SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

DIANE HUDSON, STUART HUDSON, each individually and derivatively as a shareholder of PURE LIME USA, INC.,

INDEX No. 606262/15

MOTION DATE: Jan. 4, 2016
Motion Sequence # 001, 002

Plaintiffs,

-against-

PURE LIME APS, CHRISTIAN FRIIS OLESEN, ALLAN BENGTSEN and PURE LIME USA, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affidavit/Affirmation in Support..... XX
Affidavit in Opposition..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

Motion by defendants Pure Lime APS, Christian Friis Olesen, Allan Bengtsen, and Pure Lime USA, Inc. to dismiss the complaint is **granted**. Cross-motion for leave to serve an amended complaint is **granted** only to the extent indicated below.

This is a shareholder derivative action on behalf of a closely held corporation. Defendant Pure Lime APS ("Pure Lime Denmark") is a Danish private limited company

which designs and manufactures active and fitness clothing and accessories for women and girls. Defendant Pure Lime USA, Inc. marketed the Pure Lime merchandise in the United States.

Plaintiffs Diane and Stuart Hudson each hold 25 % of the shares of defendant Pure Lime USA, and Pure Lime Denmark is the other 50 % shareholder.

On November 29, 2009, Stuart and Diane Hudson and Pure Lime Denmark entered into a shareholder's agreement. The shareholder agreement provides that management of Pure Lime USA shall be by a board of directors comprised of defendant Christian Friis Olesen as chairman, Diane and Stuart Hudson, and a fourth person designated by Pure Lime Denmark. Plaintiffs allege that Olesen is also an employee or owner of Pure Lime Denmark. The shareholder agreement provides that a quorum consists of the full board and, in case of a tie, the Chairman shall cast the deciding vote.

Plaintiffs allege that Pure Lime Denmark sold the merchandise to Pure Lime USA at a markup of 40 % above "wholesale cost" (proposed amended complaint at ¶ 31-35). Pursuant to this arrangement, Pure Lime USA purchased substantial quantities of merchandise from Pure Line Denmark from 2009 to 2014.

Defendant Allan Bengtsen was named as a Pure Lime USA board member on January 6, 2014. Plaintiffs allege that at a board meeting held on January 6, 2014 board members Olesen and Bengtsen agreed that Pure Lime Denmark would "reduce or eliminate" its markup (amended complaint at ¶ 48). Plaintiffs further allege that at the same meeting the board agreed to issue Pure Lime USA a $142,500 credit for defective merchandise, as well as a credit of $121,620 for export disbursements. Despite the alleged board action, the markup was not reduced, and Pure Lime USA never received the defective merchandise or export disbursement credits.

Plaintiffs allege that at a board meeting conducted on October 1, 2015, the directors unanimously agreed that Pure Lime Denmark would pay Pure Lime USA for "outstanding salaries and creditors," and that Pure Lime USA would then be dissolved. Plaintiff alleges that Pure Lime Denmark has not paid Pure Lime USA for these liabilities.

This action was commenced on September 28, 2015 as a derivative action on behalf of Pure Lime USA. Although the first cause of action in the proposed amended complaint is denominated as a derivative claim for breach of contract, it sounds as a derivative claim in breach of fiduciary duty. Plaintiffs allege that Olesen, Bengtsen, and Pure Lime Denmark

breached their fiduciary duties to Stuart, Diane, and Pure Lime USA by charging a 40 % markup, failing to pay the defective merchandise and export disbursement credits, hiring a chief operating officer without the unanimous consent of the board, directing Pure Lime USA's factor to make payments directly to Pure Lime Denmark, failing to pay Pure Lime USA's salaries and creditors, and otherwise diverting the profit of Pure Lime USA to Pure Lime Denmark. Plaintiffs allege that Olesen and Bengtsen have a self-interest in the challenged transactions because they are owners or employees of Pure Lime Denmark. In the second cause of action, plaintiffs individually assert the same breach of fiduciary duty claims. In the third cause of action, plaintiffs individually assert many of the same claims on the theory that they resulted in a breach of the shareholder agreement. In the fourth cause of action, plaintiffs assert individual claims for unjust enrichment.

By notice of motion dated November 11, 2005, defendants moved to dismiss the original complaint for failure to state a cause of action. More specifically, defendants argued that plaintiffs' breach of fiduciary duty claims were not pleaded with sufficient particularity and that plaintiffs had not alleged a viable derivative claim.

By notice of cross-motion dated November 30, 2015, plaintiffs cross-move for leave to serve an amended complaint. In opposition to the cross motion, defendants argue that the proposed amended complaint is without merit. More specifically, defendants argue that the shareholder agreement does not limit Pure Lime Denmark's right to charge a markup. Additionally, defendants argue that plaintiffs had "full knowledge" of all decisions and payments at issue and "acquiesced" in all of them.

The business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (***Consumers Union v New York***, 5 NY3d 327, 372 [2005]). Such matters include questions of policy of management, expediency of contracts or action, adequacy of consideration, and lawful appropriation of corporate funds to advance corporate interests (Id). The business judgment rule does not foreclose inquiry into the disinterested independence of those members of the board chosen to make the corporate decision on its behalf (***Allannic v Levin***, 57 Ad3d 443 [1st Dept 2008]). The rule shields such directors only if they possess a disinterested independence and do not have dual relations that prevent an unprejudicial exercise of judgment (Id).

However, Business Corporation Law § 713 provides that, "No contract or other transaction ...between a corporation and any other corporation...in which one or more of its directors...have a substantial financial interest, shall be either void or voidable for this reason

alone...if the material facts as to such director's interest...are disclosed in good faith or known to the board...and the board ... approves such contract or transaction by a vote sufficient for such purpose without counting the vote of such interested director...."

Defendants Oleson and Bengtsen had an interest in the 40 % markup, by virtue of their interest in Pure Lime Denmark. However, the 40 % markup was fully disclosed to plaintiffs and approved by the board, i.e. plaintiffs, without considering the votes of Oleson and Bengtsen's predecessor. The action of the board of agreeing to "reduce or eliminate" the 40 % markup is too vague and indefinite to be enforceable. Thus, plaintiff's breach of fiduciary duty claim based on the 40 % markup is without merit.

Plaintiffs do not allege any facts suggesting that Oleson and Bengtsen's decision to hire a chief operating officer for Pure Lime USA was not in good faith. Nor do plaintiffs allege any facts suggesting that the action of instructing the factor to make payments directly to Pure Lime Denmark was not in good faith. Finally, plaintiffs' allegation that defendants diverted the profit of Pure Lime USA to Pure Lime Denmark is conclusory.

However, on this motion to dismiss, the court must give plaintiffs the benefit of the possible favorable inference that the actions of failing to give Pure Lime USA credits for defective merchandise and export disbursements, after those credits were allegedly approved at a board meeting, was not in good faith. Similarly, the court must give plaintiffs the benefit of the favorable inference that failing to pay Pure Lime USA's outstanding salaries and creditors, which was also allegedly approved by the board, was not in good faith. The failure to pay these sums may have been influenced by defendant Olesen and Bengtsen's interest in Pure Lime Denmark. Thus, the latter two claims sound in breach of fiduciary duty rather than breach of contract.

Accordingly, defendants' motion to dismiss the complaint is **granted**. Plaintiffs' cross-motion for leave to amend is **granted** only to the extent that plaintiffs may serve an amended complaint, asserting derivative claims for breach of fiduciary duty, based upon non-payment of the defective merchandise and export disbursements credits, as well as the non-payment of salaries and creditors as agreed to at the October 1, 2015 board of directors meeting, within 15 days of the e-filing of this order. Defendants shall serve their answer to the amended complaint within 30 days of the date that the amended complaint is served.

So ordered.

Dated JAN 19 2016

Stephen A. Bucaria
J.S.C.