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OF THE
STATE OF DELAWARE

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Re: *FS Parallel Fund L.P., et al. v. Ergen, et al.*
Civil Action No. 19853

Dear Counsel:

This case stems from the failure and bankruptcy of StarBand Communications, Inc. ("StarBand"), which provides high-speed Internet access via satellite. Defendant EchoStar Communications Corporation ("EchoStar") and its affiliates also owned a significant stake in StarBand. Plaintiffs were shareholders of StarBand at all relevant times. Plaintiffs complain that defendants breached their fiduciary duties in connection with

the management and funding of StarBand and that defendants engaged in fraud or equitable fraud in connection with the execution by plaintiffs of a Waiver and Consent, under which plaintiffs relinquished certain contractual and stockholder rights.[1]

On July 28, 2003, this Court dismissed the original complaint in this case on the grounds that it failed to state a claim: 1) under Court of Chancery Rule 12(b)(6); and 2) under Court of Chancery Rule 23.1 because the claims asserted were derivative, not direct, in nature. Plaintiffs appealed that decision to the Supreme Court, which heard oral argument in this case in early 2004.

On April 2, 2004, the Supreme Court issued its opinion in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[2] The *Tooley* decision announced a new standard for determining whether stockholder claims are derivative or direct. Thirteen days after the *Tooley* decision, the Supreme Court remanded the instant case back to this Court without a substantive decision, but with

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[1] The execution of the Waiver and Consent was required by the Amended and Restated Memorandum of Understanding ("MOU"), which is Exhibit A to the Amended Complaint. The Waiver and Consent can be found as Exhibit B to the Amended Complaint. For a more detailed recitation of the facts, see *FS Parallel Fund L.P., et al. v. Ergen, et al.*, C.A. No. 19853, July 28, 2003 (Del. Ch.).

[2] 845 A.2d 1031 (Del. 2004).

instructions that this Court "evaluate its decision dated July 28, 2003, in light of *Tooley*, and [that] this case be remanded *for that purpose*."[3]

Following remand, plaintiffs have moved for leave to amend their complaint in light of *Tooley*. The motion for leave to amend is denied for the three independent reasons outlined below: 1) that leave to amend would exceed the scope of the Supreme Court's Order on remand; 2) that granting leave to amend would be in contravention of Court of Chancery Rule 15(aaa); and 3) that the amendments would be futile and subject to dismissal under Court of Chancery Rule 12(b)(6).

A. Scope of the Remand Order

The Remand Order was very specific as to the scope of this Court's duties and discretion upon remand. I am to evaluate my previous decision in light of the standard announced in *Tooley*. These instructions do not require this Court to allow plaintiffs to replead. Significantly, the Supreme Court's Order in *Tooley* specifically granted plaintiffs the opportunity to replead,[4] but its Order here did not. Furthermore, counsel for the plaintiffs conceded at oral argument on this motion that in their argument before the Supreme Court, plaintiffs asked that leave to amend be granted, and clearly, that leave

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[3] *FS Parallel Fund v. Ergen*, 847 A.2d 1121 (Del. 2004) (emphasis added) ("Remand Order").
[4] 845 A.2d at 1039-40.

was not given. A trial court does not have authority to exceed the scope of the appellate court's remand.[5] Therefore, I am compelled to deny plaintiffs' motion as beyond the scope of this Court's jurisdiction on remand. If plaintiffs wish to expand the scope of the remand, they must seek such relief from the Supreme Court.

B. Rule 15(aaa) Bars the Amendment

Even if the Supreme Court had granted remand for a broader purpose, granting plaintiffs' motion would still be improper under Court of Chancery Rule 15(aaa). Having answered the motions to dismiss, plaintiffs made a conscious decision to stand on the allegations of their complaint. Articulation of a new governing legal standard with respect to the allegations does not, without more, permit plaintiffs a second bite at the apple.

Plaintiffs now seek to add only one factual assertion to their complaint based upon the outcome of StarBand's bankruptcy proceeding. That fact, while certainly of great interest to plaintiffs, as it resulted in the cancellation of their stock, does not shed any additional light on the issues raised in either the original or proposed amended complaint. Therefore, granting leave to amend would not be appropriate because there are no new pertinent facts.

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[5] *See Francis v. State*, 1992 Del. LEXIS 306 at *12 (Del. Aug. 7, 1992); 5 AM. JUR. 2D APPELLATE REVIEW § 784 (2004).

Plaintiffs also wish to amend, purportedly, in order to "clarify the nature of the wrong alleged."[6] This also is unnecessary because following the Supreme Court's mandate, I will reevaluate my previous decision on the motions to dismiss in light of *Tooley*. In deciding those motions to dismiss, as with all motions to dismiss, I must construe the facts, and all reasonable inferences obtained from those facts, in the manner most favorable to plaintiffs.[7] Although I may now draw different inferences than in the past, repleading facts is simply unnecessary and potentially prejudicial to the defendants, in addition to the clear prejudice were I to permit the two new causes of action (Counts II and III).

C. The Proposed Amendments are Futile

Court of Chancery Rule 15(a) governs amended pleadings, and states that leave to amend should be liberally and "freely given when justice so

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[6] Mtn. for Leave to File Am. Compl. at 3. In reality, plaintiffs wish to assert two entirely new causes of action: fraud or equitable fraud against EchoStar and breach of fiduciary duty against defendant Mark Jackson. Neither of these claims require facts other than those pled in the Amended Complaint and, therefore, these two claims could and should have been pled in the original complaint. It would be highly prejudicial to the defendants to allow plaintiffs to create additional causes of action roughly two years after filing the first complaint. Even if the change in the law brought about by *Tooley* rises to the level of "good cause" within the meaning of Rule 15(aaa) to permit an amendment, that change in the law was not of sufficient magnitude to permit plaintiffs an opportunity to create new claims.

[7] *See Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

requires."[8] This decision, however, is a matter for the discretion of the trial judge.[9] In exercising this discretion, "[t]he motion to amend must be denied if, after assuming the truth of plaintiff's allegations, plaintiff has failed to state a claim upon which relief may be granted."[10] In other words, the standard to be applied is essentially that which would apply on a motion to dismiss under Court of Chancery Rule 12(b)(6).

In considering a motion to dismiss under Rule 12(b)(6), the Court must assume the truthfulness of all well-pleaded facts contained in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff.[11] Conclusory allegations unsupported by facts contained in the complaint, however, will not be accepted as true.[12] Dismissal (or denial of leave to amend in this case) is appropriate under Rule 12(b)(6) only where it appears with a reasonable certainty that the plaintiff would not be entitled to the relief sought under

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[8] DEL. CT. CH. R. 15(a).
[9] *See Bokat v. Getty Oil Co*., 262 A.2d 246 (Del. 1970), *overruled in part on other grounds by Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).
[10] *Smith v. Smitty McGee's, Inc*., 1998 WL 246681 at *8 (Del. Ch.).
[11] S*ee Grobow*, 539 A.2d at 187 (stating that "upon a motion to dismiss, only well-pleaded allegations of fact must be accepted as true" and that the Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences").
[12] *Id.* (stating that "conclusionary allegations of fact or law not supported by allegations of specific fact may not be taken as true").

any reasonable set of facts properly supported by the complaint, because such amendments would be futile.[13]

1. Counts I and III

Tooley approved this Court's standard, articulated in *Agostino v. Hicks*,[14] with respect to whether a particular claim is derivative or direct. *Tooley* states that "[this] analysis must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?"[15]

Applying the *Tooley* standard to Counts I and III, it is clear that StarBand (the corporation) suffered the harm alleged and that any recovery would belong to StarBand, making Count I derivative, and therefore the proposed amendments to Count I are futile. The various harms alleged in Counts I and III are typical breach of contract and fiduciary duty claims, and any recovery on those claims would inure to the benefit of StarBand directly as opposed to StarBand's shareholders.[16] For example, plaintiffs argue in Count I that, "Defendants did not discharge their contractual and fiduciary

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[13] *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).
[14] 2004 WL 443897 (Del. Ch.).
[15] 845 A.2d at 1035.
[16] *See Dieterich v. Harrer*, ___ A.2d ___, 2004 WL 1739664 at *10 (Del. Ch. 2004) (holding that breach of fiduciary duty claim belonged to the corporation because the duty is not owed separately or independently to the stockholders).

duties to the FS Investors to further the development *of StarBand*,"[17] and that EchoStar improperly competed *with StarBand*.[18] Count III is similar in claiming that relevant information was not disclosed *to StarBand* or its investors. Count III, however, is specific to defendant Jackson as opposed to EchoStar generally, but nonetheless the claim is dependent upon Jackson's fiduciary position as a director *of StarBand*. In sum, Counts I and III (to the extent they do not also include fraud claims which I will address in discussing Count II, below) are claims that arise from classic fiduciary principles of care and loyalty, claims which belong to StarBand.

Furthermore, plaintiffs argue that their injury from the alleged harms in Counts I and III was the loss of their StarBand stock.[19] The stock was lost in StarBand's bankruptcy reorganization, as a result of StarBand's economic difficulties,[20] not by any direct action taken by the defendants to cancel or otherwise invalidate plaintiffs' stock. Therefore, not only do the claims in Count I and III properly belong to StarBand rather than to plaintiffs, but the recovery would belong to the corporation because the alleged bad acts caused StarBand's value and prospects to decline (which eventually resulted

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[17] Am. Compl. ¶¶ 49, 51, 53 (emphasis added).
[18] *Id.* at ¶ 50.
[19] *Id.* at ¶ 54.
[20] *Id.* at ¶ 37.

in the bankruptcy and the cancellation of all of StarBand's common stock), not because the alleged bad acts caused the cancellation of plaintiffs' stock.[21]

Therefore, because StarBand is the injured party and because the recovery for that injury would accrue to StarBand,[22] Count I states a derivative claim, and it therefore would be futile to permit the amendment because StarBand has released all claims against the defendants.

2. Count II

With respect to Count II, defendants argue that it is futile because it fails to state a claim for fraud or equitable fraud and has not been pled with sufficient particularity.[23] I note, as mentioned above, that Counts I and III, as pled in the Amended Complaint, contain strong overtones of fraud. I speculate that this is in order to attempt to make those breach of fiduciary duty claims appear more direct, as a fraud claim is inherently direct, either under the pre- or post-*Tooley* analysis. Therefore, in addressing Count II, I also speak of the allusions to the alleged fraud contained in Counts I and III.

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[21] This is consistent with this Court's decision in *Metro Comm. Corp. BVI v. Advances MobileComm Technologies Inc.*, 854 A.2d 121, 168 (Del. Ch. 2004), where destruction of the economic value of a business entity was held to be an injury to the entity itself. *See TIFD III-X LLC v. Fruehauf Production Co., L.L.C.*, 2004 WL 1517135 (Del. Ch. 2004); *In re Syncor Int'l Corp. S'Holders Litig.*, ___ A.2d ___, 2004 WL 2158049 at *2-3 (Del. Ch. 2004).

[22] Am. Compl. ¶ 37.

[23] *See* CT. CH. R. 9(b).

Plaintiffs allege that they were defrauded by EchoStar to release certain rights they possessed by signing the MOU and the Waiver and Consent, and that plaintiffs would not have given up these rights had they known that EchoStar was still pursuing Hughes.[24] The elements of a claim for fraud in Delaware are: 1) a false statement, generally of fact, made by the defendant; 2) who knew or believed that statement to be false at the time it was made, or that defendant made the statement with reckless indifference to the truth; 3) the statement was made with the intent that plaintiff act or refrain from acting as a result of the statement; 4) plaintiff justifiably relies on that statement in his action or inaction; and 5) plaintiff is damaged as a result of that reliance.[25] In addition, under Court of Chancery Rule 9(b), these elements must be pled with particularity. The elements of equitable fraud are similar, but the plaintiff need not have known or believed the statement to be false or have been made with a reckless disregard for the truth.[26]

Plaintiffs rely on a press release issued by EchoStar on July 11, 2001 with respect to the MOU, which they argue contains the allegedly false

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[24] Am. Compl. ¶¶ 57-61.
[25] *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992); *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 116, 144 (Del. Ch. 2003); *York Lingings v. Roach*, 1999 WL 608850 at *3 (Del. Ch.).
[26] *See Stephenson*, 462 A.2d at 1074 (Del. 1983).

statements.[27] A brief analysis of the five elements discussed above indicates that plaintiffs have failed to state a claim for fraud or equitable fraud. With respect to the first element, it is very questionable as to whether a false statement of a presently existing fact was made regarding EchoStar's commitment to StarBand, but because of the procedural posture of this motion and how I must draw all inferences in favor of plaintiffs, I will not conclude at this time that a false statement of fact was not made. The second element is not necessary for a claim of equitable fraud, so I express no opinion on whether it would or could be met based upon the record before me.

On the third and fourth elements, however, plaintiffs have failed to plead facts that, if true, would prove that defendants issued the press release with the intent that the plaintiffs rely on that release, and that plaintiffs justifiably relied on the press release.[28] Preliminarily, the press release

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[27] This press release has not been attached as an Exhibit to the Amended Complaint (though the MOU and Waiver and Consent were) even though its contents, in their entirety, would be highly probative. Instead, plaintiffs have chosen to quote selectively from it. Although I draw no inference either for or against plaintiffs based on this tactic, the Court would have been better served to have the press release filed as an Exhibit to the Amended Complaint. *But see also Lewis v. Straetz*, 1986 WL 2252 (Del. Ch.) (plaintiff relied upon a press release to establish a breach of fiduciary duty, but plaintiff's selective quotations from the press release were misleading, and taken in its entirety, the press release did not support plaintiff's position).

[28] *But see Alessi v. Beracha*, 849 A.2d 939, 944-45 (Del. Ch. 2004) (press release was a specifically targeted request that plaintiffs act in accordance with the press release).

essentially discusses the MOU, which these sophisticated plaintiffs approved by virtue of the Waiver and Consent. Therefore, it is highly doubtful that EchoStar issued the press release with the intent that plaintiffs rely upon that press release in deciding whether to execute the Waiver and Consent when plaintiffs had possession of the far more detailed MOU. Furthermore, defendants rightly point out that statements regarding EchoStar's "commitment" to StarBand were not made by EchoStar or its CEO Mr. Ergen, but instead were made by StarBand's CEO, Zur Feldman.[29]

There are no representations in the press release that EchoStar had ceased its pursuit of Hughes, and combined with the MOU's specific reservation of EchoStar's right to compete with StarBand, it would be unreasonable for plaintiffs to rely upon the press release, to the exclusion of the MOU, for the proposition that EchoStar would move forward exclusively with StarBand and not with Hughes.

In sum, therefore, plaintiffs have not stated a cause of action for fraud or equitable fraud against defendants, whether those claims are stated expressly in Count II of the Amended Complaint, or, construing the complaint in the manner most favorable to plaintiffs, to the extent that Counts I and III also attempt to state claims for fraud or equitable fraud.

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[29] Am. Compl. ¶ 14.

D. Conclusion

Because granting leave to amend the complaint would exceed the scope of the Supreme Court's mandate, because leave to amend would be improper under Court of Chancery Rule 15(aaa), and because the amendments would in any event be futile and subject to dismissal upon a motion brought under Court of Chancery Rule 12(b)(6), the motion for leave to amend is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf