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Re: *Boulden v. Albiorix, Inc., et al.*
C.A. No. 7051-VCN
Date Submitted: February 21, 2013

Dear Counsel:

Defendants Janus and van Wijk filed a Motion to Correct Clerical Error in the Court's initial decision on various motions to dismiss on February 6, 2013. The mistake was listing claims of breach of contract and quantum meruit as surviving against van Wijk, when, in fact, no such claim was specified in the Complaint. The Court issued, on the following day a revised Memorandum

Opinion (the "Opinion")[1] to correct the clerical error near the end of the original version of the Opinion.[2] The clerical nature of the error is obvious from a cursory reading of the Opinion, which repeatedly and consistently states that Boulden alleged a breach of contract claim and a quantum meruit claim solely against Janus and Albiorix.[3] Moreover, the analysis of those claims confirms that the Court did not (nor did it intend to) expand the causes of action against van Wijk. Boulden now seeks to assert those claims against van Wijk.

Of course, the Court did not randomly assign those Defendants to face particular causes of action. That was all derived from the Complaint. Boulden did not specifically allege—in his Complaint or even in his answering brief—a breach

[1] 2013 WL 396254 (Del. Ch. Feb. 7, 2013).

[2] Defined terms used in this letter have the same meaning as that used in the Opinion. As of this letter, the Westlaw version of the Opinion still incorrectly states that Count IV of the Complaint states a cause of action against van Wijk.

[3] *Id*. at *1 ("Boulden brings claims for breach of contract, quantum meruit, and breach of the covenant of good faith and fair dealing solely against Janus and Albiorix"); *id*. at *4 ("Count I of the Complaint alleges a breach of contract against Janus and Albiorix, specifically, that they failed to transfer 10% of the equity of Albiorix to Boulden."); *id*. ("Count IV is a quantum meruit claim against Janus and Albiorix."); *id*. at *10-11 (heading references breach of contract claim against Janus and Albiorix); *id*. at *13-14 (heading references quantum meruit claim against Janus and Albiorix).

of contract claim or a quantum meruit claim against van Wijk.[4] Boulden cannot now seek to amend his Complaint to allege such claims against van Wijk through the artifice of relying on a quickly-caught error in the Opinion. That is not an appropriate means of amending a complaint.

Nonetheless, that observation does not resolve whether Boulden should be granted leave to amend his Complaint to add van Wijk as a defendant to Count I (breach of contract) and Count IV (quantum meruit).[5] At this stage of the proceeding, Court of Chancery Rule 15(a) permits an amendment "only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires." That decision is a matter of discretion for the Court, but "must be denied, if after assuming the truth of [the] plaintiff's allegations, [the] plaintiff has failed to state a claim upon which relief may be granted."[6]

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[4] Compl. ¶¶ 10, 13. The Complaint specifically provides that those claims are against Albiorix and Janus.

[5] Boulden has filed a Cross-Motion for Leave to Further Amend Complaint.

[6] *Krahmer v. Christie's Inc.*, 903 A.2d 773, 777-78 (Del. Ch. 2006) (alterations in original) (internal quotation marks omitted) (quoting *FS Parallel Fund L.P. v. Ergen*, 2004 WL 3048751, at *2 (Del. Ch. Nov. 3, 2004), *aff'd*, 879 A.2d 602 (Del. 2005)).

Boulden contends that van Wijk should be held liable as a preincorporation promoter under the Equity Agreement. In response, van Wijk asserts that Janus was acting as a promoter, and that the parties did not intend for him to be liable on the alleged Equity Agreement. In essence, van Wijk argues that the effort to amend should be rejected because it is futile.

The Court concludes that the proposed Second Amended Complaint does not set forth a set of facts from which it is reasonably conceivable that van Wijk could be liable as a preincorporation promoter for Albiorix. Perhaps for good reason, Boulden has not alleged or argued that liability might attach to van Wijk as an agent of Janus.[7] Generally, promoters who

> execute a preincorporation contract in the name of a proposed corporation are personally liable on the contract even though they assume they are acting on behalf of a proposed corporation, and notwithstanding that they acted solely in contemplation of the formation of the corporation. Such liability necessarily follows

[7] Even if he had, it is not clear that his claim would succeed. *See* Restatement (Second) of Agency § 320 (1958) ("Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."). In his surreply, Boulden first alleged that van Wijk exceeded the scope of his agency. *See* Pl.'s Surreply Regarding Rule 60(a) Mot. by Defs. to Correct Clerical Error & Cross-Mot. for Leave to Further Am. Compl. ¶ 2. However, there are no facts in the proposed Second Amended Complaint that suggest that van Wijk exceeded the scope of his authority.

> because a promoter has no principal, and one cannot act as the agent of a nonexistent principal.[8]

A promoter can be released from that liability upon adoption, acceptance, or ratification of the contract by the newly formed corporation "where it is clear that the promoter's liability was not intended, the contract or other agreement releases the promoters, or there is a novation."[9]

"Although an agent that contracts in the name of a nonexistent principal will generally be held liable on the contract, whether a promoter is personally liable on a contract for the benefit of the corporation depends on the intention of the parties."[10] Thus, "if the contract is on behalf of the [nonexistent] corporation and the person with whom the contract is made agrees to look to the corporation alone for responsibility, the promoters incur no personal liability."[11]

Here, the Equity Agreement contemplated that Boulden would obtain an equity interest in Janus or Albiorix (or whatever entity would ultimately obtain ownership of the Plant) if the acquisition of the Plant occurred. As a consequence,

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[8] 1A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 215 (Sept. 2012) (footnotes omitted)
[9] *Id*. at § 216 (footnotes omitted).
[10] 12 Williston on Contracts § 35:71 (4th ed.).
[11] *Frazier v. Ash*, 234 F.2d 320, 326-27 (5th Cir. 1956).

the alleged agreement did not obligate Janus or Albiorix to perform unless the acquisition was completed. By the time the deal closed, Albiorix had been formed, and as Boulden contends, it implicitly adopted the Equity Agreement when it took an indirect ownership of the Plant and accepted the work performed by Boulden in helping to bring the deal to fruition.

The only reasonable inferences that can be drawn from the proposed Second Amended Complaint are that van Wijk was acting as Janus's agent and that Janus was the preincorporation promoter on behalf of Albiorix. The proposed complaint never alleges that van Wijk was acting in his personal capacity or planning to invest his own funds in the Plant. Nor does it allege that van Wijk would derive (or in fact, did obtain) a direct benefit from the Equity Agreement.[12] Instead, van Wijk is consistently referred to as working "on behalf of Janus" or as a Janus representative.[13]

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[12] (Proposed) Second Am. Compl. ¶ 49 (noting that the acquisition of the Plant would "benefit . . . Janus and Albiorix," not van Wijk.).

[13] *See, e.g.*, *id.* ¶ 21 ("Van Wijk, on behalf of Janus, expressed interest in becoming an investor in the project."); ¶ 28 ("Van Wijk and Wagner, on behalf of Janus, further offered Boulden employment as the President and CEO of Janus's United States operations."); ¶¶ 29, 31, 37 (referring to "van Wijk and other Janus representatives"); ¶ 49 ("Van Wijk, on behalf of Janus and Albiorix . . . offered to Boulden the choice of either 9% of the equity of Janus or 10% of the

As the primary investor in the Plant, Janus was to form Albiorix, which was to have actual ownership of the Plant. An entity can only act through its agents or appointed representatives. That van Wijk might have taken an action that ultimately benefited Albiorix does not necessarily make him a promoter when those actions were taken pursuant to his employment at Janus.[14] Consequently, Janus, not van Wijk, would have been the preincorporation promoter in this instance. That conclusion is supported by the terms of the alleged Equity Agreement, which make clear that Janus would be obligated to give Boulden—depending on what he chose—either equity in Janus or equity in Albiorix.

Even if van Wijk were the promoter of Albiorix or perhaps a co-promoter with Janus, there is no indication that the parties ever intended for van Wijk to be

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equity of Albiorix in exchange for presenting this opportunity to Janus and for Boulden's continued services in bringing the Plant to fruition . . . .").

[14] The proposed complaint, in limited instances, might be read in isolation to support a reasonable inference that van Wijk was acting on behalf of Albiorix, but when read in context, van Wijk was clearly acting solely on behalf of Janus. *See id.* ¶ 22 ("Boulden entered into an agreement with van Wijk, who was speaking as the Chairman and controlling shareholder of Janus and Janus USA, . . . which was later to become Defendant Albiorix.") Notably, at the time the Equity Agreement was allegedly formed, Albiorix did not exist, and thus, van Wijk was not also the Chairman and controlling shareholder of Albiorix. Here, van Wijk was acting solely on behalf of Janus. *See id.* ¶ 1 ("In exchange for Boulden delivering the deal to Janus and working toward its consummation, Janus promised and agreed with Boulden, in writing, that Boulden would receive a 10% interest in Janus's United States operations . . . .").

personally liable on the agreement, assuming that the acquisition was completed.[15] Thus, it is not reasonably conceivable that van Wijk assumed any liability under the Equity Agreement.

Boulden also seeks to add van Wijk as a defendant to his quantum meruit claim based on allegations that van Wijk was a preincorporation promoter for Albiorix.[16] But Boulden has not cited any law for the application of the preincorporation doctrine in the context of promoter liability for a quantum meruit claim. Thus, for the same reasons that Boulden's unjust enrichment claim against Albiorix was dismissed, Boulden's attempt to add van Wijk as a defendant to this claim also fails.[17]

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[15] In contrast, there are facts alleged in the proposed Second Amended Complaint that show that the parties did not intend for van Wijk to be personally liable. These include the fact that Boulden knew that Albiorix had not been formed and that van Wijk was acting on behalf of Janus, and the alleged Equity Agreement contemplated that only Janus or Albiorix would perform under it. (Proposed) Second Am. Compl. ¶¶ 21-22.

[16] Pl.'s Resp. to Rule 60(a) Mot. by Defs. & Cross-Mot. for Leave to Further Am. Compl. ("Pl.'s Resp.") ¶ 6.

[17] *Boulden*, 2013 WL 396254, at *13-14 n. 126 (noting that Boulden did not provide any authority for the proposition that the doctrine of preincorporation could or should apply to claims that are not based in contract).

The question remains whether a claim against van Wijk may be properly added because of his role as an agent of Janus.[18]

> [T]o recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if the services were performed at the behest of someone other than the defendants, the plaintiff must look to that person for recovery.[19]

To be sure, van Wijk, as the controlling shareholder of Janus, was indirectly enriched by the acquisition of the Plant. As explained above, however, the services that Boulden performed under the alleged Equity Agreement were done for Janus, not van Wijk. That van Wijk was acting solely in his capacity as Janus's agent is buttressed by Janus's assumption of liability and the lack of any pleaded facts suggesting that the parties intended that van Wijk personally assume any

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[18] Boulden seems to rely mostly on the allegation that van Wijk was a preincorporation promoter to sustain an unjust enrichment claim against van Wijk. The closest he comes to arguing that van Wijk is liable as Janus's agent is when he argues: "The Plaintiff's promissory estoppel claim (Count III) was upheld as to both Janus and van Wijk based on van Wijk's conduct. Therefore, van Wijk is a proper defendant under Count IV." Pl.'s Resp. ¶ 6 (citation omitted). Whether van Wijk was acting in his personal capacity or solely as an agent of Janus, or whether he had exceeded his authority as an agent, was not argued by the Defendants on their motion to dismiss. Consequently, the Court did not address this issue in the Opinion.

[19] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch. May 16, 2007) (quoting *Michele Pommier Models, Inc. v. Men Women NY Model Mgmt., Inc.*, 14 F. Supp. 2d 331, 338 (S.D.N.Y. 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999)).

liability. Thus, Boulden may not amend the Complaint to add a quantum meruit claim against van Wijk.

Accordingly, Boulden's Cross-Motion for Leave to Further Amend Complaint is denied as to those issues addressed in this letter opinion. Boulden has also sought to revise the Complaint to bring it into harmony with the Opinion. The Defendants do not oppose those changes, and leave is granted to accomplish those revisions.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K