

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

MICHAEL PATRICK KELLY, )  
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 Plaintiff, )  
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 v. ) *Civil Action No. 6797-VCG*  
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 FUQI INTERNATIONAL, INC., )  
 )  
 Defendant. )

**MEMORANDUM OPINION**

Date Submitted: November 21, 2012  
Date Decided: January 2, 2013

Michael Patrick Kelly, Thousand Oaks, CA, Pro Se Plaintiff.

John L. Reed and Scott Czerwonka, of DLA PIPER LLP, Wilmington, DE; OF COUNSEL: Robert Brownlie and Jennifer A. Lloyd, of DLA PIPER LLC, Attorneys for Defendants and Nominal Defendant.

GLASSCOCK, Vice Chancellor

## I. OVERVIEW

The Plaintiff is a disgruntled stockholder of Fuqi International, Inc. (“Fuqi”), a Delaware Corporation engaged in the manufacture of jewelry in China. Fuqi’s corporate conduct has been the source of much litigation, and its fulfillment of its obligations to its stockholders has been, at best, idiosyncratic.<sup>1</sup> This is the second action brought pro se by this Plaintiff seeking court intervention in recovering some \$150 million that the Plaintiff contends was fraudulently transferred out of the corporation. The first action, brought in California state court, was dismissed with prejudice. This Delaware action now before me was purportedly brought derivatively to recover these payments on behalf of Fuqi’s stockholders. The Amended Complaint in this matter names only Fuqi—the entity for which the plaintiff purports to litigate here—as a defendant. Fuqi has moved to dismiss based on Court of Chancery Rule 23.1; Rules 12(b)(4), (5), and (6); Rule 12(f); as well as res judicata and collateral estoppel. In his Answering Brief, the Plaintiff failed to address any of the Defendant’s grounds for dismissal, and elected instead to pursue ad hominem attacks against Fuqi’s counsel. Though this Court attempts to provide extra latitude to litigants proceeding pro se to the extent consistent with the pursuit of justice, such litigants are still responsible for presenting cogent

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<sup>1</sup> See, e.g., *Rich v. Fuqi Int’l, Inc.*, 2012 WL 5392162, at \*5-6 (Nov. 5, 2012)(concerning leave to appeal my Order requiring Fuqi to hold an annual stockholder’s meeting, despite Fuqi’s inability to produce audited financial statements for the past three years), *appeal denied*, 2012 WL 5470770, at \*1 (Nov. 9, 2012).

responses to an opponent's pleadings. Because the Plaintiff has failed to present any such arguments as to why this action should not be dismissed, and because substantial grounds supporting the Motion to Dismiss are present, I grant the Defendant's Motion to Dismiss.

## II. BACKGROUND FACTS

### *A. Procedural Background*

The following facts are derived from the Plaintiff's Complaint and Amended Complaint, the documents attached to or referred to in the Complaint, as well as the judgments and pleadings in related litigation, which are properly the subject of this Court's judicial notice.<sup>2</sup> Plaintiff Michael Patrick Kelly ("Kelly") is, and at all relevant times has been, a stockholder of Fuqi International, Inc., a Delaware corporation ("Fuqi").<sup>3</sup> Fuqi is in the business of manufacturing jewelry in China.<sup>4</sup> Prior to filing this suit, the Plaintiff filed a First Amended Complaint in the California Superior Court, County of Los Angeles (the "California Action").<sup>5</sup> The California Complaint alleged claims of breach of fiduciary duty, negligence, and fraud against twelve defendants, including Fuqi's directors, managers, auditors and attorneys.<sup>6</sup> One of the defendants in the California Action was Jeff Haiyong Liu,

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<sup>2</sup> See *Alliance Data Sys. v. Blackstone Capital P'rs V L.P.*, 963 A.2d 746, 752 (Del. Ch. 2009).

<sup>3</sup> Complaint ¶ 10, Aug. 19, 2011 ("Compl.).

<sup>4</sup> Compl. Ex. 1, First Amended Complaint to California Action ¶ 1 ("Calif. Compl.").

<sup>5</sup> Compl. ¶ 3; *Michael Patrick Kelly v. Victor Hollander, et al.*, SC 112254.

<sup>6</sup> See Calif. Compl. 2.

an elected director of Fuqi (“Liu”).<sup>7</sup> The California court granted a motion brought by Liu to quash service and jurisdiction.<sup>8</sup> At that point, the Plaintiff filed the Complaint in this Court, seeking (according to him) to create “at least assistant jurisdiction” over Liu to enable the California Action to move forward with Liu as a defendant.<sup>9</sup> The Complaint incorporated by reference the facts and causes of action alleged in the California Complaint.<sup>10</sup>

On November 11, 2011, the California court found that the California Complaint failed to “allege facts sufficient to constitute a cause of action for breach of fiduciary duty [or fraud]. . . .”<sup>11</sup> Consequently, the California court dismissed the Plaintiff’s claims with prejudice and without leave to amend.<sup>12</sup>

On June 18, 2012, Plaintiff Kelly “filed” an Amended Complaint in this Court seeking to “initiate an action to recover for the common stockholder the money embezzled from the corporation,” which names only Fuqi as a Defendant, in lieu of Liu.<sup>13</sup> The Amended Complaint was never docketed with the Court; the pleading exists only as an exhibit to a letter from Kelly to Vice Chancellor Laster

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<sup>7</sup> Compl. ¶ 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶ 5. In the Verified Complaint, the Plaintiff argued that, although California’s long-arm statute did not allow for in personam jurisdiction over Liu, Delaware’s statute does allow for such jurisdiction. *Id.* at ¶ 4.

<sup>10</sup> *Id.* at ¶¶ 13-14.

<sup>11</sup> Reed Aff. Ex. A, Calif. Minute Order, 6, 14, 17 (Nov. 11, 2011).

<sup>12</sup> Reed Aff. Ex. E, Calif. Minute Order (Jan. 25, 2012); Reed Aff. Ex. F, Calif. Minute Order (Mar. 28, 2012).

<sup>13</sup> Am. Compl. ¶ 2.

dated June 18, 2012.<sup>14</sup> Since the parties have briefed the Motion to Dismiss as though the Amended Complaint had been properly filed, I consider it so for purposes of this Motion only. The Amended Complaint attempts to incorporate “the specifics as outlined in the narrative first amended complaint filed previously in the Delaware Court of Chancery.”<sup>15</sup> Since this reference to the Amended Complaint is made in the Amended Complaint itself, the reference is manifestly unclear; Kelly refers, perhaps, to the complaint in the California Action that was dismissed with prejudice.<sup>16</sup>

The Amended Complaint is not specific as to the relief sought. Presumably, Kelly seeks return of the allegedly embezzled funds to Fuqi.<sup>17</sup> The Amended Complaint also states that Kelly “has filed a motion for injunctive relief and is filing this amendment to make the corporation a party to that motion.”<sup>18</sup> No such motion appears on the docket. Kelly did file a “Reply to Motion to Quash Subpoena [and] Motion for Equitable, Declaratory, and Injunctive and Other Relief” on March 13, 2012.<sup>19</sup> This document appears to have been, originally, a pleading in the California Action; and its caption names the Superior Court for

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<sup>14</sup> See Letter from Michael Patrick Kelly to Vice Chancellor Laster 1 (June 18, 2012).

<sup>15</sup> Am. Compl. ¶ 3.

<sup>16</sup> The California Complaint filed in this Court as an exhibit to the Complaint is titled the “First Amended Complaint to California Action.”

<sup>17</sup> See Am. Compl. ¶¶ 2-3 (“seeking to recover for the common stockholder the money embezzled from the corporation [of] . . . almost \$150M . . .”).

<sup>18</sup> *Id.* at ¶ 12.

<sup>19</sup> Reply Mot. Quash Subpoena Mot. Equitable Decl., Inj., Other Relief, Mar. 13, 2012 (“Reply Mot.”).

New Castle County as the venue.<sup>20</sup> Kelly then wrote to Vice Chancellor Laster to ask why he had “heard absolutely nothing” from the Court of Chancery.<sup>21</sup> The Vice Chancellor replied that, to the extent the filed document was intended as a motion in this Court, “it seeks relief against a non-party” among other defects, and directed Kelly to file an answering brief regarding Fuqi’s Motion to Dismiss.<sup>22</sup> Instead, Kelly attached the Amended Complaint to a letter to the Court, as detailed above. To the extent I consider the “Motion” a part of the Amended Complaint, it seeks a declaration that Fuqi is insolvent;<sup>23</sup> a mandatory injunction requiring cash to be transferred from a “Chinese subsidiary operating account” to Fuqi;<sup>24</sup> an order requiring Fuqi to “obtain a refund of all fees and costs paid to [Fuqi’s] director’s [sic] attorneys and to make no future payments;”<sup>25</sup> and the appointment of a receiver for the corporation.<sup>26</sup>

The Defendant moved to dismiss the Amended Complaint on July 16, 2012, citing Court of Chancery Rules 12(b)(4), (5), and (6).<sup>27</sup> Following briefing, I attempted to schedule oral argument. The Plaintiff requested that he be excused from appearing in Delaware for oral argument, since he is a resident of

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<sup>20</sup> *Id.* at 1.

<sup>21</sup> Letter from Michael Patrick Kelly to Vice Chancellor Laster 1 (June 7, 2012).

<sup>22</sup> Letter from Vice Chancellor Laster to Michael Patrick Kelly 1-2 (June 14, 2012).

<sup>23</sup> Reply Mot. ¶ 35.

<sup>24</sup> *Id.* at ¶ 37.

<sup>25</sup> *Id.* at ¶ 40.

<sup>26</sup> *Id.* at ¶ 42.

<sup>27</sup> Def.’s Mot. Dismiss Am. Compl. 1, Jul. 16, 2012.

California.<sup>28</sup> Upon review, I determined that no argument was necessary.<sup>29</sup> The following represents my decision based on the briefs.

*B. The Substance of the Amended Complaint.*

Alleged breaches of duty by Fuqi management have been the bases of numerous other suits, filed in this Court<sup>30</sup> and elsewhere,<sup>31</sup> as well as an ongoing formal investigation undertaken by the Securities and Exchange Commission (“SEC”). The Plaintiff has expended considerable effort to bring this lawsuit, and the lawsuit in California. Faced with Fuqi’s cryptic SEC disclosures<sup>32</sup>—that would frankly give any reasonable stockholder pause—Kelly took the initiative to try to find out what was really going on with the company.

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<sup>28</sup> See Email from Michael Patrick Kelly to Lisa K. Roach (Nov. 21, 2012 12:23 EST)(on file with the Court)(“I would appreciate it if the [Vice Chancellor] would convene a telephone conference before I fly to Delaware. If the [Vice Chancellor] plans to tell me to pound sand: he can tell me that over the phone and save me the pain.”).

<sup>29</sup> A telephonic argument was scheduled, which I later cancelled upon determining that no argument was necessary. See Email from Lisa K. Roach to Michael Patrick Kelly and John L. Reed (Nov. 30, 2012 8:48 EST)(on file with the Court). As a result of these communications, the “Date Submitted” for this Matter is the date Kelly requested to be excused from appearing in Delaware, November 21, 2012.

<sup>30</sup> See *Rich v. Fuqi Int’l, Inc.*, C.A. No. 5653-VCG (Del. Ch.); *Rich v. Chong*, C.A. No. 7616-VCG (Del. Ch.).

<sup>31</sup> See *In re Fuqi Int’l, Inc. Sec. Litig.*, Cause No. 10-CIV-02515 (S.D.N.Y.).

<sup>32</sup> Fuqi announced in March 2010 that its 2009 financial statements contained accounting errors and that its compliance systems contained material weaknesses, See Calif. Compl. ¶ 23. No audited financial statements have been made available to stockholders since 2009. See *id.* at ¶ 28. While Kelly was in the middle of his investigation, Fuqi additionally disclosed that certain “cash transfers” had been made funneling \$130 million out of the company and into bank accounts owned by three Chinese entities. *Id.* at ¶ 84 (quoting Fuqi’s March 2011 Press Release). After Fuqi’s auditor discovered these cash transfers, Fuqi was unable to determine the accuracy of the receiving companies’ addresses or whether the companies had any business operations. *Id.* In the Press Release, Fuqi told its investors that these transfers had been short-term transactions and that all funds had been transferred back into the company. *Id.*

Kelly alleges that “[c]orporate insiders embezzled almost \$150M from the corporation[,] and the Board of Directors, corporate counsel, auditors and investor relations consultants conspired to conceal the embezzlement from the common stockholder.”<sup>33</sup> In his efforts to seek more information about these issues, Kelly was five times denied access to the books and records of the company, by both the Board of Directors and the corporate counsel.<sup>34</sup> In what may be an attempt to plead demand futility, Kelly has represented that:

It is beyond futile to request anything from this Chinese fraud company known as Fuqi International Inc. because in addition to denying the Plaintiff access to the books and records twice, the corporation has [(a)] not filed an audited Financial Statement since December 31, 2008; [sic] [(b)] not held an [annual stockholder meeting] as required by law and [(c)] disregarded all forms of required corporate governance.”<sup>35</sup>

According to the pleadings in the California Action, the Plaintiff personally hunted down information about Fuqi by interviewing Fuqi board members, executives, employees, auditors, and lawyers.<sup>36</sup> Each conversation held over the phone was recorded.<sup>37</sup> In the California Action, Kelly claimed to have

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<sup>33</sup> Am. Compl. ¶ 3.

<sup>34</sup> *Id.* at ¶ 5.

<sup>35</sup> *Id.* at ¶ 6.

<sup>36</sup> *See generally* Calif. Compl. ¶¶ 30-74 (detailing the Plaintiff’s “course of action to uncover the truth as to why such an apparently benign accounting issue could take so long to correct and re-state”).

<sup>37</sup> *See id.* at ¶ 72 (“On April 11, 2011, Plaintiff finally connected with the CFO and spoke for 54 minutes. That phone call like all the others was placed on a VOIP phone system, logged and recorded.”).



relied on repeated assurances from these parties that the company was doing well and would turn around.<sup>38</sup> He alleged that each of these parties knew of the company's fraud and lied to him about it.<sup>39</sup> In the Delaware action, Kelly seeks to recover on behalf of Fuqi \$150,000,000 raised in two U.S. IPOs, presumably, although not explicitly, in vindication of the wrongdoing alleged in the dismissed California Action.<sup>40</sup>

It appears that the market shares Kelly's apprehension about Fuqi: in September 2009, the stock price of Fuqi was as high as \$30/share.<sup>41</sup> Today, after Fuqi stock was delisted by NASDAQ over a year ago, Fuqi stock trades on the OTC markets for around \$.65/share.<sup>42</sup>

*C. Fuqi Moves to Dismiss under Court of Chancery Rule 12(b)(4),(5) and (6), or, in the Alternative, to Stay this Action.*

Fuqi moved to dismiss the Amended Complaint on July 16, 2012,<sup>43</sup> alleging a variety of procedural and substantive reasons why the Amended Complaint

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<sup>38</sup> See, e.g., *id.* at ¶ 34 (“The Plaintiff relied on [a director’s] representation and continued to hold stock because of this statement.”).

<sup>39</sup> See, e.g., *id.* at ¶ 44 (“Ms. Chen knew cash raised from the public offerings was stolen or lost and that fact would not be revealed to the common stockholder.”).

<sup>40</sup> Pl.’s Br. Opp’n Def.’s Mot. Dismiss ¶¶ 12-13 (the “First Brief”)

<sup>41</sup> Fuqi Interactive Stock Chart, NASDAQ, <http://www.nasdaq.com/symbol/fuqi/interactive-chart?timeframe=1y&charttype=line> (last visited Dec. 20, 2012)(showing Fuqi’s stock closing at \$30.35 on September 7, 2009).

<sup>42</sup> See Fuqi International, Inc., <http://www.marketwatch.com/investing/stock/fuqi> (last visited Dec. 31, 2012).

<sup>43</sup> Def.’s Mot. to Dismiss Am. Ver. Compl., Jul. 16, 2012.

should be dismissed.<sup>44</sup> Many of these reasons stem from procedural errors the Plaintiff has made, presumably, due to his lack of familiarity with the legal system. Vice Chancellor Laster, who was originally assigned to this case, appropriately urged the Plaintiff to engage legal counsel to act on his behalf.<sup>45</sup> This he declined to do.<sup>46</sup>

Fuqi's stated grounds for dismissal are the following. First, Fuqi contends that the Amended Complaint must fail because, though it is characterized as a direct action, it is actually a derivative action that has been improperly pled.<sup>47</sup> Fuqi contends that the direct action fails to state a direct claim and therefore should be dismissed under Court of Chancery Rule 12(b)(6).<sup>48</sup>

Second, if the Amended Complaint has been properly brought derivatively, Fuqi argues (i) that a pro se plaintiff may not maintain a derivative action on behalf of a corporation, (ii) that the derivative action fails to name any defendants, (iii) that the Amended Complaint fails to adequately plead demand futility under Court of Chancery Rule 23.1, and (iv) that the Amended Complaint fails to plead sufficient facts to state a claim.<sup>49</sup>

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<sup>44</sup> See Def.'s Op. Br. 1 (citing service of process problems, pleading deficiencies, res judicata, collateral estoppel, and Rule 23.1 derivative-suit issues).

<sup>45</sup> Letter from Vice Chancellor Laster to Michael Patrick Kelly 2 (June 14, 2012).

<sup>46</sup> Letter from Michael Patrick Kelly to Vice Chancellor Laster 1 (June 18, 2012).

<sup>47</sup> Def.'s Op. Br. 1

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Third, Fuqi alleges that it has not been served with a summons of service of process, and therefore Court of Chancery Rules 12(b)(4) and (5) allow for dismissal of the Amended Complaint.<sup>50</sup> Finally, Fuqi argues that this case “derives from a lawsuit previously filed by [the Plaintiff] in California” which has since been dismissed, and therefore the Amended Complaint here should be dismissed due to res judicata and collateral estoppel.<sup>51</sup>

In the alternative, if I decide that Fuqi’s Motion to Dismiss should be denied, Fuqi requests that I stay this action in favor of the prior filed suits in the Southern District of New York and this Court.<sup>52</sup>

*D. Plaintiff Kelly Files Inappropriate Answering Briefs.*

On September 24, 2012, Fuqi’s counsel informed the Court that the Plaintiff would soon be filing an answering brief in opposition to the Defendant’s Motion to Dismiss.<sup>53</sup> Counsel alerted the Court that the Plaintiff’s Brief contained “unwarranted personal attacks, including attacks on Fuqi’s counsel, DLA Piper LLP (US).”<sup>54</sup> As a result of these attacks, Fuqi renewed its request to dismiss for the reasons stated in its Opening Brief.<sup>55</sup> Counsel attached the allegedly offensive

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2.

<sup>53</sup> Letter from John L. Reed to Vice Chancellor Glasscock 1 (Sept. 24, 2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

brief to its letter as an exhibit.<sup>56</sup> The same exhibit was later filed, on the same day, as the Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss (the "First Brief"). The First Brief is two pages long, and is separated into two sections: (1) "The Guts of the Matter" and (2) "DLA Piper – Opposing Counsel."<sup>57</sup> In the first of these two sections, the Plaintiff has written the following relevant provisions:

Fuqi International Inc. violated, abused and [micturated] on the Constitution of the State of Delaware. . . . It is really very simple[.] Fuqi International Inc. has not complied with any of the laws of the State of Delaware. They have misused and abused their corporate powers. . . . The charter should be revoked and each and every cause of action in my amended complaint should be granted.<sup>58</sup>

The First Brief's second section, titled "DLA Piper – Opposing Counsel," consists of the following, in relevant part, quoted from the brief:

7. DLA Piper has no shame.
8. DLA Piper is receiving money for legal fees **ILLEGALLY**.
9. DLA Piper has said nothing about when or if Financial Statements will be filed.
10. DLA Piper has said nothing about when an [annual stockholder meeting] will be held.
11. DLA Piper has not addressed the status of the SEC investigation.

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<sup>56</sup> Letter from John L. Reed to Vice Chancellor Glasscock (Sept. 24, 2012), Ex. A.

<sup>57</sup> Pl.'s First Br. 2.

<sup>58</sup> *Id.*

12. DLA Piper has said nothing about where the \$150M raised from investors is.
13. DLA Piper has said nothing about the reported embezzlement of nearly \$130M.
14. DLA Piper offers no reason why FUQI International Inc. should not be declared insolvent.
15. DLA Piper offers no reason why a receiver should not be appointed.
16. DLA Piper offers no reason why the cash should not be brought back to the parent corp., or if there is even any cash left (DLA Piper is making damn sure they get paid though).
17. DLA Piper offers no reason why the appointed receiver should not investigate the [board of directors] and seek return of the legal fees paid to DLA Piper and other law firms.
18. Rather than share important information with the Court DLA Piper muddies the waters and prostitutes themselves for money.
19. Derivative / Direct / First Filed / Collateral Estoppel / Res Judicata / Improper Service, and a Partridge in a Pear Tree. This is all form and no substance.
20. I may not have articulated the arguments like lawyers do, or illuminated the right path forward and I undoubtedly have made mistakes – but this should be about JUSTICE.
21. Shut Fuqi International Inc. down.<sup>59</sup>

Following DLA Piper’s Letter Response to the First Brief, the Plaintiff filed yet another brief on October 5, 2012: Plaintiff’s Opposition to Defendant’s Letter to [Vice] Chancellor Glasscock (the “Second Brief”).<sup>60</sup>

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<sup>59</sup> *Id.*

The Second Brief does not explain why the Plaintiff engaged in ad hominem attacks in the First Brief.<sup>61</sup> Instead, the Second Brief alternates in quoting sections of the Delaware Code and subsequently arguing how those sections empower me to act on the Plaintiff's behalf. For example, the shortest of these couplets is the following:

Title 10 Section 341, "The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."

I ask for the Court of Chancery to issue an order to the Defendant to seize cash from the Chinese operating subsidiary and transfer it to the corporate parent entity to secure and protect the cash for the benefit of the corporate stockholders.<sup>62</sup>

In addition to this request, the Plaintiff requests further relief, in other such couplets, such as a declaration that Fuqi is "a shell company with no real assets and insolvent;"<sup>63</sup> a Rule to Show Cause why attorneys were paid fees pursuant to an allegedly illegal indemnification agreement;<sup>64</sup> and the appointment of a receiver "to oversee the seizure and maintenance of the cash on behalf of corporate stockholders."<sup>65</sup>

### III. ANALYSIS

As I have explained above, it is obvious that the Plaintiff has dedicated many hours of his life to tracking down the facts of what is going on at Fuqi. It is

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<sup>60</sup> Pl.'s Opp'n Def.'s Letter to [Vice] Chancellor Glasscock, Oct. 5, 2012 (the "Second Brief").

<sup>61</sup> *See id.*

<sup>62</sup> *Id.* at ¶¶ 4-5.

<sup>63</sup> *Id.* at ¶¶ 1-3.

<sup>64</sup> *Id.* at ¶¶ 6-7.

<sup>65</sup> *Id.* at ¶¶ 8-9.

not my intention to chill such fact-finding missions that may arise in the future, be they into Fuqi or other companies with similar problems. Likewise, I understand the difficulties—self-imposed—facing Kelly, given the obstacles that he faces in coming before this Court pro se. The Court of Chancery is a court of equity, which at its core, deals in concepts of fairness. Consequently, there is a great deal that I, and my peers on the Court, will undertake to ensure that every plaintiff gets a chance to be heard. For example, pro se pleadings may be judged by a “less stringent standard” than those filed by an attorney,<sup>66</sup> and Delaware courts have the discretion to “look to the underlying substance of a pro se litigant's filings rather than rejecting filings for formal defects . . . .”<sup>67</sup>

However “self-representation is not a blank check for defect.”<sup>68</sup> There are limits to the level of informality that the Court will tolerate: “proceeding pro se will not relieve . . . Plaintiffs of their responsibility to present and support cogent arguments warranting the relief sought.”<sup>69</sup> Furthermore, “[t]he fact that [the plaintiff] is prosecuting this action pro se does not excuse him from complying with the procedural rules of this Court.”<sup>70</sup>

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<sup>66</sup> *Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at \*1 (Del. Ch. Feb. 20, 2009)(quoting *Johnson v. State*, 442 A.2d 1362 (Del. 1982)).

<sup>67</sup> *Sloan v. Segal*, 2008 WL 81513, at \*7 (Del. Ch. Jan. 3, 2008).

<sup>68</sup> *Pitts v. City of Wilmington*, 2009 WL 1515580, at \*1 (Del. Ch. May 29, 2009)(quoting *Quereguan v. New Castle Cnty.*, 2006 WL 2925411, at \*4 (Del. Ch.2006)).

<sup>69</sup> *Thornton*, 2009 WL 426179 at \*1.

<sup>70</sup> *Pitts*, 2009 WL 1515580, at \*1.

Up until the Plaintiff filed his answering brief, Kelly’s filings with the Court had been, occasionally, colorful.<sup>71</sup> Kelly is clearly passionate about his pursuit of justice—as he sees it—for the stockholders of Fuqi. Passion is a powerful driving force that can be instrumental in protecting the rights of those who have been abused or defrauded by sinister actors. But at this point, it seems that the Plaintiff’s passion, like Kafka’s Mr. Samsa, has been transformed, and debased.<sup>72</sup>

In its letter response to the Plaintiff’s First Brief, the Defendant’s Counsel DLA Piper complains, with cause, that it has been traduced.<sup>73</sup> This Court does not condone ad hominem attacks.<sup>74</sup> Furthermore, as I pointed out above, “proceeding pro se will not relieve the Plaintiff[] of [his] responsibility to present and support

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<sup>71</sup> See Letter from Michael Patrick Kelly to Commissioner Lynne M. Parker 2 (June 12, 2012)(“What the hell is going on in this country? I am a 58 year old man, a Certified Public Accountant and a Registered Investment Advisor, father of 2, sober for over 18 years and still going to 3 meetings a week, and I have never been this disillusioned with our economic system. We have Jon Corzine walking free on the streets of New York, we have Lloyd Blankfein talking about doing God’s work, we have the US based independent directors of Fuqi laughing and hiding. They are laughing and hiding. So I am asking you not to let them. Don’t let them hide.”); Letter from Michael Patrick Kelly to Vice Chancellor Laster 1 (June 18, 2012)(“There are a bunch of Delaware corporations like Fuqi International Inc. that came to our shore, stole money, and went dark. They are running and hiding and the state of Delaware has done nothing pro-actively to stop it. We are suffering here[,] Mr. Laster. Suffering.”). See also Am. Compl. ¶ 12 (“The Plaintiff is praying, and quite literally praying, that Delaware will go after these bastards to get the money back.”); Letter from Michael Patrick Kelly to Vice Chancellor Laster 1 (July 19, 2012)(“While all of the lawyers are filing briefs, responding to each other’s briefs, maybe even exposing their briefs, the money still sits in China.”).

<sup>72</sup> See Franz Kafka, *The Metamorphosis* (1915).

<sup>73</sup> See Letter from John L. Reed to Vice Chancellor Glasscock 1 (Sept. 24, 2012).

<sup>74</sup> See, e.g., *In re Guy*, 625 A.2d 279, at \*3 (Del. 1993)(“By direction of the Court, Respondent’s motion was stricken because it contained unsupported ad hominem attacks on others and was not within the bounds of professional propriety.”).



cogent arguments warranting the relief sought.”<sup>75</sup> Even ignoring the offensive presentation of the Plaintiff’s Briefs, the First and Second Briefs do not remotely resemble legal arguments. For example, if I were to attempt to excise the offensive portions of the First Brief, there would remain very little of substance – a few sentences at most. Likewise, even if I were to consider the Plaintiff’s First Brief as stricken and only look to his Second Brief for substance, I would find no responses to Fuqi’s arguments of why the suit should be dismissed under Rules 12(b)(4), (5) and (6). Although the Plaintiff has structured his Second Brief in a logical style—stating legal rules and then applying those rules to his situation—he has failed to address the legal issues relevant to the Motion to Dismiss.

Instead, in his briefing, Kelly has requested that I take several actions, pursuant to my equitable powers, to corral Fuqi’s alleged fraud.<sup>76</sup> It is true that I have the power to order these requested forms of relief, in certain situations where procedurally and factually appropriate. However, this is not the season to be considering declaratory relief, the disgorgement of attorney’s fees, or the transfer of funds. There are necessary rules to the litigation game, even though the Plaintiff is a non-lawyer, representing himself. Just as one cannot collect \$200 before passing “Go”, a litigant is not entitled to final relief before surviving any motion to dismiss, nor to summary judgment before proving his case through

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<sup>75</sup> *Thornton*, 2009 WL 426179, at \*1.

<sup>76</sup> *See* Pl.’s Second Br. ¶¶ 1-9.

submission of evidence. Litigation must be either a game of rules, or anarchy. I sympathize with the Plaintiff's frustration at being the man on the Monopoly board who hasn't been taught the rules. Navigating complicated procedural and substantive legal doctrines can be difficult for lawyers, and more so, obviously, for one without legal training. It is clear from Mr. Kelly's First Brief that he sees the issues raised by the Defendant as a kind of mumbo-jumbo designed only to obfuscate: "Derivative / Direct / First Filed / Collateral Estoppel / Res Judicata / Improper Service, and a Partridge in a Pear Tree. This is all form and no substance."<sup>77</sup> After being dismissed in the California Action and faced with a Motion to Dismiss here, it is also apparent that the Plaintiff considers himself the victim of a meaningless bureaucratic labyrinth reminiscent of another work of Kafka, *The Trial*.<sup>78</sup> The Plaintiff is incorrect: such rules as the demand requirement for bringing derivative actions are valuable devices that protect corporations and their stockholders alike.<sup>79</sup> In any event, the Plaintiff voluntarily came into this Court, and I cannot create special rules for him to play by. The rules must stand, and if the Plaintiff is as passionate about seeking justice for the Fuqi

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<sup>77</sup> Pl.'s First Br. ¶ 19.

<sup>78</sup> See Franz Kafka, *The Trial* (1925).

<sup>79</sup> See, e.g., *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) ("The rationale of Rule 23.1 is two-fold. On the one hand, it would allow a plaintiff to proceed with discovery and trial if the plaintiff complies with this rule and can articulate a reasonable basis to be entrusted with a claim that belongs to the corporation. On the other hand, the rule does not permit a stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation.").

stockholders as he claims to be,<sup>80</sup> he would have been well-advised to heed Vice Chancellor Laster's advice that he engage the services of an attorney who could navigate the game board for him.<sup>81</sup> Kelly has failed to take – has waived – the opportunity to oppose the Motion to Dismiss in any substantive way.<sup>82</sup>

I find that the Plaintiff's claims are facially problematic for the reasons set forth in Fuqi's Opening Brief in support of its Motion to Dismiss. The Plaintiff has alleged claims on behalf of the stockholders of Fuqi that are clearly derivative, without complying with the demand requirements of Court of Chancery Rule 23.1.<sup>83</sup> A derivative action may not be brought pro se,<sup>84</sup> and must name individual

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<sup>80</sup> See Pl.'s First Br. ¶ 20 (“I may not have articulated the arguments like lawyers do, or illuminated the right path forward and I undoubtedly have made mistakes – but this should be about JUSTICE.”).

<sup>81</sup> See Letter from Vice Chancellor Laster to Michael Patrick Kelly 2 (June 14, 2012)(advising Kelly to seek legal counsel).

<sup>82</sup> See *Loppert v. WindsorTech, Inc.*, 2004 WL 3092338, \*1 (Del. Ch. Sept. 21, 2004)(denying a defendant's motion to stay after its briefing was “devoid of argument that addresses [the relevant issues]”). See also *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999)(holding that a plaintiff waived arguments by failing to raise them in its opening brief); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at \*4 (Del. Ch. Oct.19, 2006)(“Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion [and] should not hold matters in reserve for reply briefs.”); *In re Asbestos Litig.*, 2011 WL 5429164, at \*4 (Del. Super. Oct. 3, 2011)(noting that the “Plaintiffs' strategy of making conclusory and unsupported allegations in their response brief deprives the moving defendant of the opportunity to make reasonable arguments in reply”); *Leffler v. Allstate Ins. Co.*, 1998 WL 961768, at \*1 (Del. Super. Oct. 13, 1998)(holding an issue was abandoned because a “defendant did not respond to the argument in its reply brief”).

<sup>83</sup> See Compl. ¶ 5; Am. Compl. ¶ 2; Ct. Ch. R. 23.1(a)(“The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.”).

<sup>84</sup> *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 2006 WL 903578, at \*2 n.4 (Del. Ch. Apr. 3, 2006)(“[A] derivative plaintiff, who steps into the shoes of the corporation, also must be represented by counsel.”).

defendants.<sup>85</sup> The Amended Complaint is deficient in both respects. Fuqi contends—and the Plaintiff has not demurred—that it has not been adequately served, and therefore Court of Chancery Rules 12(b)(4) and (5) allow for dismissal of the Amended Complaint.<sup>86</sup> Finally, I note that the Amended Complaint states no grounds under which the corporation would be liable to Kelly. To the extent that I were to construe the Amended Complaint to allege any direct claim by Kelly against Fuqi (a construction that would require importing the California Complaint, whole-hog, into the Amended Complaint), any such claims could have been or were pursued in the California Action and would likely be barred due to res judicata<sup>87</sup> or collateral estoppel.<sup>88</sup> Finally, this is not the only outstanding

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<sup>85</sup> Director Liu was originally named as a defendant, but Liu was subsequently dropped as a defendant in the Amended Complaint, which named only Fuqi as a defendant. *See* Am. Compl. ¶2 (“In the original complaint the defendant was Jeff Haiyong Liu . . . . The defendant in this Amended Complaint is the corporation Fuqi International Inc.”). In a derivative suit, the corporation will be considered a defendant in name alone. The purpose of a derivative suit is to allow the stockholder to pursue claims of the corporation on behalf of the corporation. *See Harff v. Kerkorian*, 324 A.2d 215, 218 (Del. Ch. 1974) *aff’d in part, rev’d in part*, 347 A.2d 133 (Del. 1975) (“The derivative action was developed by equity to enable stockholders to sue in the corporation’s name where those in control of the corporation refused to assert a claim belonging to the corporation.”). Therefore, a logical conclusion of this principle is that the corporation may not be the only named defendant in a derivative suit. *See id.*

<sup>86</sup> *See* Ct. Ch. R. 12(b)(4), (5).

<sup>87</sup> *See Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (“[A] final judgment on the merits rendered by a court of competent jurisdiction may, in the absence of fraud or collusion, be raised as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party.”). Here, the California court made a final judgment adverse to the Plaintiff on the same issues raised in this case. As a result, if the individual directors and officers had been named as defendants in this action, any direct claims against them would be precluded. *See Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001). Moreover, even if the Plaintiff neglected to assert claims in the California action that should have been pursued, those claims will similarly be barred by res judicata. *Maldonado*, 417 A.2d at 382.

<sup>88</sup> Collateral estoppel requires that “(1) the issue previously decided is identical with the one

stockholder lawsuit against or on behalf of Fuqi. At the very least, I am satisfied that the Plaintiff's interests will be adequately championed by the stockholder plaintiff in *Rich v. Chong*, a similar derivative suit currently before me.<sup>89</sup>

As I have discussed, Kelly references a "motion" captioned in the Superior Court seeking the appointment of a receiver. That relief is not requested in the pleadings before me.<sup>90</sup> Nothing in this decision should be construed as determining Kelly's right as a stockholder to seek the appointment of a receiver under 8 *Del. C.* § 291.<sup>91</sup>

The Plaintiff having failed to assert substantive opposition to the Defendant's Motion to Dismiss, and there appearing sufficient grounds stated in that Motion to warrant dismissal, the Motion is GRANTED. An appropriate Form of Order accompanies this Opinion.

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presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party . . . to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000). Here, Kelly has pled facts that are virtually identical to the facts he pled in the California action. A final judgment was entered dismissing Kelly's claims. There has been no evidence that Kelly did not have a full and fair opportunity to litigate in that case. Therefore, any direct claims are likely barred by collateral estoppel. *See id.*

<sup>89</sup> *Rich v. Chong*, C.A. No. 7616-VCG (Del. Ch.).

<sup>90</sup> *But see* Pl.'s Second Br. ¶¶ 8-9.

<sup>91</sup> 8 *Del. C.* § 291.