COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Fonds de Régulation et de Contrôle Café Cacao v. Lion Capital Management, LLC, et al.*
Civil Action No. 1509-N

Dear Counsel:

Parties dispute the ownership of the New York Chocolate and Confectionary Company ("NYCCC"), a Fulton, New York-based chocolate manufacturer organized under the laws of Delaware. Between July 2003 and at least May 2004, the parties worked together to acquire the assets necessary to operate a chocolate factory. Plaintiff Fonds de Régulation et de Contrôle Café Cacao ("FRC") asserts that it paid defendant Lion Capital Management ("LCM") to act as its agent during the acquisition process and did not offer an equity stake to defendant until March 2005.[1] Defendant argues that Lion Capital Management incorporated NYCCC in late 2003, and only later did it transfer an equity stake to plaintiff in exchange for

[1] New York Chocolate and Confectionary Company is also a nominal defendant.

the promise of $40 million that never appeared. Plaintiff asks this Court, pursuant to its power under 10 *Del. C.* § 6501, to declare FRC the sole owners of all issued shares of NYCCC. Defendant raises a host of affirmative defenses and four counterclaims based in breach of contract, promissory estoppel, fraud, and unjust enrichment.

During a three day trial, both plaintiff and defendant offered testimony and written evidence. In considering this case, I have placed greater emphasis upon the written record than upon the statements of witnesses at trial. First, much of the testimony involved events occurring several years before the dispute arose, and a number of the witnesses were uncertain in their memories. Second, none of the witnesses speak English as their first language, and much of the trial was conducted with the aid of an interpreter. On several occasions, particularly on cross-examination, it appeared to me that witnesses were unclear as to the question being asked. Although such difficulties do not, and should not, detract from the general credibility of a witness; they cause me to question the accuracy of information provided through testimony, particularly where that testimony conflicts with written evidence. Most importantly, the written record describes a more coherent and less contradictory sequence of events than trial testimony.

I. FACTS

This case presents an unusual spectacle: a dispute over the initial ownership of an entity that has been fully incorporated, held two annual meetings, and after three years languishes near the brink of financial distress. Nearly twenty months separate the incorporation of NYCCC in November 2003 and the initiation of this lawsuit in July 2005. The condition of the enterprise has deteriorated: little if any production is taking place at present; lawsuits have been filed by creditors; utilities and other services have been sporadically discontinued; and the company has shrunk from over eighty employees to under fifteen. The outcome of this ownership dispute ultimately depends upon the legal effect of three critical events: (a) the incorporation of NYCCC by an LCM employee in October 2003 and the subsequent transfer of shares to LCM and then FRC; (b) a May 14, 2004 shareholders' meeting that purported to appoint ten directors to the NYCCC board; and (c) a March 23, 2005 board of directors meeting, during which a majority of FRC-appointed directors voted to require a $5 million capital contribution from LCM in exchange for the issuance of its shares.

A. Events Leading to the Incorporation of NYCCC

In March 2003, Dr. Hausmann-Alain Banet, an LCM employee, learned from Ahmed Diomande, then an employee of the New York state senate, that Nestle intended to close a chocolate plant in Fulton, New York. Interested in the investment potential of the plant, LCM initiated a feasibility study, contacted officials from Oswego County, New York, and toured the plant during the second quarter of 2003.

Diomande also informed officials in Côte d'Ivoire of the Nestle opportunity, and in late July word reached Dr. Jean Claude Amon, then serving as special advisor to the President of Côte d'Ivoire for industrial development and economic infrastructure. On July 31, Amon and several other representatives of Côte d'Ivoire toured the plant, later meeting with Banet to discuss how they might jointly proceed. LCM (through Banet) and Amon then signed a contract that would, in theory, govern their relationship in the future.

The parties differ in their interpretation of the contract and almost all events that occurred thereafter.[2] Plaintiff contends that it agreed to pay $225,000 to LCM for consulting services that would lead to the acquisition of the Fulton plant, and that any equity involvement by LCM was to be determined later. Defendant insists that the contract required them only to produce a study detailing the process and requirements involved in acquiring the assets from Nestle. Notably, the contract was not signed by any representative of the FRC, but by Amon on behalf of a "Groupement d'Interet Economique" ("GIE") to be named in the future.

Over the next few months, LCM sent two letters of intent to Nestle offering to buy the factory and its assets outright. Defendant asserts that these offers were made on its own behalf. Plaintiff insists that LCM acted as plaintiff's agent, and that the real party in interest was FRC.[3] In the end, Nestle rejected all offers and instead decided to donate the land to Oswego County and sell the equipment at auction. On the auction date, LCM purchased most of the equipment using its own money, later repurchasing other equipment from other successful bidders.

Again, plaintiff insists that defendant's bids were made on behalf of plaintiff. There is no doubt that before the auction LCM asked Dr. Amon to

[2] The contract was executed in French. Parties have agreed upon an English translation.

[3] FRC maintains that it did not wish to make an offer directly, concerned that Nestle would refuse to sell a manufacturing plant to one of the major international producers of cocoa.

provide LCM with cash, or that later FRC paid LCM for the equipment. Defendant characterizes this request as an offer to allow FRC to participate in the investment, in a manner to be explicitly specified at a later date, and asserts that defendant would have made such purchases with or without plaintiff's involvement. No written contract required FRC to reimburse LCM for any expenditure made on behalf of this nascent venture.

On October 30, 2003, Banet incorporated NYCCC in Delaware, authorizing the company to issue one thousand shares of common stock and naming himself as the sole director. The factory and acquired equipment were transferred to the new company. On November 17, 2006, Banet then issued all 1,000 shares of stock to LCM, and on the same day LCM transferred 800 of those shares to FRC. On December 3, 2003, FRC was notified of this transfer via facsimile from an attorney for LCM.[4]

B. November 2003 to March 2005

Between November 17, 2003 and March 23, 2005, the evidentiary record regarding NYCCC becomes increasingly confused. Plaintiff insists that a shareholders' meeting was held in New York City on May 14, 2004, and offers minutes suggesting that shareholders elected directors, approved bylaws, and elected a CEO and President. Defendant's representative at that meeting, Banet, asserts that he agreed to attend only because plaintiff threatened to withhold a $1 million repayment from the auction; that he never believed the shareholders' meeting was official, as he, as sole director, was the only person authorized to call such a meeting; and that the minutes presented at trial were never provided to him. Two letters undermine defendant's characterization of the May 14, 2004 meeting. In one, Banet refers to Gabriel Yallé Agbré as a member of the board of directors of NYCCC. In another, an LCM employee refers to an agreement made at the first meeting of NYCCC's board of directors. LCM clearly recognized that a shareholders' meeting had taken place on May 14, 2004. Further, Banet filed an amendment to NYCCC's certificate of incorporation on February 24, 2005,

[4] Although there is conflicting testimony as to precisely when LCM notified FRC of the 800 share transfer, there is no need for the Court to resolve this issue. It is enough that FRC was notified before the first shareholders' meeting.

amending the articles of incorporation to reflect the election of nine board members.[5]

C. The March 21, 2005 Special Board Meeting

As NYCCC's financial health deteriorated, the Chairman of the Board, Louis Okaingni, called for a special board meeting to be held on March 21, 2005 in Abidjan, Côte d'Ivoire. Nine board members participated, with LCM-appointed board members attending remotely via telephone. The FRC-appointed majority proceeded to resolve, over LCM abstentions, that (a) the stated capital of NYCCC would henceforward be $25 million; (b) each of the $1,000 shares had a stated value of $25,000; (c) FRC had contributed at least $18.2 million dollars to the venture, and that 728 shares were to be issued to FRC; and (d) LCM had thus far contributed no capital, and that its right to subscribe would be revoked if $5 million were not paid to the company within thirty days.

NYCCC demanded $5 million from LCM in exchange for 200 shares. LCM insisted that it owned 200 shares of NYCCC free of any encumbrance. On July 20, 2005, plaintiff filed suit in this Court.

II. CONTENTIONS

Plaintiff asks for a declaratory judgment determining that it owns 728 shares in NYCCC and that LCM holds neither an ownership interest nor right to purchase shares in NYCCC. LCM raises eight affirmative defenses (standing, fraud, estoppel, waiver, illegality, payment, ratification and unclean hands), and in turn brings four counterclaims for breach of contract, promissory estoppel, fraud and false representation, and unjust enrichment. Defendant seeks a declaratory judgment confirming its ownership of 100% of NYCCC and finding that any directors elected by FRC are not, nor ever have been, directors of NYCCC. Defendant also asks this Court to award damages for breach of contract and to order an accounting to determine contributions made by FRC and LCM to NYCCC. Plaintiff's claims are brought directly as a shareholder, while defendant seeks relief both directly and derivatively on behalf of NYCCC.

[5] One of the FRC-appointed board members had passed away. The record does not show that this director has been replaced.

The proponent of each claim bears the burden to show, by a preponderance of the evidence, that it is entitled to relief.[6] Similarly, defendant bears the burden of proof with respect to its affirmative defenses.[7] The trier of fact determines the weight and credibility to be given to any evidence, and resolves conflicts in the evidence presented.[8]

III. ANALYSIS

Three questions must be answered in order to render judgment. First, how many shares in NYCCC have been validly issued, and who owns them at present? Second, who are the current elected directors of NYCCC? Finally, is defendant entitled to damages under theories of breach of contract, promissory estoppel, fraud and false representation, or unjust enrichment?

A. Ownership of Shares in NYCCC

1. <u>Banet Validly Issued 1,000 Shares of NYCCC to LCM</u>

Plaintiff does not challenge the incorporation itself, but instead insists that Banet, then the sole director of NYCCC, did not properly specify the consideration that LCM provided in exchange for no-par value stock in order to comply with 8 *Del. C.* §§ 152-53.[9] The written resolution does not specify the consideration paid by LCM.

In general, an issuance of stock without receipt by the company of valid consideration is void.[10] This Court has long held that directors are required to place a value upon consideration,[11] but equally longstanding precedent holds that this

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[6] *Seaford Assocs. Ltd. P'ship v. Subway Real Estate Corp.*, 2003 WL 21254847, at *5 (Del. Ch. May 21, 2003).
[7] *Warwick Park Owners Ass'n, Inc. v. Sahutsky*, 2005 WL 2335485, at *4 (Del. Ch. Sept. 20, 2005).
[8] *Johnson v. Wagner*, 2003 WL 1870365, at *4 (Del. Ch. Apr. 10, 2003).
[9] Shares of stock without par value must be issued for consideration determined by the board of directors (or by shareholders if provided for in the certificate of incorporation). 8 *Del. C.* § 153(b). Consideration may be received in the form of cash, services rendered, personal property, real property, leases of real property, or any combination thereof. 8 *Del. C.* § 152. Absent fraud, the judgment of directors as to the value of consideration is conclusive. *Id*.
[10] *STARR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991).
[11] *Field v. Carlisle Corp.*, 68 A.2d 817, 819-20 (Del. Ch. 1949).

valuation need not be formally recorded.[12] Plaintiff thus bears the burden of proving by a preponderance of the evidence that either LCM never provided valid consideration in exchange for the issuance of 1,000 shares, or that Banet never valued that consideration at all. Plaintiff fails to do so.

Plaintiff attempts to meet this weighty burden with two pieces of evidence. First, Banet testified on cross examination that LCM contributed the $1 million used to purchase equipment at auction as consideration for its 1,000 shares, and then later admitted that FRC repaid that purchase price eight months later. I give this testimony little weight, however. Banet's statements occurred during a relatively lengthy exchange on cross-examination, and I am not convinced that Banet understood the question asked of him. Dr. Banet obviously believed that LCM had contributed substantial services to NYCCC, services that he described at great length. Such services would constitute valid consideration under 8 *Del. C.* § 152.

Plaintiff argues that any services LCM may have rendered on behalf of NYCCC were illusory for purposes of consideration because LCM was already required to perform such services under the July 31 contract between LCM and Amon. This requires a radically broad reading of the contract. The document at most constitutes an agreement to agree, at a later date, to pursue a joint venture, coupled with a requirement for LCM to conduct a study. There is no indication that defendant was required, for instance, to finance auction payments for seven months. Services such as arranging asset purchases or incorporating a business entity were listed in the contract as operational goals, but not benefits to which either Amon or FRC were contractually entitled.

The minutes of the May 14, 2004 meeting provide further evidence that both parties considered the November 17, 2003 issuance of shares to be valid. These minutes reflect the approval and adoption of all pre- and post-incorporation actions by LCM on behalf of NYCCC. They further reflect the election of a ten member board of directors with an 8-2 split between the parties. The document clearly refers to shareholders.[13] In short, nothing in the document suggests that, on May 14, 2004, any member of FRC believed that any shares had been distributed improperly.

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[12] *Bowen v. Imperial Theatres*, 115 A. 918, 920 (Del. Ch. 1922).

[13] The minutes do not specifically name the entities considered to hold shares for purposes of the meeting, but the language clearly indicates the existence of more than one shareholder. The split in board membership strongly indicates acceptance of the November 17, 2003 share distribution.

I find that all authorized shares of NYCCC were validly issued and paid for by LCM on November 17, 2003. Any action taken at the May 21, 2005 board meeting with respect to issuing shares, or requiring payment for their issue, is of no legal effect.

2. LCM Transferred 800 Shares to FRC

Defendant maintains that LCM transferred 800 shares of NYCCC to FRC pursuant to an agreement wherein FRC would invest an additional $40 million in NYCCC. No contemporaneous writing signed by either LCM or FRC reflects such an agreement, and plaintiff denies entering into any contract, written or otherwise. Defendant's corporate resolution transferring shares to FRC makes no mention of any requirement of further payment, nor is FRC a party to that resolution. Defendant falls far short of its burden to prove the existence of an agreement.

Nothing in the record suggests that either party has transferred its shares since they were validly issued and distributed on November 17, 2003. Plaintiff and defendant hold 800 and 200 shares, respectively, in NYCCC. Furthermore, I find that no contract for further investment existed between the two parties as of November 17, 2003, and, thus, both parties own their shares free of encumbrance.

B. Membership of the Board of Directors

As Banet's distribution of shares to the parties in November 2003 was valid, both FRC and LCM were in fact shareholders when they met in May 14, 2004. Although defendant now protests that the meeting was not properly held, the contemporaneous written record reflects defendant's acceptance of a board meeting. LCM later referred to FRC employees as directors of the corporation, and Banet himself described the gathering in New York as a board meeting in more than one letter. Finally, Banet himself filed an amendment to the certificate reflecting the new board membership. Defendant has recognized that the board is larger than simply Banet, and provides no evidence to suggest that elections to the board took place on any date other than May 14, 2004. This Court has no grounds to conclude, therefore, that the membership of NYCCC's board is anything other than the individuals named in the May 14, 2004 minutes and the amended certificate.

C. Award of Damages and Appointment of Custodian

As defendant has failed to prove the existence of an enforceable agreement between the parties with respect to the transfer of 800 shares from LCM to FRC, defendant's claims for breach of contract and promissory estoppel must fail. There can be no liability where there is neither a contract on which to base a breach or a promise by which a party may be estopped. Nor has defendant adequately proven the existence of a false representation under which it might be awarded damages.

Similarly, defendant fails to show that plaintiff has been unjustly enriched at the expense of the corporation. To the extent that defendant argues that FRC-appointed directors or managers have received excessive compensation, such a claim might be proper in a derivative action against the directors individually, but defendant has not shown that *plaintiff* (as opposed to employees of plaintiff) has been unjustly enriched.

As defendant fails to assert any valid counterclaims, this Court may offer no remedy, either in damages or in the form of an accounting or the appointment of a custodian. Any remedy defendant seeks should be sought from the directors, and the company derivatively.[14]

IV. CONCLUSION

Banet validly issued 1,000 shares of NYCCC to LCM on November 17, 2003, and LCM thereafter transferred 800 shares to FRC. Both parties own validly issued shares free of all encumbrances. The NYCCC board of directors consists of Louis Okaingni, Angeline Kili, Firmin Kouakou, Traore Alexandre, Serge-Philippe Bailly, Ahoua Gaston, Yalle Agbre, Ousmann Gbane (Banet), and Evelyn Cudel. No damages are awarded to either party, nor is an accounting to be ordered or a custodian appointed.

[14] Defendant does not assert that plaintiff's agents, the FRC-appointed directors, have caused NYCCC to issue any dividends. Such dividends, if distributed only to FRC, would constitute unjust enrichment of FRC, but payments to individual directors do not.

Awarding defendant damages from plaintiff in this case would cause a manifest injustice. If one assumes, *arguendo*, that defendant is correct and that various FRC-appointed directors and executives have looted corporate assets, then FRC's injuries are possibly greater than defendant's. Requiring the payment of damages by an organization representing agricultural interests in Côte d'Ivoire would be raiding the assets of coffee and cocoa farmers twice: once when the challenged directors were enriched, and once again when FRC compensates LCM for damages.

Plaintiff and defendant shall confer and submit an implementing form of Order.

Very truly yours,

William B. Chandler III

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