

SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 606262/15

MOTION DATE: May 12, 2016

Motion Sequence # 003

Plaintiffs,

-against-

PURE LIME APS, CHRISTIAN FRIIS OLESEN,  
ALLAN BENGTSSEN, PURE LIME USA,  
INC., PETER L. HESSELLUND-JENSEN and  
PURELIME, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... XX

Motion by defendant Peter Hesslund-Jansen to dismiss the second amended complaint, as asserted against him, is **granted**.

This is a shareholder derivative action on behalf of a closely held corporation. Petitioners Diane and Stuart Hudson jointly hold 50% of the shares of respondent Pure Lime USA, Inc. Pure Lime APS is a Danish limited liability company and the other 50% shareholder of Pure Lime USA. The Danish company designs and manufactures active and

fitness clothing for women and girls, which was marketed and sold by Pure Lime USA in the United States.

Pursuant to a shareholder's agreement dated November 29, 2009, Stuart Hudson was the president and treasurer of Pure Lime USA, and Diane Hudson was the vice president and secretary. The agreement provides that Stuart and Diane were to receive reasonable compensation in salary and benefits commensurate with their contribution to the success of the corporation.

The shareholder agreement provides that management of Pure Lime USA shall be by a board of directors comprised of Christian Friis Olesen, who is aligned with Pure Lime APS, as chairman, Diane and Stuart Hudson, and a fourth person designated by the Danish company. Section 2.2 of 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.

Section 1.6 of the shareholder agreement provides that if a shareholder desires to sell or transfer all or any part of his shares, he shall give the corporation written notice. If there is a prospective transferee other than the corporation or another shareholder, the notice shall state the terms and conditions of the proposed transfer. The corporation shall have the option to purchase the shares at "book value," defined as assets minus liabilities including good will, or any lower price stated in the notice.

Plaintiffs allege that between 2009 and 2014 the Danish company diverted approximately \$1,349,949 from Pure Lime USA, avoiding distribution to the shareholders. Various other disputes arose between the Hudsons and Pure Lime APS, including the Danish company's markup on the merchandise, a \$142,000 credit for defective merchandise, and a \$121,620 credit for "export disbursements." Plaintiffs allege that after a board of directors meeting on October 1, 2015 the directors aligned with Pure Lime APS excluded them from the business.

On September 28, 2015, Diane and Stuart Hudson commenced the present derivative action on behalf of Pure Lime USA against Pure Lime APS and its aligned directors. Plaintiffs alleged 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, failing to pay Pure Lime USA's salaries and creditors, and otherwise diverting the profit of Pure Lime USA to Pure Lime Denmark. By order dated January 19, 2016, the court granted defendants' motion to dismiss the complaint. Plaintiffs were granted leave to 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.

Meanwhile, by order to show cause dated January 11, 2016, petitioners commenced a proceeding for the judicial dissolution of Pure Lime USA on the ground of deadlock. In the order to show cause, the court issued a temporary restraining order prohibiting the directors of Pure Lime USA from transferring the assets of the company, except by permission of the court. By order dated April 11, 2016, the court granted the petition for judicial dissolution only to the extent of ordering a hearing to be conducted on a later date. The tie-break provision in the shareholder agreement did not expressly limit a shareholder's right to bring a dissolution proceeding. As the court should not limit a shareholder's statutory buy-out rights by implication, neither should it limit a shareholder's right to bring a dissolution proceeding (*Ferolito v Vultaggio*, 99 AD3d 19, 26 [1<sup>st</sup> Dept 2012]). Since the judicial dissolution proceeding was brought pursuant to BCL § 1104 on the ground of deadlock, respondents did not have a statutory right to elect to buy petitioner's shares at fair value pursuant to BCL § 1118 (See, *Sakow v Seafood Restaurant*, 297 AD2d 229 [1<sup>st</sup> Dept 2002]).

On February 3, 2016, plaintiffs served an amended complaint in the derivative action, purporting to comply with the court's January 19, 2016 order. However, in the first cause of action, plaintiffs asserted a fourth breach of fiduciary duty claim for allegedly "freezing" Pure Lime USA's corporate bank accounts and changing the password on the electronic billing system without the consent of plaintiffs. Plaintiffs also asserted a second cause of action for breach of fiduciary duty by failing to pay plaintiff Stuart Hudson \$54,286 in outstanding gross salary.

On April 21, 2016, plaintiff filed a supplemental summons and second amended complaint. In the first cause of action, the second amended complaint purports to assert a fifth breach of fiduciary duty claim for allegedly causing a new corporation, Pure Lime, Inc., to amend Pure Lime USA's purchase orders to divert money from Pure Lime USA and otherwise competing with Pure Lime. Plaintiffs also purported to assert a third cause of action against defendant Peter Hessellund-Jansen for allegedly aiding and abetting a breach of fiduciary duty by defendants Olesen, Bengtsen, and Pure Lime Denmark. Hessellund-Jansen is the attorney who incorporated the new Pure Lime corporation on September 2,

2015. Plaintiffs also purported to assert a fourth cause of action against defendant Pure Lime for tortious interference with contract.

By notice of motion dated April 18, 2016, defendant Peter Hessellund-Jansen moves to dismiss the second amended complaint as asserted against him for failure to state a cause of action.

There is no allegation that defendant Peter Hessellund-Jansen provided substantial assistance to any of the breach of fiduciary duty claims permitted to be asserted in the amended complaint pursuant to the court's order of January 19, 2016. Accordingly, defendant Peter Hessellund-Jansen's motion to dismiss the second amended complaint as asserted against him is **granted**. On the court's court's own motion, parts d, e, and f of paragraph 70, as well as the second, third, and fourth causes of action in the second amended complaint are also stricken as not in compliance with the court's January 19, 2016 order.

So ordered.

Dated 6/7/16

*Stephen A. Bucaria*  
J.S.C.

**ENTERED**

JUN 09 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE