IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE FUQUA INDUSTRIES, INC. SHAREHOLDER LITIGATION	)	CONSOLIDATED Civil Action No. 11974
SACHNOFF & WEAVER, LTD., an Illinois limited liability corporation, LOWELL E. SACHNOFF and DAVID SCHACHMAN,	)	
Plaintiffs,	)	C.A. No. 2173-N
v.	)	
BURTON R. ABRAMS,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 7, 2006
Date Decided: September 7, 2006

Joseph A. Rosenthal, of ROSENTHAL, MONHAIT & GODDESS, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

David P. Primack, of DRINKER BIDDLE & REATH LLP, Wilmington, Delaware; OF COUNSEL: Robert P. Cummins and Thomas C. Cronin, of CUMMINS & CRONIN, LLC, Chicago, Illinois, Attorneys for Defendant.

CHANDLER, Chancellor

Plaintiff is a law firm that recently served as class counsel in a class and derivative action litigated and settled in this Court. In conjunction with the settlement, this Court approved a plaintiff's allowance of $50,000 to be paid to the representative plaintiff. The representative plaintiff now alleges there was a contract obligating the law firm to pay him for hundreds of hours of legal work he performed in connection with the case. The law firm has filed a complaint seeking a declaration that the contract is unenforceable as a matter of law. I grant plaintiff's motion for summary judgment on the grounds that the purported contract is unenforceable as a matter of law and contrary to the principles governing stockholder class and derivative litigation in Delaware.

I. FACTS

This case arises out of *In re Fuqua Industries, Inc. Shareholder Litigation*, a class and derivative action litigated in this Court between 1991 and 2006. Sachnoff & Weaver, Ltd. ("Sachnoff & Weaver") served as class counsel in *In re Fuqua*. The initial representative plaintiff in *In re Fuqua* was Virginia Abrams ("Mrs. Abrams") acting as trustee for the Virginia Abrams Trust (the "Abrams Trust"). When Mrs. Abrams passed away in 2003, her husband, Burton Abrams ("Mr. Abrams"), was appointed representative plaintiff.

A. History of the In re Fuqua *Litigation*

1. The Complaint

In the 1980s and 1990s, the Virginia Abrams Trust owned stock in Fuqua Industries, Inc. ("Fuqua Industries"). Mr. and Mrs. Abrams came to believe that the Fuqua Industries board of directors was undertaking certain transactions in order to entrench itself. Mr. Abrams, a retired trial attorney, sent numerous letters to the board of directors complaining of managerial misconduct.[1] Mr. Abrams then began looking for counsel to represent Mrs. Abrams in a stockholder action.[2] He eventually hired two lawyers at Sachnoff & Weaver: Lowell Sachnoff and David Schachman.

The first complaint was filed in Mrs. Abrams' name on February 22, 1991. The complaint asserted numerous causes of action against Fuqua Industries' board of directors. After this complaint was consolidated with two other complaints, there followed a second amended complaint on December 28, 1995. Defendants responded by filing a motion to dismiss and on May 13, 1997, this Court dismissed all the class claims and all but one of plaintiff's derivative claims.[3]

[1] *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 129 (Del. Ch. Dec. 2, 1999).
[2] *Id.* at 128.
[3] *In re Fuqua Indus., Inc. S'holder Litig.*, 1997 WL 257460, at *1 (Del. Ch. May 13, 1997).

2. The Motion to Disqualify Virginia Abrams

In 1998, the *In re Fuqua* defendants filed a motion to disqualify Mrs. Abrams from serving as representative plaintiff. Defendants objected to Mrs. Abrams serving as class representative on the grounds that she was elderly, had recently suffered health problems, and was unfamiliar with the facts underlying her claims.[4] Defendants took depositions of Mrs. Abrams showing that her health and memory had deteriorated and that she "lacked a meaningful grasp of the facts and allegations of the case prosecuted in her name."[5]

On December 2, 1999, I issued a letter opinion denying defendants' motion to disqualify Mrs. Abrams.[6] I agreed with defendants that Mrs. Abrams most likely did not have the stamina to constantly monitor her lawyers[7] and that she was unfamiliar with the details of her lawsuit.[8] Nevertheless, I did not dismiss her as lead plaintiff. The role played by a representative plaintiff in a stockholder derivative suit is typically quite

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[4] *In re Fuqua*, 752 A.2d at 136.

[5] *Id.* at 129 ("During the long pendency of this litigation Mrs. Abrams fell ill. As she concedes, her memory and faculties have suffered as a result. In a 1998 deposition, it was evident that Mrs. Abrams lacked a meaningful grasp of the facts and allegations of the case prosecuted in her name . . . . She was obviously confused about basic facts regarding her lawsuit.")

[6] *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126 (Del. Ch. 1999).

[7] *Id.* at 136.

[8] *Id.* ("Abrams is elderly and has suffered health problems in recent years. While her lawyers sat on her claims, her health and memory have deteriorated and now she cannot remember very many things about her lawsuit.")

limited.[9] As a result, the fact that Mrs. Abrams would not be a particularly active lead plaintiff was not sufficient grounds for ordering her dismissal.

I declined, however, to find that there was absolutely no competency requirement whatsoever for serving as a representative plaintiff.[10] As I stated in the letter opinion, the lead plaintiff performs a necessary function: she serves as a bulwark against the risk of "attorneys bring[ing] actions through puppet plaintiffs while the real parties in interest are the attorneys themselves in search of fees . . . ."[11] Based on the affidavits submitted by Mr. Abrams suggesting that Mrs. Abrams would benefit from the advice and experience provided to her by her husband,[12] I concluded that Mrs. Abrams was competent to the extent that she would not be a mere "puppet plaintiff."

3. Burton Abrams Becomes Lead Plaintiff

In 2003, Mrs. Abrams passed away. Her husband, as successor trustee to the Virginia Abrams Trust, became the representative plaintiff. Mr. Abrams is a retired trial attorney who practiced in Chicago, Illinois for over sixty years.[13]

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[9] *Id.* at 135 ("Our legal system has long recognized that lawyers take a dominant role in prosecuting litigation on behalf of clients.")
[10] *Id.* at 133 (declining to follow preponderance of federal courts).
[11] *Id.*
[12] *Id.* at 134.
[13] *Id.* at 134 n.28.

4. The Settlement

On December 19, 2005, the parties in the *Fuqua* litigation notified me that they had agreed on a stipulation of settlement. I scheduled a settlement hearing for March 6, 2006, and plaintiffs submitted a brief in support of the stipulated settlement on March 1, 2006.

i. The Request For a Plaintiff's Award

On March 2, 2006, Mr. Abrams filed a motion requesting a so-called "plaintiff's award." In Delaware, representative plaintiffs typically receive no compensation for their services other than their pro-rata share of the class recovery and their reasonable out-of-pocket costs and expenses.[14] A "plaintiff's award" is an additional sum intended to reward and incentivize extraordinary service to the class performed by the class representative. Mr. Abrams proposed that he be given a $50,000 allowance to be awarded out of Sachnoff & Weaver's legal fees.

Sachnoff & Weaver filed a statement in support of this award being paid out of its legal fees. The brief highlighted Mr. Abrams' involvement in the case over its fourteen-year history[15] and referred to this Court's recent opinion in *Raider v. Sunderland*.[16] In *Raider*, this Court employed a four-

[14] *See Raider v. Sunderland*, 2006 WL 75310, at *2 (Del. Ch. Jan. 5, 2006) (awarding a plaintiff's allowance, but noting that "Delaware Courts are reluctant to award lead plaintiffs anything other than their out-of-pocket costs and expenses . . . .").
[15] Resp. of Pls.' Counsel to Mot. for an Award to the Virginia Abrams Trust, at *2.
[16] *Raider*, *supra*, 2006 WL 75310 (Del. Ch. Jan. 5, 2006).

part test for determining whether to grant an award.[17] Under *Raider*, an award may be appropriate where: (1) lead plaintiff makes unusually significant efforts monitoring the litigation; (2) the efforts result in a direct benefit to the class; (3) the lead plaintiff owns so few shares that she stands to gain only a small pro-rata recovery as a member of the class; and (4) notice is provided to the class.[18]

Attached to Sachnoff & Weaver's statement supporting a plaintiff's award was a series of three letters between Sachnoff & Weaver and Mr. Abrams relating to the payment of legal fees to Mr. Abrams. Mr. Abrams asserts that these letters formed a contract with Sachnoff & Weaver, obligating the firm to pay Mr. Abrams for the legal work he performed in connection with *In re Fuqua*.

The first of these letters, dated July 30, 1992, was from Burton Abrams to Lowell E. Sachnoff. In this letter, Mr. Abrams brought attention to the significant time and effort he had expended in connection with the *Fuqua* case.[19] The letter went on to state: "the value of my efforts should be incorporated as part of your billing when fees are considered in the course of

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[17] *Id.* at *2.

[18] *Id.*

[19] Resp. of Pls.' Counsel to Mot. for an Award to the Virginia Abrams Trust, Ex. B (July 30, 1992 Abrams letter to Sachnoff, at *1 ("A few days ago, I spoke at length with David Schachman and pointed out to him and reminded him of the time and effort I expended prior to your retainer and subsequently in connection with the *Fuqua* case. I did this because you mentioned or inferred that there could be no participation in the fees you will claim")).

any settlement negotiations and in the event of a successful resolution, *upon presentation to the court*."[20]

In the second letter, Mr. Sachnoff responded on July 31, 1992, stating he was "in full accord with what you say" and that "the valuable time you spent working on the case will be fully compensated."[21]

In the third letter, dated March 10, 1999, Mr. Sachnoff wrote to Mr. Abrams, advising him that "consistent with the law governing the payment of attorneys fees in a representative action . . . *I will not object to any application* [to the Court] . . . for compensation either as fees or as a consultant."[22] The letter went on to advise Mr. Abrams that to bring the issue of Mr. Abrams' billing to this Court's attention "when we have no settlement of the litigation" would be "premature and seriously counterproductive."[23]

ii. Mr. Abrams' Three Supporting Affidavits

Mr. Abrams' submitted three affidavits in support of his request for an award.[24] These affidavits were dated January 19, 1999, November 22, 2005, and February 27, 2006.[25] In these affidavits, Mr. Abrams made

[20] *Id.* (emphasis added).
[21] *Id.* Ex. B (July 31, 1992 Sachnoff letter to Abrams, at *1).
[22] *Id.* Ex. C (Mar. 10, 1999 Sachnoff letter to Abrams, at *1 (emphasis added)).
[23] *Id.*
[24] Mar. 2, 2006 Verified Mot. for an Award to the Virginia Abrams Trust, Ex. A.
[25] *Id.*

representations regarding the work he performed on behalf of the class. The 2006 affidavit stated:

> Over the fourteen year history of the litigation, my wife and I were continuously and actively involved in monitoring the litigation through numerous contacts with co-lead counsel. I have had more than 150 contacts with co-lead counsel over the course of the litigation by telephone, correspondence and through in-person meetings. In connection with the careful and continuous monitoring of the litigation, I have requested, received and reviewed significant filings and actively assisted co-lead counsel in the preparation of Virginia Abrams for her deposition . . . . Although I have not maintained formal and detailed time sheets, a review of my records reveals hundreds of hours of effort and assistance to counsel over the fourteen-year history of this litigation.[26]

iii. The Settlement is Approved

On March 6, 2006, I approved the settlement, pursuant to which attorneys' fees were awarded in the amount of $2,100,000 and expenses in the amount of $335,000. In addition, I authorized a plaintiff's allowance in the amount of $50,000, to be paid to Mr. Abrams *out of Sachnoff & Weaver's legal fees*. My approval of the plaintiff's award (paid out of Sachnoff & Weaver's fee award) was based on Mr. Abrams' affidavits and Sachnoff & Weaver's supporting brief.

[26] Mot. for an Award to the Virginia Abrams Trust and Supp. Memo., Ex. A (Feb. 27, 2006 Affidavit of Burton Abrams, ¶ 7.)

B. The Illinois Action

On May 21, 2006, Burton Abrams filed a lawsuit against Sachnoff & Weaver in the Circuit Court of Cook County Illinois. The complaint (the "Illinois Complaint") alleged that Sachnoff & Weaver agreed to split its legal fees with Burton Abrams in order to compensate him for his assistance in *In re Fuqua*.[27]

Attached to the Illinois Complaint were the three letters described above. The complaint asserted counts for promissory estoppel and breach of contract.

C. The Delaware Action

On May 22, 2006, Sachnoff & Weaver filed a complaint in this Court seeking injunctive and declaratory relief. In particular, plaintiffs sought: (1) an injunction barring Burton Abrams from filing suit for additional compensation in another jurisdiction; (2) a declaratory judgment that any purported contract authorizing Burton Abrams to act as counsel in *In re Fuqua* would be in violation of principles applicable to representative actions in Delaware and, therefore, unenforceable; and (3) alternatively, a

[27] Mot. to Consol., Ex. E, at ¶ 6 (alleging that Sachnoff & Weaver "retained Mr. Abrams to assist their efforts in the Delaware litigation" after they realized that his "professional services and decades of experience would be of substantial assistance.").

declaratory judgment that no contract exists between Sachnoff & Weaver and Burton Abrams to pay legal fees to Burton Abrams.[28]

On May 26, Sachnoff & Weaver filed a motion to consolidate its Delaware action with *In re Fuqua* on the grounds that the two cases arise out of and concern a set of common facts. Defendant opposed the motion to consolidate. I granted plaintiffs' motion to consolidate on June 14, 2006.

D. The Illinois Action is Dismissed

On June 7, 2006, the Illinois Court dismissed the Illinois complaint in deference to this Court's jurisdiction over the matter.[29]

E. Abrams' Answer and Counterclaim

On June 14, 2006, Mr. Abrams filed his answer and counterclaim. The counterclaim asserts five counts. Count one seeks a declaratory judgment ordering Sachnoff & Weaver to pay Abrams for his legal work. Count two is for breach of contract. Count three is for promissory estoppel. Count four is for quantum meruit. Count five is for fraudulent misrepresentation.

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[28] Compl. ¶ 1.
[29] June 13, 2006 Rosenthal letter to C. Chandler, Ex. A, at *1.

F. Additional Correspondence

In briefing plaintiffs' summary judgment motion, the parties have submitted further correspondence relating to the agreement between Sachnoff & Weaver and Mr. Abrams.

On May 4, 1994, Duane Sigelko, a Sachnoff & Weaver lawyer, sent Brian Abrams (Mr. Abrams' son) a letter advising him that it would be unethical and illegal to compensate Mr. Burton Abrams out of the firm's attorneys fees. The letter stated in part:

> I am sending you a copy of a recent Delaware decision [*Emerald Partners v. Berlin*[30]] which is instructive on the issue of whether a relative of a class representative[31] can serve as counsel for the class. The enclosed decision indicates that the spouse of a class representative could not serve as counsel for the class.[32]

On March 10, 1999, Lowell Sachnoff sent Mr. Abrams a letter stating, in part:

> I wanted to respond to your fax and citation of *Wanninger v. SPNV Holdings, Inc.*[33] On reading the *Wanninger* case it is clear that the opinion is not authority that would require us … to advise the Delaware court on any matters relating to fees in the case. In *Wanninger* the court criticized two law firms for waiting to advise the court of a fee sharing agreement until after the court had approved a final

[30] 564 A.2d 670 (Del. Ch. 1989).
[31] At this time, Mrs. Abrams was still the named plaintiff in *In re Fuqua*.
[32] Aff. of Joseph A. Rosenthal, Ex. A (May 4, 1994 letter from Sigelko to Brian Abrams, at *1).
[33] 1994 WL 285071 (N.D. Ill. June 24, 1994) (declining to enforce an agreement to split attorneys fees when agreement was made known to the court after the attorneys fees had been approved).

> settlement and initial distribution of attorneys fees. The court used the law firms' failure to inform the court until after the settlement was proposed and before the final settlement hearing as evidence that any rights under agreement were waived.
>
> As I've told [Mr. Abrams] on numerous occasions, consistent with the law governing the payment of attorneys fees in a representative action such as *Fuqua*, I will not object to any application by [Mr. Abrams] for compensation either as fees or as a consultant.[34]

The parties have not submitted any correspondence between 1999 and 2006. It is clear, however, that by 2006 the relationship between Sachnoff & Weaver and Mr. Abrams had deteriorated substantially. Mr. Abrams hired counsel, Robert Cummins, to represent him in his dispute with Sachnoff & Weaver regarding Mr. Abrams' contention that the law firm had agreed to compensate him for legal work performed in connection with *In re Fuqua*.

On February 8, 2006, Arnold Pagniucci, Sachnoff & Weaver's general counsel, sent Cummins a letter stating:

> As you know, I am General Counsel to the law firm of Sachnoff & Weaver, Ltd. As you also know, I represent the Firm and its members when claims of malpractice are asserted against the Firm. I was therefore surprised that you would contact Lowell Sachnoff directly about a potential malpractice claim. Please consider this a formal request that any further communication by you on behalf of Mr. Abrams discussing possible claims against Sachnoff & Weaver should be directed to me and only me. There should be no further contact with Mr. Sachnoff or any other Firm lawyers about any such claims.

[34] Def.'s Mem. in Opp'n to Pls.' Mot. for Partial Summ. J., Ex. E (Mar. 10, 1999 letter from Sachnoff to Abrams (emphasis in original)).

> In your discussion with Mr. Sachnoff you asked about Mr. Abrams' right to be compensated for the time and effort he expended in assisting his wife Virginia in her representative capacity as a named plaintiff in the *Fuqua* matter. First let me direct your attention to the Delaware Chancery Court opinion in the *Emerald Partners v. Berlin* litigation. On the basis of that case and similar cases, we advised Mr. Abrams on numerous occasions that because he is Virginia's husband he could not act as co-counsel in the litigation, nor could he be paid a forwarding or referral fee. Our opinion has been confirmed by Joe Rosenthal [Sachnoff & Weaver's Delaware co-counsel] . . .
>
> Although Mr. Rosenthal has had no direct contacts with Mr. Abrams over the years, he said that he would have no trouble supporting an application for a plaintiff's award . . . .[35]

Also on February 8, 2006, Mr. Sachnoff sent Mr. Abrams a letter expressing Sachnoff & Weaver's willingness to support a request for a plaintiff's award:

> As I've said before, David Schachman and I as co-lead counsel will, with your consent, prepare an application to the Chancery Court seeking a plaintiff's award for you of up to $50,000, and we stand ready to support that application with our affirmation of the value the many contacts with the lawyers at our firm and with David Schachman have had [sic] with you over the 14 years of the case in relation to the prosecution of the claims against the *Fuqua* defendants.[36]

There followed a series of letters in which Mr. Abrams and his attorney took the position that the purported contract would be enforceable

[35] Def.'s Mot. to Supp. the R., Ex. A (Feb. 8, 2006 Pagniucci letter to Cummins, at *1).
[36] Def.'s Mot. to Supp. the R., Ex. A (Feb. 8, 2006 Sachnoff letter to Abrams, at *1).

in court and that he was entitled to compensation in the amount of $296,200 for the hours he spent working on the case.[37]

By this point, relations between the two sides had become entirely adversarial. On February 10, 2006, Cummins wrote Pagniucci a letter that stated:

> According to you, Mr. Sachnoff thought he was the subject of a malpractice claim by Mr. Abrams as a result of our discussions. Putting aside the legitimacy of that belief, are we to understand that he thereafter decided to communicate directly with Mr. Abrams on February 8th? We certainly hope not; but, if so, it appears you have a job to do in explaining Rule 4.2 to your folks.
>
> . . . Under the specific circumstances here, the rationale of *Emerald Partners* has no applicability.[38]

On February 13, 2006, Pagniucci responded via letter:

> Thank you for your concession . . . that you are not asserting a malpractice claim on behalf of Mr. Abrams against Sachnoff & Weaver, Ltd. . . . . Mr. Abrams has no claim for compensation other than through the plaintiffs' award procedure outlined in [Sachnoff & Weaver's February 8 letter].[39]

Having agreed that a request should be made for a plaintiff's award, the parties could not agree on the form of the request. Mr. Abrams insisted that any award be separate and apart from the hours he spent on *In re Fuqua*.

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[37] *See* Def.'s Mot. to Supp. the R., Ex. A (Feb. 10, 2006 letter from Cummins to Pagniucci, at *1).

[38] *Id.*

[39] Def.'s Mot. to Supp. the R., Ex. A (Feb. 13, 2006 letter from Pagniucci to Cummins, at *1).

He insisted that the award be for the work done by Mrs. Abrams while she was still class representative.

On February 14, 2006, Cummins sent a letter to Pagniucci stating:

> Putting aside the matter of Mr. Abrams' individual claim, please proceed with the preparation of the documents necessary to pursue a plaintiff's award on behalf of his wife, who was your client.[40]

Cummins then prepared a draft affidavit to support the plaintiff's award and submitted it to Sachnoff & Weaver. In a letter dated February 15, 2006 from Pagniucci to Cummins, Pagniucci protested that, if the plaintiff's award had any chance of being approved, it had to be an award to compensate Mr. Abrams' efforts. The letter stated:

> It is necessary for the Trustee to submit an Affidavit outlining the efforts undertaken by Mr. Abrams and his wife, the predecessor Trustee, in support of the claims asserted in the Fuqua litigation. The Affidavit should stress how Mr. Abrams and his wife were attentive and responsive to the needs of the case.[41]

Cummins responded with an email to Pagniucci, dated February 20, 2006. This email stated, in its entirety:

> THE MEMO NEEDS TO REFLECT THE AWARD IS TO THE VIRGINIA ABRAMS TRUST NOT TO BURTON ABRAMS—PLEASE REVISE IMMEDIATELY[42]

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[40] Def.'s Mot. to Supp. the R., Ex. A (Feb. 14, 2006 letter from Cummins to Pagniucci, at *1).
[41] Def.'s Mot. to Supp. the R., Ex. A (Feb. 15, 2006 letter from Pagniucci to Cummins, at *1).
[42] Def.'s Mot. to Supp. the R., Ex. A (Feb. 20, 2006 email from Cummins to Pagniucci (emphasis in original)).

Cummins continued to insist that any plaintiff's award be for the work performed by Mrs. Abrams on behalf of the class. Sachnoff & Weaver considered this unacceptable. Pagniucci responded to Cummins by letter dated February 21, 2006, stating:

> The draft affidavit you have prepared is not acceptable. While the award can be paid to the Trust, it cannot be based on the efforts of Mrs. Abrams . . . .
>
> Sachnoff & Weaver's contact with the representative plaintiff was almost exclusively through Mr. Abrams. We are aware of his efforts, and based on that awareness, can support a plaintiff's award based on his involvement. We are not aware of Mrs. Abrams' efforts, and cannot therefore support an award based on the affidavit you have drafted.[43]

On February 23, 2006, Cummins sent an email to Pagniucci stating:

> It may be helpful to note that your earlier draft memorandum was substantively and procedurally improvident for several reasons including, but not limited to, your attempt to bootstrap Mr. Abrams into the role of a *de facto* plaintiff. Not being a shareholder and given your agreement that he provide independent services as counsel . . . Burt is not and never was a *de facto* plaintiff in the litigation. When you redraft the memorandum these manifest errors must be avoided.[44]

Pagniucci responded to Cummins by letter dated February 23, 2006. This letter again offered to support a plaintiff's award based on the efforts of Mr. Abrams, but not Mrs. Abrams. The letter stated:

[43] Def.'s Mot. to Supp. the R., Ex. A (Feb. 21, 2006 letter from Pagniucci to Cummins, at *1).
[44] Def.'s Mot. to Supp. the R., Ex. A (Feb. 23, 2006 Cummins email to Pagniucci).

> We will, as we have stated repeatedly, support a plaintiff's award for the Virginia Abrams Trust in a manner that is consistent with the truth, controlling Delaware law, and our ethical and professional responsibilities. The Affidavit you drafted for Mr. Abrams however, ignored our advice about how to best present the strongest arguments in favor of a plaintiff's award to the Trust. The Affidavit continues to focus on the conduct and contribution of Mrs. Abrams, despite the irrefutable facts that (1) Mrs. Abrams' participation as a plaintiff in the litigation was at best minimal, (2) her understanding of the litigation was, as shown by her deposition, marginal, and (3) she as trustee qualified as a derivative plaintiff only because, as the court unmistakably recognized in its opinion, it was Mr. Abrams who functioned at all times as the principal advisor to Mrs. Abrams and the Trust.
>
> If you desire to limit an application for a plaintiff's award to the conduct and contributions of Mrs. Abrams as trustee alone, we will support such an application for up to $5,000, an amount consistent with her limited role in the case. We cannot support an application for a plaintiff's award for a larger amount supported by an Affidavit from Mr. Abrams that fails to accurately reflect the contributions and conduct of both Mr. and Mrs. Abrams. You are, of course, free to do so with other counsel.[45]

On February 24, 2006, Pagniucci sent Cummins a letter that stated:

> Enclosed is a copy of a motion and supporting memorandum we are prepared to file in support of a plaintiff's award of up to $50,000.00 for the Trust. Although Mr. Abrams did no formal legal work, his conduct and contributions, along with the conduct and contributions of his wife, justify in our opinion such an award. It is necessary that Mr. Abrams modify his affidavit as we have previously suggested to more fully describe his conduct and contributions.[46]

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[45] Def.'s Mot. to Supp. the R., Ex. A (Feb. 23, 2006 letter from Pagniucci to Cummins, at *1).

[46] Def.'s Mot. to Supp. the R., Ex. A (Feb. 24, 2006 letter from Pagniucci to Cummins, at *1).

On March 6, 2006, this Court approved the plaintiff's award without having seen these letters and without having considered their implications.

II. ANALYSIS

At the outset, I note that based on the record before me it is highly doubtful (in my opinion) that a contract or agreement ever existed between Burton Abrams and Sachnoff & Weaver regarding a fee splitting arrangement in the *Fuqua* litigation. If I believed otherwise, it would be a far more serious matter. It would, for example, seem unlikely that a court of equity would entertain a law firm's argument that an illegal and unethical contract it had entered into should be held unenforceable, thereby enriching the firm that had conspired to commit a fraud on the Court and the stockholder class in the first place. In such circumstances, it seems more likely that a court would order disgorgement of *all* of the attorneys fees awarded to the offending law firm. Given that I do not determine whether a contract was formed here (as I assume it's existence for purposes of the present motion only), however, I obviously need not reach these more serious questions.

Now, assuming there was a contract by which class counsel engaged Mr. Abrams to perform legal work in connection with *In re Fuqua*, I hold that any purported contract would be unethical and in violation of the principles governing representative actions in Delaware. On that basis, I

conclude that such a contract, if it existed, would be void and unenforceable and I grant plaintiffs' motion for summary judgment.[47]

A. The Contract Violates Delaware's Rules of Ethics

The purported contract Abrams seeks to enforce conflicts with two of the Delaware Rules of Professional Responsibility: Rules 1.5 and 1.7.

Rule 1.5 governs the division of legal fees. It provides that if two lawyers who are not members of the same firm wish to split attorneys fees, they must obtain the client's consent.[48] Mr. Abrams argues that the parties agreed to pay him legal fees out of the Sachnoff & Weaver's fee application. Mr. Abrams did not advise the class, either in writing or orally, of this alleged fee-sharing agreement. The agreement, therefore, violates Rule 1.5.[49]

Rule 1.7 relates to conflicts of interest and provides that "a lawyer shall not represent a client if the representation involves a conflict of

[47] Under Chancery Court Rule 56, this Court may grant summary judgment in favor of movants if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Chancery Ct. R. 56(c).

[48] Rule 1.5(e) of the Delaware Rules of Professional Responsibility states:

> (e) A division of fee between lawyers who are not in the same firm may be made only if:
>
> > (1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and
> >
> > (2) the total fee is reasonable.

[49] *See Wanninger*, 1994 WL 285071, at *4 (applying analogous Northern District of Illinois Rule 1.5(f) as basis for refusing to enforce an agreement to split legal fees between lawyers who were not part of the same firm).

interest," including "a personal interest of the lawyer."[50] This Court has previously held that "there is an inherent conflict of interest when one person serves both as class representative and as attorney for the class."[51] Thus, the alleged contract Mr. Abrams seeks to assert violates Rule 1.7.[52]

The contract plainly would violate rules 1.5 and 1.7. Had I known about it when the defendants filed their motion to disqualify Mrs. Abrams in *In re Fuqua*, I would have disqualified her from serving as class representative on ethical grounds.[53] The contract would have also disqualified Mr. Abrams from serving as class representative. The same ethical considerations that would have required disqualification earlier in the

[50] Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyers responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[51] *Goodrich*, 1993 WL 94456, at *2 (citing *Emerald Partners v. Berlin*, 564 A.2d 670, 676-80 (Del. Ch. 1989)).

[52] *See Emerald Partners*, 564 A.2d at 679 (granting motion to disqualify a law firm under Rule 1.7 where a member of the firm was serving as class representative).

[53] This would have been true even before Mr. Abrams became trustee of the Abrams Trust, because his relationship to Mrs. Abrams would have been a disqualifying conflict. *See Goodrich*, 1993 WL 94456, at *2 ("These concerns are equally applicable when the class representative and the attorney for the class are married to one another").

The failure of class counsel to bring the fee sharing agreement to my attention, either at its inception or during the briefing on the motion to disqualify Mrs. Abrams, was (in my opinion) a serious lapse of professional judgment.

case now require that the purported contract in question be declared void and unenforceable.

B. The Purported Contract Conflicts With the Principles Governing Representative Actions as Articulated in Emerald Partners v. Berlin.

There is an inherent conflict of interest when one person serves simultaneously as class representative and as attorney for the class.[54] This situation presents the possibility that the class representative might be excessively generous in agreeing to attorney fees or might too readily agree to a settlement.[55]

On the basis of this conflict of interest, this Court disqualified class counsel in *Emerald Partners*.[56] The class representative in *Emerald Partners* was a partner at the law firm serving as class counsel. The Court held that this potential conflict of interest warranted disqualification of the law firm.[57]

In *Goodrich v. E.F. Hutton*, this Court declined to disqualify a class representative whose late wife had associated with the law firm serving as class counsel. The *Goodrich* Court noted, however, that had the class representative's wife still been associated with the firm, this potential

[54] *Goodrich*, 1993 WL 94456, at *2 (citing *Emerald Partners*, 564 A.2d at 676-80).
[55] *Id.*
[56] *See Emerald Partners*, 564 A.2d at 676-80.
[57] *Id.*

conflict of interest would have been a sufficient basis for disqualifying the class representative.[58]

Emerald Partners and *Goodrich* reflect a policy of preserving the independence and objectivity of the class representative from the class counsel. Keeping the two roles separate is necessary in order to ensure that the class representative represents the interests of the class vis-à-vis the attorneys. The contract Mr. Abrams seeks to enforce weakens this independence and objectivity at precisely the point in the litigation when it is most needed. Throughout the litigation of a stockholder derivative suit, the interests of class counsel and the class members are more or less aligned. At the point where the class attorneys make a request for attorney's fees, however, their interests diverge.[59] At that point, "the plaintiffs' attorney's role changes from one of fiduciary for the clients to that of a claimant against the fund created for the clients' benefit."[60] Thus, the class representative's objectivity and independence are particularly important when the question of attorney's fees arises.

By giving the class representative a claim for a portion of the fees, Mr. Abrams' alleged contract gives the representative an incentive to be overly generous in approving fees and to accede to settlement too readily

[58] *Goodrich*, 1993 WL 94456, at *3.
[59] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del. 1996).
[60] *Id.* (citing *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).

when continuing the litigation would be in the best interests of the class. The contract impugns the representative's objectivity and independence at precisely the point when they become useful. Because the alleged contract in this case conflicts with the strong public policy articulated in *Emerald Partners* and *Goodrich*, I hold that, assuming it existed, it would be unenforceable as a matter of law. Mr. Abrams' counterclaims in this action, predicated on the same unenforceable contract, are without merit.

III. CONCLUSION

For the reasons stated above, I grant summary judgment in favor of plaintiff Sachnoff & Weaver and against defendant Burton R. Abrams. Plaintiffs shall submit a form of order within ten days.

IT IS SO ORDERED.