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

Dear Counsel:

This is my decision on plaintiffs' motion to amend the Consolidated Third Amended Derivative Complaint. I have concluded that oral argument

on the pending motion is unnecessary. For the reasons discussed below, I grant plaintiffs leave to amend the complaint.

I. BACKGROUND

Plaintiffs' original complaint contained allegations that the Fuqua Industries, Inc. ("Fuqua") directors had:

> engaged in numerous violations of fiduciary duties and other wrongdoing including fraud, usurpation of corporate opportunity, waste of corporate assets, entrenchment, gross mismanagement, disclosure of false and misleading information, self-dealing, formation of an unlawful business combination, denial of a class right to lawful and informed elections, and failure to maximize shareholder value.[1]

Defendants, pursuant to Court of Chancery Rule 12(b)(6), moved to dismiss all of plaintiffs' claims. I found that all but one of plaintiffs' claims failed to state a claim upon which relief could be granted and, therefore, they were dismissed. One of the claims that was subject to dismissal asserted that part of the defendant's entrenchment scheme was J.B. Fuqua's ("J.B.") sale of his six percent block of Fuqua shares to Triton for which he received a substantial premium. Plaintiffs further alleged that he received this premium because both he and other board members agreed to promote Triton's interest within Fuqua contrary to the interests of Fuqua's other

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[1] *In re Fuqua Industries, Inc. Shareholder Litigation*, 1997 WL 257460, at *1 (Del. Ch.).

stockholders.[2] I concluded that such allegations, if found to be true, entitled plaintiffs to relief.[3] I dismissed this claim, however, because there were no facts "indicating that the premium was shared with the other directors or that [J.B.] was in a position to dominate or control the other directors."[4] Without these facts, I could find no reason that the directors, without having shared in the premium, would have breached their fiduciary duties. Nor could I conclude on the facts alleged that J.B. had control over the board so that the premium served as a payment for the board's actions to benefit Triton.

Based upon evidence obtained during discovery on the surviving claim, plaintiffs now seek leave to amend the complaint pursuant to Court of Chancery Rule 15(a). Plaintiffs' proposed amendment would add Count V to the complaint. Count V essentially reasserts the aforementioned claim, stating that:

> The premium of $14,431,824 Triton paid to [J.B.] Fuqua was not paid in consideration for his stock but was an improper payment in exchange for the agreements and benefits Triton derived from its acquisition of Fuqua's stake. These agreements and benefits included Triton's representation on Fuqua's Board of Directors (notwithstanding the fact that Triton possessed only a minority stake during the initial phases of the Sherman Plan) and the understanding that [Fuqua] would use its own

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[2] *Id.* at *9.
[3] *Id.*
[4] *Id.*

> resources to enable Triton to accumulate a control block of stock. As a result, [J.B.] Fuqua was unjustly enriched by receiving a huge premium for his [Fuqua] stock in return for turning over corporate offices to Triton and knowingly assisting Triton to accumulate a control block of stock at [Fuqua's] expense. He thereby violated his duty of loyalty to [Fuqua] and should account to [Fuqua] for all unlawful profits he realized from his wrongdoing. Defendants Scott, Warner, Klamon and Sanders were participants in and beneficiaries of the wrongdoing and are liable to [Fuqua] for any damages J.B. Fuqua fails to pay.

II. STANDARD OF REVIEW

Court of Chancery Rule 15(a) governs amended pleadings, and states that leave to amend should be liberally and "freely given when justice so requires."[5] This decision, however, is a matter for the discretion of the trial judge.[6] 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."[7] 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-pled facts contained in the complaint and view those facts and all reasonable inferences drawn from

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[5] DEL. CT. CH. R. 15(A).
[6] *See Bokat v. Getty Oil Co.,* 262 A.2d 246 (Del. 1970).
[7] *Smith v. Smitty McGee's, Inc.,* 1998 WL 246681, at *8 (Del. Ch.).

them in the light most favorable to the plaintiff.[8] Conclusory allegations unsupported by facts contained in the complaint, however, will not be accepted as true.[9] 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 plaintiffs would not be entitled to relief sought under any reasonable set of facts properly supported by the complaint.[10]

III. ANALYSIS

Plaintiffs assert that they are entitled to amend the complaint because they now possess sufficient evidence to support the very same allegations that the Court has previously found lacking a factual basis. As I stated in my earlier opinion, if J.B. did obtain an inflated premium from Triton on the sale of his shares by agreeing to promote Triton's interest within the corporation, this would be a breach of fiduciary duty and constitute an actionable claim.[11] If the Court finds, therefore, that the claim is supported by sufficient evidence, the Court should freely grant leave to amend. Plaintiffs assert that evidence they obtained during discovery supports the

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[8] *See Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988) (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").
[9] *Id.* (stating that "conclusory allegations of fact or law not supported by allegations of specific fact may not be taken as true").
[10] *Rabkin v. Philip A. Hunt Chem. Corp.,* 498 A.2d 1099, 1104 (Del. 1985).
[11] *In re Fuqua Industries*, 197 WL 257460, at *9.

allegation that the premium that J.B. received was a result of agreements between J.B., the Board and Triton to further Triton's interests and that J.B. was able to control and manipulate the board.

The evidence plaintiffs rely on can be summarized as follows:

- June 6, 1988—letter from Charles Scott to J.B. offering to purchase J.B.'s shares at a 40% premium. In this letter Scott promised, among other things, to keep the corporate office in Atlanta and to name Larry Klamon as President and CEO of Fuqua.
- September 6, 1988—memorandum from Fuqua's outside counsel analyzing the sale of J.B.'s stock which stated "as part of the sale there will be an oral understanding that the Company will nominate a certain number of the buyers' designees for places on the board. The question here is whether such an understanding is permissible."
- John Stiska's (Triton's then attorney) deposition testimony in which he stated that it was his understanding that pursuant to Triton's purchase of J.B.'s shares, Triton would receive two seats on Fuqua's board.[12]
- Larry Klamon's deposition testimony in which he stated that he understood that Triton "had no intent to change the method of operations, the management, the location of the corporate office, and the like; that basically, everything was going to continue as it had been."[13] Klamon further testified that "Mr. Scott indicated to Mr. Fuqua that he intended to have me named as president and CEO, and Mr. Scott had assured me that he didn't contemplate any changes in the management of Fuqua."[14]
- J.B.'s deposition testimony in which he stated that Triton "was trying to assure the staff that there would be no significant changes" and that it was J.B.'s understanding that Triton

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[12] Stiska Tr. at pp. 102-103.
[13] Klamon Tr. at pp. 210-211.
[14] *Id.* at p. 212.

wouldn't fire any of the senior management.[15] J.B. stated that the commitment to his staff was an important factor in his decision to sell his shares to Triton.[16] Fuqua also stated that Triton had made a commitment not to move the corporate headquarters out of Atlanta and also that Triton would keep Klamon on as CEO.[17]

- J.B.'s 2001 autobiography that contains various statements asserting the fact that J.B. controlled the board and was loyal to his employees.

Plaintiffs argue that this evidence supports the conclusion that J.B. received the premium on his shares because he was able to deliver two seats on the board to Triton and because he was able to control and manipulate the board to act for Triton's benefit. Plaintiffs further argue that even though the directors did not share in the actual dollars and cents of the premium, their incentive to go along with the plan was because Triton, in various ways, had given assurances that senior management jobs would be secure if they were in control.

Defendants counter that whatever promises Scott may have made to J.B. in the June 6 letter or otherwise (not breaking up the company, leaving senior management intact, offering various offices to J.B.), that none of these promises can be found in the actual Stock Option Agreement and, therefore, are irrelevant. Defendants recognize that there was an oral

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[15] Fuqua Tr. at p. 237.
[16] *Id.* at p. 261.
[17] *Id.* at pp. 245-246.

understanding discussed by which Triton would be entitled to have two persons nominated to the Fuqua board, they note, however, that this nomination would be subject to the vote of the shareholders. Lastly, defendants assert that there was no evidence that J.B. asserted any control over the board, or that the directors shared the premium that he received in any way.

Assuming the truthfulness of all well-pled facts, I conclude that the plaintiffs have stated a claim upon which relief may be granted. Plaintiffs have presented facts that, when viewing those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiffs, might support a claim that the premium J.B. received on his shares was because he and the other directors agreed to work to the benefit of Triton, and the directors assented because they were assured that their jobs would be secure with Triton in control. Because plaintiffs have satisfied their burden, I grant plaintiffs leave to amend the complaint.

IV. CONCLUSION

For the aforementioned reasons, I grant plaintiffs leave to amend the complaint. Counsel should advise the Court whether, in light of this decision, the pending motion for summary judgment should go forward as presented or whether the motion for summary judgment will be

supplemented or modified. If the pending summary judgment motion is to go forward as presently briefed, I ask counsel to confer regarding possible dates for oral argument and to contract my chambers regarding scheduling the argument.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:jsm