Inc. ("Actava") and, in November 1995, merged with three other companies. Its name is now Metromedia International Group, Inc. ("Metromedia").

The Consolidated Third Amended Derivative Complaint ("Third Amended Complaint") identifies plaintiffs as current or former shareholders of Fuqua and Actava. Defendants J.B. Fuqua ("J.B."), Lawrence P. Klamon ("Klamon"), Carl E. Sanders ("Sanders"), Charles R. Scott ("Scott"), and Thomas N. Warner ("Warner") were Fuqua directors when the initial complaint was filed in February 1991. Defendant John B. Zellers ("Zellers") was a Fuqua director from 1986 through April 27, 1990.

Plaintiffs' Third Amended Complaint alleges that the defendants, beginning in July or August 1988, formulated and engaged in an entrenchment plan that was designed to transfer control of Fuqua to Triton, a wholly owned subsidiary of Intermark, Inc. and a friendly stockholder, in a way that would allow the defendants to retain their positions on the Fuqua board.[1] The plan, as plaintiffs allege, also ensured that J.B. would receive a substantial premium on the sale of his 6% block of stock. The essential elements of the entrenchment scheme were the Section 203 Agreement, the Stock Repurchase Program and J.B.'s sale of his 6% block of stock at a premium, all of which will be defined and discussed below.

A. J.B.'s Sale of His 6% Block of Stock to Triton

J.B. was the owner of a 6% block of Fuqua stock. Triton, on January 11, 1989, purchased this stock from J.B. at a premium of $14,431,824 over the market price. The Third Amended Complaint asserts that the premium Triton paid to J.B. for the sale of his 6% block was not paid in consideration for his stock, but instead was an improper payment in exchange for the agreements and benefits Triton derived from its acquisition of J.B.'s stake. Plaintiffs assert that Scott made this offer to J.B. in writing on June 6, 1988. These agreements and benefits included Triton's guaranteed representation on Fuqua's Board of Directors[2] and the understanding that Fuqua would use its own resources to enable Triton to accumulate a control block of Fuqua

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[1] In 1992 Intermark filed for protection under Chapter 11 of the Bankruptcy Act and was merged into Triton in June of 1993. Scott was the President, CEO and a director of Intermark during all relevant time periods. Warner was a director and Chairman of Intermark's Executive Committee. Both Scott and Warner became Fuqua directors in January 1989, after J.B. had sold his shares to Triton.

[2] According to the complaint, Triton was given two seats on the board in exchange for the purchase of J.B.'s stock as part of the entrenchment scheme. *See* Compl. ¶ 38.

stock. Plaintiffs have presented evidence that suggests that the defendant directors (other than J.B.) benefited because there was an agreement between Triton, J.B., and the other defendants whereby Triton promised not to alter the managerial or asset structure of Fuqua as long as the defendants helped Triton to obtain the control block. Essentially, plaintiffs allege that defendants were promised that they could retain their jobs if they cooperated with Triton's plan.

As a result of this plan, J.B. was allegedly unjustly enriched because he received a premium for his stock in exchange for turning over corporate offices to Triton, for knowingly assisting Triton to accumulate a control block of stock at Fuqua's expense and for securing the cooperation of the other directors. Plaintiffs assert that J.B. violated his duty of loyalty to Fuqua and should account to Fuqua for all unlawful profits he realized from his wrongdoing. Plaintiffs further assert that defendants Scott, Warner, Klamon and Sanders were participants in and beneficiaries of the wrongdoing and should be liable to Fuqua for any damages J.B. fails to pay because, although they did not share in the monetary premium paid to J.B., they benefited from his sale and cooperated with the plan to benefit Triton because they were told that Triton would keep all executives and directors on board.[3]

B. The Section 203 Agreement and the Stock Repurchase Program

The next phase of the entrenchment plan, according to plaintiffs, is what plaintiffs refer to as the Section 203 Agreement and the Stock Repurchase Program. Section 203 of Delaware's General Corporation Law is commonly referred to as Delaware's business combination statute. It provides that a corporation shall not engage in a business combination with an interested shareholder within three years of the date on which that shareholder became an interested shareholder unless: 1) before that date the corporation's board of directors had approved the business combination or had approved the shareholder becoming an interested shareholder; 2) at the time the shareholder became an interested shareholder it obtained at least eighty-five percent of the voting stock of the corporation; or 3) the business

[3] When reviewing this claim during the motion to dismiss related to the Second Amended complaint, I dismissed this claim because there were no facts "indicating that the premium was shared with the other directors or that [J.B.] was in a position to dominate or control the other directors." (*In re Fuqua Indus., Inc. S'holders Litig.*, 1997 WL 257460, at *9-10 (Del. Ch. May 13, 1997)). Without these facts, I could find no reason why the directors, without having shared in the premium, would have breached their fiduciary duties. Nor could I conclude, on the facts alleged, that J.B. had control over the board so that the premium served as a payment for the board's actions to benefit Triton. Plaintiffs, however, sought and were granted leave to amend the Third Amended Complaint because they were able to present the Court with sufficient facts so as to state a claim upon which relief could be granted. For a full recitation of the evidence, see *In re Fuqua Indus., Inc. S'holders Litig.*, Del. Ch., C.A. No. 11974, at 6-7, Chandler, C. (Dec. 14, 2004).

combination is approved by the board of directors and two-thirds of the disinterested shareholders.[4] Plaintiffs allege that defendants, contrary to the advice of counsel and without any proper business purpose, exempted Triton from Section 203 solely to allow Triton to gain a control block of Fuqua.

At Fuqua's May 17, 1989 board meeting, J.B., Klamon and Sanders approved a resolution, pursuant to § 203(a)(1), to allow Triton or its affiliates to purchase over fifteen percent of Fuqua stock and thereby become an interested shareholder.[5] Plaintiffs assert that there was no rational business purpose for this exemption. Plaintiffs further assert that J.B., Sanders and Klamon were all interested in the transaction because each owned substantial amounts of stock in Triton or its affiliated companies.

The resolution conditioned the final agreement with Triton on three terms. First, Triton and its affiliates would be prevented from entering into a business combination with Fuqua for a period of three years from the date on which Triton became an interested shareholder unless it first obtained the approval of a majority of Fuqua's disinterested directors. The resolution defined "disinterested director" as "[o]ne who was not an officer, director or

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[4] In general terms, an "interested shareholder" is one who owns 15% or more of the corporation's outstanding stock. *See* 8 *Del. C.* § 203(c)(5).

[5] Scott also attended the meeting, but is not alleged to have voted in favor of the resolution. Warner is not alleged to have been at the meeting.

control person of Triton or any "affiliate of Triton." Second, during this three-year period, Fuqua's board would consist of a minimum of seven directors, three of whom would be disinterested. Third, Triton and its affiliates would vote their Fuqua shares in favor of the board's nominees for Fuqua's board of directors. On May 22, 1989, Triton and Fuqua entered into the Section 203 Agreement, which also provided that Fuqua would not be considered an affiliate of Triton. This provision ensured that Fuqua's officers and directors would be classified as "disinterested directors" as long as they were not officers or directors of Triton or any of its affiliates other than Fuqua. By July 1989, Triton owned fifteen percent of Fuqua's stock. By September, Triton had acquired just over twenty percent.

Between November 1989 and October 1990, Fuqua's board authorized the repurchase of six million shares in three, two-million share increments. Fuqua expended its own money to repurchase these shares. Fuqua halted repurchases in late 1990 when it had acquired 4.9 million shares at a total cost of approximately $110 million. As a result of the repurchases, Triton's ownership of Fuqua increased from just over twenty percent to just over twenty-five percent, the minimum amount necessary for Triton to avoid classification as a passive investor and to avoid the need to comply with the associated reporting requirements of the Investment Company Act of 1940.

The Third Amended Complaint asserts that the Section 203 Agreement and the Share Repurchase Program were part of an entrenchment scheme carried out by defendants. Plaintiffs allege that the Section 203 Agreement created shares, owned by Triton, which could only be voted in favor of the directors and, therefore, this Agreement served to protect the directors' tenure. Plaintiffs further allege that the Share Repurchase Program, which caused Triton to increase its holdings from twenty to twenty-five percent, was entered into by defendants, because by helping Triton to increase its ownership, the defendants were increasing the number of shares that were limited in their ability to vote against the current board, thereby reducing the likelihood that they could be voted out of office.

Plaintiffs further allege that the defendants misused and wasted roughly $110 million of Fuqua funds by repurchasing shares pursuant to the entrenchment plan instead of using those monies in a more productive fashion. Furthermore, plaintiffs allege that the defendants breached their duties of loyalty, care and candor, and committed waste, gross mismanagement and self-dealing by engaging in transactions solely meant to benefit themselves at the expense of the Fuqua shareholders.

C. Current Status

With respect to the Section 203 Agreement and the Share Repurchase Program, defendants J.B., Klamon, Sanders and Scott have moved for summary judgment. Defendant Warner has filed an individual motion for summary judgment. Both motions argue that plaintiffs failed to present evidence that Fuqua was damaged by the transactions, that there is no evidence to support the existence of the alleged entrenchment scheme, and that there is no evidence that the defendants were unjustly enriched by the alleged entrenchment scheme. Warner, in his individual motion, additionally argues that there is no evidence that he was even aware of the proposed entrenchment scheme. Responding to plaintiffs' amended complaint, defendants amended their motions for summary judgment to include J.B.'s sale of the six percent block. Warner and Sanders have filed independent motions for summary judgment. Warner argues that there is no evidence that he had any knowledge of the entrenchment scheme, and Sanders argues that there is no evidence that he had any knowledge of the sale. All defendants argue that because of the lack of evidence concerning the alleged entrenchment scheme and the defendants' motivations, there is no genuine issue of material fact and, therefore, they are entitled to summary judgment.[6]

II. ANALYSIS

A. Standard of Review

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[7] The moving party always has the burden to show the absence of any genuine issue of material fact.[8] As plaintiffs' claims concern an entrenchment scheme with a number of different components, in order to properly determine whether there are genuine issues of material fact, I will consider all of the components comprising the alleged scheme together.

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[6] Plaintiffs assert in their answering brief that they are entitled to recover from J.B. a $4 million change of control payment that was made by Fuqua on J.B.'s behalf to Duke University. J.B.'s original employment agreement had provisions for a change of control payment. Plaintiffs contend, however, that the defendants amended J.B.'s employment agreement because the original change of control provisions would not have resulted in a payment to J.B. under the entrenchment plan that defendants allegedly were in the midst of carrying out. Plaintiffs, in their answering brief, feign confusion as to why defendants failed to address this part of the entrenchment scheme in their motion for summary judgment. The answer to that is simple. This part of the entrenchment scheme received no mention in the Third Amended Complaint. Having reviewed the Third Amended Complaint, I have found not a single reference to the $4 million payment and its involvement in the alleged entrenchment scheme. This purported claim, therefore, is not an issue in this lawsuit.

[7] CT. CH. R. 56(c).

[8] *Mell v. New Castle County*, 2003 WL 1919331, at *3 (Del. Ch.).

B. Is There a Genuine Issue of Material Fact as to the Existence of an Entrenchment Scheme?

Defendants argue that they are entitled to summary judgment because they assert that plaintiffs cannot demonstrate the existence of an entrenchment scheme and, therefore, there is no genuine issue of material fact as to whether there was an entrenchment scheme. Under normal circumstances, directors' actions are protected by the business judgment rule. In order to rebut the business judgment rule, "a successful claim of entrenchment requires plaintiffs to prove that the defendant directors engaged in actions which had the effect of protecting their tenure and that the action was motivated primarily or solely for the purpose of achieving that goal."[9] The burden is on the plaintiffs to demonstrate that the actions taken by the defendants not only had the effect of entrenching defendants in their positions on the board, but also that their actions were motivated primarily or solely for entrenchment purposes. For summary judgment, however, the burden is on the defendants to demonstrate that there is no genuine issue of material fact with respect to the entrenchment plan.

I conclude that there are issues of material fact concerning whether actions taken by defendants had the effect of entrenching defendants in their

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[9] *In re Fuqua Indus., Inc. S'holders Litig* 1997 WL 257460, at *10 (quoting *Heineman v. Datapoint,* 1990 WL 154149, at *1-2 (Del. Ch. Oct. 9, 1990)).

positions on the board and I therefore cannot grant defendants summary judgment on these grounds. Plaintiffs have asserted that the effect of the Section 203 Agreement, the Share Repurchase Program and J.B.'s sale of stock was to entrench defendants in their positions. Without argument, all of these transactions had the effect of giving Triton more control. Plaintiffs have presented sufficient evidence at this stage in the proceedings to suggest that Triton had agreed to keep the defendants in their current positions if Triton gained a control block of Fuqua. Additionally, the Section 203 Agreement created shares of Fuqua that had to be voted in accordance with the Fuqua board's wishes, and the Repurchase Program not only increased the percentage of those restricted shares in relation to other Fuqua shares, but increased Triton's overall ownership percentage. For these reasons, I conclude that there are genuine issues of material fact as to whether the actions taken by defendants had the effect of entrenching the defendants. Therefore, I cannot grant summary judgment on these grounds.

The next inquiry is whether entrenchment was the primary or sole motivation of defendants in taking the actions in question. Defendants argue that the plaintiffs have produced no evidence that demonstrates that entrenchment was a motive, let alone the sole or primary motive of the defendants' action. I conclude, however, that there are genuine issues of material fact regarding this claim and, therefore, I cannot grant defendants summary judgment on these grounds. Plaintiffs have presented evidence that suggests that the defendants were motivated, at least in part, by a desire to retain their positions and, therefore, entrench themselves. Based upon the record, I am unwilling to make a summary judgment determination as to what motivated the defendants to take the actions they took; nor am I willing to determine at this stage what the defendants' primary or sole motivation might have been. I am satisfied, however, that based upon the evidentiary record, an issue of material fact exists as to what motivated the defendants. There is a possibility that the defendants were motivated primarily or solely by the desire to entrench themselves; accordingly, I deny defendants' motions for summary judgment on these grounds.

C. Is There a Genuine Issue of Material Fact as to Whether Defendants Warner or Sanders Knowingly Participated in the Alleged Entrenchment Scheme?

Defendants Warner and Sanders have filed individual motions for summary judgment. Warner asserts that plaintiffs have produced no evidence that demonstrates that Warner formulated, negotiated or facilitated the Section 203 Agreement or that his primary or sole purpose was entrenchment. Sanders asserts that plaintiffs have produced no evidence that demonstrate his knowledge or participation in the alleged deal associated with J.B.'s sale to Triton. Without digressing into unnecessary detail, I conclude that there are genuine issues of material fact as to Warner's participation in the Section 203 Agreement and the Share Repurchase Program as well as to his motivations. Accordingly, I deny his motion for summary judgment with respect to these transactions. Likewise, I conclude that there are genuine issues of material fact with respect to Sanders' level of knowledge and participation in the alleged deal associated with J.B.'s sale, and I, therefore, deny his motion for summary judgment. I note, however, that as Warner was not a fiduciary of Fuqua at the time J.B. sold his shares to Triton, Warner owed no fiduciary duty to Fuqua and, thus, cannot be held responsible for any breach associated with J.B.'s sale, regardless of his actions on Triton's end or his actions once he joined Fuqua.[10] I grant Warner's motion for summary judgment with respect to J.B.'s sale. The same logic holds true for Scott, and I grant summary judgment in his favor with respect to any alleged breaches of fiduciary duty associated with J.B.'s sale.

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[10] *See In re Walt Disney Co.*, 2004 WL 2050138, at * 3-4 (Del. Ch. Sept. 10, 2004).

D. Is There a Genuine Issue of Material Fact as to Whether Plaintiffs Can Demonstrate Damages?

Defendants argue that they are entitled to summary judgment because plaintiffs have failed to present evidence that Fuqua was damaged by the alleged entrenchment scheme. Plaintiffs advance two alternate theories of damages.

a. <u>Rescissory Damages and The Lost Time Value of Money</u>

Plaintiffs first assert that they are entitled to rescissory damages. They propose that because the entrenchment scheme was a violation of the Fuqua directors' duty of loyalty, that they are entitled to rescissory damages for the Fuqua funds expended on the stock repurchased. Plaintiffs propose that these damages would be calculated by taking the difference of the price paid for the shares and either the intrinsic value of the shares at the time Fuqua merged into Metromedia (November 1, 1995), or the market price of the shares immediately before the announcement of the merger (August 30, 1994). Plaintiffs assert that this would recompense them for the money that was spent on the shares purchased during the Repurchase Program over the actual value of the shares.

Defendants assert a number of reasons why plaintiffs are not entitled to rescissory damages. They argue that the plaintiffs have failed to plead a basis for rescissory damages, that rescissory damages are barred by plaintiffs' undue delay in prosecuting the action, and that rescissory damages in this context would be speculative and, therefore, inappropriate.

Defendants also contend that plaintiffs have failed to properly plead rescissory damages because they believe plaintiffs have failed to show any damage to the corporation or any unjust benefit that accrued to the defendants arising from the overall entrenchment scheme. Delaware courts have long held that "[a]n award of rescissory damages may be appropriate in cases where directors are found to have breached their duty of loyalty" and that the Court of Chancery "may fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages."[11] Rescissory damages are "most appropriate where it is shown that the defendant fiduciaries unjustly enriched themselves by exercising their fiduciary authority deliberately to extract a personal financial benefit at the expense of the corporation's shareholders."[12] Additionally, "it is improper to cause the corporation to repurchase its stock for the sole or primary purpose of maintaining the board or management in control, [and] [i]n such a case, the purchase is deemed unlawful even if the purchase price is fair."[13]

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[11] *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 698 (Del. Ch. 1996). *See also Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).
[12] *Ryan*, 709 A.2d at 698.
[13] *Strassburger v. Early*, 752, A.2d 557, 572-573 (Del. Ch. 2000).

In sum, not only are rescissory damages available to this Court to remedy a breach of fiduciary duty, but in cases of the breach of the duty of loyalty, the plaintiff need not prove damages to establish a breach of that duty. In this respect, the defendants' contention that the corporation did not suffer damages from the Section 203 Agreement or the Repurchase Program is unavailing as plaintiffs need not demonstrate damages.[14] Fuqua funds, however, were only used for the Repurchase Program, so to recover for J.B.'s sale of stock and the Section 203 Agreement, plaintiffs would still need either to demonstrate damages to Fuqua or an unjust benefit accruing to the defendants. As I have already stated, plaintiffs have presented sufficient evidence to raise a genuine issue of material fact as to whether the defendants unjustly benefited from J.B.'s sale. I conclude, therefore, that plaintiffs have adequately pled a claim for rescissory damages that will withstand a motion for summary judgment.

Defendants next argue that plaintiffs are precluded from seeking rescissory damages because they insist that plaintiffs unduly delayed in seeking rescissory damages. Defendants are correct in that "it is a well-

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[14] *Id.* ("The limiting fiduciary principle upon which plaintiff relies is that it is improper to cause the corporation to repurchase its stock for the sole or primary purpose of maintaining the board or management in control. In such a case the purchase is deemed unlawful even if the purchase is fair.")

established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it."[15] In order to benefit from a party's excessive delay in asserting rescissory damages, the delay must have both worked a disadvantage to the opposing party and must have been unreasonable under the circumstances.[16] Unfortunately, this case has a long and tortured history. The events at issue took place in the late 1980s, and the first complaint was filed in 1991. There have been three iterations of the complaint and countless years of procedural posturing by both parties. Without dispute, the first time that plaintiffs asked for rescissory damages was in their answering brief to the defendants' motion for summary judgment. Defendants, beyond citing the length of time it took plaintiffs to identify this form of relief, have failed to argue that they were in any way prejudiced or that the delay was in any way unreasonable beyond the simple fact that it was a delay. Additionally, all the parties are responsible for the amount of time this case has consumed. It would be unfair to force plaintiffs to shoulder that blame alone. On this record, I am unwilling, strictly on the basis of time elapsed between the initial complaint and the assertion of

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[15] *Ryan*, 709 A.2d at 699 (quoting *Gaffin v. Teledyne, Inc.*, 1990 WL 195914 (Del. Ch. Dec. 4, 1990)).
[16] *Updyke Assoc. v. Wellington Mgmt. Co.*, 1982 WL 17848, at *1 (Del. Ch. Feb. 4, 1982).

rescissory damages, to conclude that plaintiffs have unreasonably delayed or that the defendants have suffered any harm as a result of this delay. I do, however, reserve the right to conclude after trial that the delay was unreasonable or that the defendants were prejudiced by the delay, but based upon what is currently before me, I am unable to draw these conclusions.

Lastly, defendants argue that the award of rescissory damages would be too speculative and would therefore be inappropriate. Again, defendants are correct in stating that rescissory damages may only be considered if they are "susceptible of proof and a remedy appropriate to all the issues of fairness."[17] Defendants argue that the original entity, Fuqua Industries, no longer exists and that in fact it has engaged in so many combinations before arriving at the current entity of Metromedia that to come to an appropriate rescissory remedy would be entirely speculative. Additionally, defendants argue that there has been no evidence presented to calculate the appropriate amount of rescissory damages, and that plaintiffs' expert offers no opinion as to the appropriate amount of rescissory damages. On the contrary, plaintiffs have presented calculations as to how the Court should deal with rescissory damages and although they include no expert opinion, I have not

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[17] *Weinberger*, 457 at A.2d 714. *See also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. Ch. 1993).

yet concluded that one would aid the Court.[18] Similar to my conclusion with respect to the unreasonable delay argument, I am unwilling to conclude on the present record that an award of rescissory damages would be too speculative. I would note, however, that,

> unlike the more exact process followed in an appraisal action, the law does not require certainty in the award of damages where a wrong has been proven and injury established. Responsible estimates that lack mathematical certainty are permissible so long as the Court has a basis to make a responsible estimate of damages.[19]

Therefore, if the Court ultimately determines that rescissory damages are appropriate in this matter, the Court must endeavor to reach a responsible estimate, not a precise calculation.

To complement rescissory damages, plaintiffs propose that they also be awarded the lost time value of the $110 million that the defendants spent on the Repurchase Program. Plaintiffs' expert, Dr. John S. Hekman, Ph. D., suggests in his expert report that there are three ways to calculate the lost time value of money with respect to the $110 million: 1) the amount that Fuqua could have saved in cumulative interest paid if, instead of using $110

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[18] *See* D.R.E. 702 ([i]f scientific or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert … may testify thereto).
[19] *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999) (quoting *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *12 (Del. Ch. Sept. 29, 1992)).

million of its cash to further defendants' entrenchment scheme, the Company had used the money to pay down its long term debt; 2) the amount Fuqua could have earned if the Company had invested the money in its ongoing business and earned an appropriate equity return; and 3) the amount Fuqua could have earned if the Company had invested $110 million in zero coupon ten-year treasury securities.

Defendants argue that the lost time value of money calculations performed by Dr. Hekman, while correctly executed, lack any foundation to make them applicable to the current facts. Dr. Hekman performed these calculations, according to defendants, only because it was requested of him by counsel and, they further argue, any calculation of the lost time value of money would be far too speculative for the Court to award to plaintiffs. Essentially, defendants take issue with plaintiffs' claim for the lost time value of money because to come to any conclusion as to what Fuqua might otherwise have done with the money would be entirely speculative. Although calculations can demonstrate what various alternative results would have been, there is no rational reason to conclude that any of the options illustrated by Dr. Hekman would have actually been chosen. Plaintiffs recognize the speculative nature of these damages, but again argue that when a defendant's misconduct makes it impossible without some degree of speculation to determine what would have happened had the defendants not violated their fiduciary duties, the risk of uncertainty must be resolved against the wrongdoers and, therefore, speculation as to what investment choices Fuqua Industries would have made is perfectly acceptable. I disagree.

In similar circumstances, Delaware courts have found that there is no authority to support a plaintiff's recovery on money they would have earned had they invested their money elsewhere. In *Manzo v. Rite Aid Corporation*, the plaintiff alleged that she would not have held her shares had the defendant accurately disclosed financial information and requested damages to compensate her for the return she allegedly would have earned from other investments.[20] The *Manzo* Court was asked to presume that the plaintiff's hypothetical investment would have been profitable, and refused plaintiff recovery by holding that "awarding money damages to compensate plaintiff for the return she *could* have earned had she invested elsewhere -- as she was free to do but didn't do -- amounts to speculation founded upon uncertainty."[21] The Court also noted that there was no precedent or policy to support such a damages calculation and stated that "investment opportunity

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[20] 2002 WL 31926606 (Del. Ch. Dec. 19, 2002).
[21] *Id*. at *5 (emphasis added).

losses [do] not … state a cognizable injury."[22] The Superior Court relied heavily on the *Manzo* decision in its determination in *Benning v. Wit Capital Group, Inc.*, that the plaintiffs could not recover for the loss they suffered because of their failure to sell their shares and invest elsewhere, holding that "[a]ny award of money damages would be too speculative and not based upon a cognizable injury."[23]

Plaintiffs' claim is only slightly different than the claim posed by both the *Manzo* and *Benning* plaintiffs. They assert that Fuqua Industries would have invested its money successfully had it not participated in the Share Repurchase Program and, therefore, they are entitled to recover for the lost time value of money that they propose to calculate by applying the money spent on the Share Repurchase Program to various other activities, which of course all leave Fuqua Industries in a better position. The main difference being that the plaintiffs are not asserting that they *would* have invested money differently and deserve the hypothetical lost profits. Rather, they are asserting that Fuqua *should* have spent the money differently, and reaped the rewards from those hypothetical investments. This claim, however, still suffers from the problems identified by the *Manzo* Court in that the claim is

[22] *Id.*
[23] 2004 WL 3030005, at *3-4 (Del. Super. Nov. 30, 2004).

entirely speculative. Plaintiffs have not brought to my attention any basis in Delaware law or policy to support a damage calculation based on *hypothetical* investments. Accordingly, I grant summary judgment to defendants, but only with respect to plaintiffs' assertion that they are entitled to the lost time value of money based upon Dr. Hekman's present calculations. In the event that after trial plaintiffs are granted rescissory damages, they may be entitled to pre-judgment interest; but that is a matter, however, that can be more properly addressed post-trial.

b. Compensatory Damages

As an alternative to rescissory damages, plaintiffs propose that compensatory damages should be awarded because, according to their expert Dr. Hekman, Fuqua overpaid for the stock with Fuqua money and was therefore damaged. In summary, Dr. Hekman contends that the market's lack of awareness of the entrenchment scheme served to artificially inflate the value of Fuqua. Then, once Triton obtained a control block and the market gained awareness of the control block, the value of Fuqua's shares decreased. Dr. Hekman proposes that the market discovered the entrenchment plan and Triton's control block through a "creeping realization," which took place over time, although he is unable to specify when exactly the market became aware of both the control block and the entrenchment plan. Dr. Hekman described this analysis as "the implied negative effect of the control block of stock" created by the defendants.

Defendants argue that plaintiffs are not entitled to compensatory damages because plaintiffs, through their expert, have not been able to establish damages. Defendants contend that Dr. Hekman admitted during his deposition that, in fact, he believed that the shares were purchased at a fair price. Defendants also contend that Dr. Hekman's conclusions are reached without foundation, are largely speculative, and are based on methodology that is not recognized by the investment community or the courts.

Without cataloging here all of defendants' attacks on Dr. Hekman and all of plaintiffs' defenses of Dr. Hekman, I am convinced that there are genuine issues of material fact with respect to Dr. Hekman's report. Thus, I cannot conclude on the record that the plaintiffs have failed to demonstrate damages. Nevertheless, I find a more serious problem with plaintiffs' claim of damages. Plaintiffs' compensatory damages theory rests on the premise that the price of the Fuqua shares were inflated because defendants kept their alleged entrenchment plan a secret. The fundamental premise of this claim is that had defendants been forthcoming with the market and revealed their entrenchment plan, that as a reflection of this plan the price of Fuqua would have declined.[24] This premise runs against the grain of a familiar principle of Delaware law that "a board is not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter."[25] To date, decisions concerning self-flagellation have been largely concerned with disclosures to shareholders in proxy materials. Because Delaware courts have consistently held that there is no duty for a director to disclose potential breaches of fiduciary duty in direct statements to the shareholders, I do not understand why a director would be required to disclose potential breaches of fiduciary duty when no statements to the shareholders were required. To the extent that plaintiffs' compensatory damages claim relies on defendants' failure to report the alleged entrenchment plan (and how that failure led to an inflation of Fuqua's share price), I grant summary judgment as to that claim in favor of defendants. To be clear, plaintiffs remain free to seek damages arising from the defendants' alleged breach of fiduciary duty and are free to use Dr. Hekman's report at trial to attempt to prove damages. But plaintiffs may not seek damages

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[24] It should be noted that defendants assert that all relevant information regarding Fuqua's activities was available to the market.

[25] *In re MONY Group, Inc., S'holder Litig.*, 853 A.2d 661, 682 n.93 (Del. Ch. 2004). S*ee also Alidina v. Internet.com Corp.*, 2002 WL 31584292, at *10-11 (Del. Ch. Nov. 6, 2002); *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1070 (Del. Ch. 2001).

based on any theory that defendants' failed to report their alleged breach of fiduciary duty.

III. CONCLUSION

For the stated reasons, I grant defendants' motion for summary judgment with respect to plaintiffs' current claim for the lost time value of money, plaintiffs' claim for compensatory damages and plaintiffs' claims against Warner and Scott arising from J.B.'s sale. I deny all of defendants' remaining summary judgment motions. Counsel shall submit an implementing form of order.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:jsm