SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ANDREW MULE,

Plaintiff,

- v -

ROBERT F.X. SILLERMAN, PETER C. HORAN, MICHAEL MEYER, MITCHELL J. NELSON, FRANK E. BARNES, BIRAME SOCK, and FUNCTION(X), INC.,

Defendants.

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INDEX NO. 654984/2016

MOTION DATE

MOTION SEQ. NO. 011 011

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229
were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229
were read on this motion to/for LEAVE TO FILE.

In motion sequence 011, plaintiff Andrew Mule moves pursuant to CPLR 3025(b) for leave to file the proposed Second Amended and Supplemental Class Action Complaint for Entrenchment due to Breach of Fiduciary Duties. (NYSCEF Doc. No. [NYSCEF] 210, Second Amended and Supplemental Class Action Complaint for Entrenchment due to Breach of Fiduciary Duties [SAC].)

Defendant Yann Geron, as the Chapter 7 Trustee of Robert F.X. Sillerman (collectively Sillerman), cross moves to dismiss the Amended and Supplemental Class Action Complaint for Breach of Fiduciary Duties (FAC). (NYSCEF 44, June 29, 2017 FAC; NYSCEF 213, Notice of Cross-Motion.) Plaintiff fails to address the cross motion. Further, for the reasons stated in the court's decision on motion 009, the motion is

granted as to the entrenchment allegations in the FAC. (NYSCEF 198, January 1, 2024 Decision and Order.)

This is a class action by plaintiff on behalf of the shareholders of Function(x) Inc. (Company) against Sillerman, the Chief Executive Officer (CEO) and majority shareholder. (NYSCEF 210, SAC at 1.) Sillerman acquired the Company in February 2011 and took it public in 2014, raising $48 million in 2014 and 2015. (*Id*. ¶ 1.) Allegedly because of its heavy debt, on November 11, 2015, NASDAQ threatened to delist the Company. (*Id*. ¶ 3.) The Company was given until August 22, 2016 to comply with the minimum shareholders' equity requirement. (*Id*.) Accordingly, Sillerman entered into an Exchange Agreement with the Company to exchange $34.8 million of debt into Company Common Stock. (*Id*. ¶ 4; NYSCEF 11, July 8, 2016 Exchange Agreement.) "[T]he stated objectives of which were to remain listed on the NASDAQ and to improve the Company's balance sheets and capital structure." (NYSCEF 210, SAC ¶ 31.) Sillerman approved the agreement on behalf of the Company. (*Id*. ¶ 5.) In the absence of public shareholder approval, Sillerman could not meet NASDAQ requirements. (*Id*. ¶¶ 5-6.) Accordingly, on the last day before delisting, and to avoid the need for public shareholder approval, Sillerman exchanged the debt for nonconvertible nonvoting Series C Preferred shares. (*Id*. ¶¶ 6-7.) "[T]he Amended Certificate of Designation eliminated the Sillerman Entities' right to convert the Series C Preferred Stock into shares of Company Common Stock." (*Id*. ¶ 7.) Since "Sillerman Entities no longer ha[d] the right to convert the Series C Preferred shares into Common Stock, the issuance of the Series C Preferred shares to the Sillerman Entities did not

require the Company to meet the requirements of or to seek NASDAQ approval for 'Listing of Additional Shares.'" (*Id*.)

Despite exchanging the debt for *nonconvertible* shares, Sillerman made the shares convertible to remain controlling shareholder even after the public offering. (*Id*. ¶¶ 7-8; NYSCEF 12, July 18, 2016 First Amendment to Exchange Agreement.) In a Note Exchange Agreement, Sillerman included a "provision stating that the Sillerman Entities' Series C non-convertible Preferred shares would nevertheless be subject to the same obligation to convert into Company Common Stock as the Sillerman Entities' debt had been under the original Exchange Agreement, and on the same terms and conditions set forth in the Exchange Agreement. Those conditions included the same Conversion Price agreed to in the Exchange Agreement, as well as a public offering of common stock requirement for proceeds of at least $10 million." (*Id*. ¶ 8; NYSCEF 178, August 2016 Note Exchange Agreement.) On August 26, 2016, NASDAQ approved the deal with the nonvoting Series C Preferred shares. (NYSCEF 210, SAC ¶ 9.) As a result, public shareholders became majority owners of the voting stock. (*Id*. ¶ 10.) However, on February 28, 2017, Sillerman converted the Series C nonvoting shares into Common Shares and returned to the position of majority owner. (*Id*.)

The question is the circumstances of the conversion feature. The Exchange Agreement conditioned conversion on the Company raising $10 million through a public offering. (*Id*. ¶ 11.) That condition was never satisfied. (*Id*.) "Sillerman thus unilaterally, and without any public shareholder approval, renegotiated both the exchange rate of the conversion, and the maximum number of common shares that could be exchanged for the Series C Preferred Shares immediately prior to the closing

of the Exchange Agreement on February 28, 2017." (*Id*. ¶ 13.) As a result of decreasing the price, Sillerman received more than twice as many shares. (*Id*.) Moreover, "on March 3, 2017, Sillerman improperly directed the transfer of $500,000 of the proceeds from the February Public Offering from Function(x)'s bank account into his own personal bank account." (*Id.* ¶ 56.) The Company was delisted from NASDAQ on June 21, 2017. (*Id*. ¶ 15.) On June 28, 2019, the SEC initiated an action against Sillerman for violations of the Exchange Act and Securities Act. (*Id.* ¶ 55.)

Under CPLR 3025, leave to amend is to be freely given. However,

> "leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025. Any other conclusion would lead to the waste of public and private resources - namely, amending the complaint only to have it be dismissed after a separate round of briefing, argument, and decision." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021].)

Plaintiff's primary purpose of amending the complaint is to clearly articulate an entrenchment theory against Sillerman, which had not been so articulated in the FAC against the Director Defendants or Sillerman. "Corporate fiduciaries may not utilize corporate machinery for the purpose of perpetuating themselves in office." (*Benihana of Tokyo, Inc. v Benihana, Inc*., 891 A2d 150, 185-86 [Del Ch 2005], *affd* 906 A2d 114 [Del 2006].)

> "A successful claim of entrenchment requires plaintiffs to prove that the defendant directors engaged in action which had the effect of protecting their tenure and that the action was motivated primarily or solely for the purpose of achieving that effect." (*In re Fuqua Indus., Inc. Shareholder Litig.*, 1997 WL 257460, *10, 1997 Del Ch LEXIS 72, *40 [Del Ch, May 13, 1997, No. CIV.A. 11974] [internal quotation marks and citation omitted].)

Plaintiff alleges that the following acts were for the purpose of Sillerman's entrenchment:

> "13. The principal purpose of increasing the number of Common Shares issued to Sillerman was to permit him and which thus allowed Sillerman to maintain his control and thus to entrench himself in power and to massively dilute the voting interests of the minority. These acts of entrenchment thus caused a special and directing direct injury to the public shareholders."
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> "15. The primary purpose for reducing and thus manipulating the Exchange Agreement's Conversion Price was to entrench Sillerman as the controlling shareholder, and that wrong, coupled with the supine, hand-picked Sillerman Board, allowed Sillerman to continue to run and govern the Company as if it were privately held. Sillerman swiftly ran it into the ground. By June 21, 2017, only four months after the February 28, 2017 conversion to Common Shares, Function(x) was delisted from the NASDAQ for failure to file a Form10-Q for the period ending March 31, 2017. The Company's auditor resigned six days later, on June 27, 2017, citing lack of internal controls at the Company, and fraudulent behavior on the part of Sillerman. By June 2018, the Company had ceased operations."
>
> "32. Pursuant to the Company's August 19, 2016 Information Statement, the Exchange Agreement Conversion Price, set by Sillerman and the Board, for each share of Common Stock was $0.26 ($5.20 Post Reverse Stock Split). The conversion price for Debentures sold to investors on July 12, 2016 was $0.3133 per share and was never reduced. The Conversion Price for the Sillerman Debt and Series C Preferred Stock, however, could not be greater than $0.26 per share or less than $0.10 per share. Such a price collar only protected Sillerman and not the public shareholders."
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> "46. [T]he purpose of converting Sillerman's non-voting Series C Preferred shares to voting Common Stock pursuant to the Exchange Agreement was solely to issue voting shares to Sillerman so as to entrench him as controlling shareholder of the Company. Without the conversion benefit provided in the Exchange Agreement, the issuance of 4,571,428 voting Common Shares as a result of the Public Offering and the simultaneous conversion of the Rant Series E Preferred shares into 4,124,750 Common Shares would have reduced Sillerman's holdings to well below 50% and control thereof would have passed to the public shareholders."
>
> "94. Defendant has violated his fiduciary duties including his duty of care and duty of loyalty by placing his own interests ahead of the interests of Function(x)'s minority shareholders as set out herein. These breaches include, among other things, engaging in wrongful conduct that has resulted in the conversion of Sillerman's Series C Preferred Shares into Common Stock at terms most favorable to him and highly dilutive to the voting rights of the minority

> shareholders of the Company for the purpose of entrenching himself in control of the Company and preventing a change of control passing to the public shareholders." (NYSCEF 210, SAC.)

The court granted motion sequence 004 and dismissed the action against the Director Defendants.[1] (NYSCEF 97, December 31, 2018 Decision and Order.) The court found that plaintiff failed to state a claim against the Director Defendants for entrenchment because plaintiff failed to allege in the FAC that in approving the Exchange Agreement transactions, the independent directors breached their duty of loyalty, which is required to state a claim for entrenchment. (*Id.* at 9/10 [NYSCEF pagination].) In the SAC, plaintiff removed all allegations regarding the board of directors and their breach of loyalty. (NYSCEF 210, SAC.) Instead, plaintiff alleges that Sillerman used the board to rubber stamp his decisions, which were intended to keep him entrenched as the majority shareholder. For example, plaintiff alleges:

> "[T]he supine, hand-picked Sillerman Board allowed Sillerman to continue to run and govern the Company as if it were privately held." (*Id*. ¶ 15.)

> "[Sillerman] exchang[ed] his non-voting Series C Preferred shares for excessively issued voting Common Shares at the expense of and to the detriment of the public shareholders. Said exchange was agreed to without any review and approval by an independent Special Committee of the Board advised by independent legal counsel, without any analysis or fairness opinion by or from an independent financial advisor, or a fully informed vote of the majority-of-the-minority of Function(x)'s shareholders." (*Id.* ¶ 16.)

> "In approving the Conversion Price terms, the Board permitted a level of improper flexibility to allow Sillerman to entrench his power to maintain voting control of the Company." (*Id*. ¶ 31.)

> "Despite the patent conflicts of interest between Sillerman and the minority shareholders, the Board failed to put into place any procedural safeguards to

[1] The Director Defendants' names remain in the caption though the order directed them to serve a copy of the order upon the County Clerk to have their names removed. (NYSCEF 97, December 31, 2018 Decision and Order at 10/10 [NYSCEF pagination]).

> protect the minority shareholders' voting interests in connection with the Exchange Agreement." (*Id*. ¶ 54.)
>
> "No independent Special Committee of the Board with the ability to retain its own independent legal and financial advisors was established. No independent advisors were retained to negotiate, review and approve or disapprove the Exchange Agreement, to value Sillerman's Debt and Series C Preferred Stock, or to determine a fair value for exchange purposes. No one at the Company was empowered to or in fact did represent the interest of the minority shareholders and no vote was ever sought by a majority of the minority to approve such insider transactions. The Board members consciously disregarded their duty to act by failing to use procedural safeguards and fully inform themselves as to whether the Exchange Agreement was fair to the minority shareholders of the Company. As such, Sillerman was allowed to entirely dictate the terms of the Public Offering and the Exchange Agreement so that they favored him at the expense of the minority." (*Id*.)

Plaintiff asserts one cause of action for breach of fiduciary duty for entering into and effecting the Exchange Agreement. (*Id*. ¶¶ 92-99.) Plaintiff seeks rescissory damages among other remedies. (*Id*. at 42.)

The court finds that plaintiff has stated a claim against Sillerman for entrenchment by breach of fiduciary duty and duty of loyalty. Plaintiff sufficiently alleges that Sillerman "engaged in action which had the effect of protecting their tenure and that the action was motivated primarily or solely for the purpose of achieving that effect." (*In re Fuqua Indus.*, 1997 WL 257460, *10, 1997 Del Ch LEXIS 72, *40.) Plaintiff has described Sillerman's plan and how it was executed in violation of good corporate governance procedures, Company rules, and federal laws and regulations.

In opposition, Sillerman relies on this court's prior decision finding that plaintiff failed to state an entrenchment claim in the FAC. (NYSCEF 198, January 1, 2024 Decision and Order [mot. seq. no. 009].) The court observed that plaintiff's proposed "purpose of the Exchange Agreement … to 'mitigate the potentially negative impact on Sillerman's controlling equity stake'" is contradicted by "the Exchange Agreement's

stated purpose," "to (i) remain listed on the NASDAQ Global Market, and (ii) upon consummation, improve its balance sheet and capital structure." (*Id.* at 5.) Plaintiff's theory "is not supported by the allegations in the [FAC]" and "is inconsistent with the events that followed." (*Id*.) However, the SAC is different and contains factual allegations to support plaintiff's claim of entrenchment. Indeed, the SAC includes the word entrenchment, which the FAC did not. Plaintiff also explains in the SAC how Sillerman's acts initially satisfied the goals of the Exchange Agreement but ultimately benefitted him six months later at the expense of the shareholders and ultimately losing NYSDAQ listing. (NYSCEF 210, SAC ¶¶ 10, 46.) Further, plaintiff explains how certain acts did not benefit the shareholders at all and only benefitted Sillerman. (*Id*. ¶¶ 10, 16, 18, 41, 47, 50, 69, 96, 97.)

Similarly, the court's earlier finding that plaintiff failed to allege in the FAC that the board had breached its duty of loyalty is irrelevant since the SAC asserts one claim for breach of fiduciary duty against Sillerman only, not the board. (NYSCEF 97, December 31, 2018 Decision and Order [mot. seq. no. 004].) Plaintiff is not required to assert entrenchment against the entire board. (See *Strassburger v Earley*, 752 A2d 557, 572-73 [Del Ch 2000] [as rev Jan. 27, 2000] [the limiting fiduciary principle "still applies" when using corporate funds to repurchase stock in an "effort to shift control to a single director rather than the entire board."].)

Sillerman objects that plaintiff mistakenly focuses on the effect of the Exchange Agreement instead of its primary purpose. Sillerman's reliance on *Benihana of Tokyo* (891 A2d at 186) for the proposition that "[t]he fact that a plan has an entrenchment effect, however, does not mean that the board's primary or sole purpose was

entrenchment" is misplaced. First, Sillerman omits the balance of the quote which reads: "Conversely, where the objective sought in the issuance of stock is not merely the pursuit of a business purpose but also to retain control, a court will not accept the argument that the control effect of an agreement is merely incidental to its primary business objective." (*Id.*) Plaintiff has alleged more than an incidental effect. Further, *Benihana of Tokyo* is a trial decision issued after hearing witnesses and judging their credibility. At this juncture, plaintiff's allegations are sufficient to satisfy the pleading requirement.

Sillerman opines that "[i]f the purpose of the Exchange Agreement was to entrench Sillerman, the Exchange Agreement would have given the Sillerman Entities the option to exchange, not obligated them to exchange, their Secured Debt and Convertible Preferred Stock for Common Stock in connection with the public offering." (NYSCEF 225, Sillerman's MOL at 1.) This is certainly a defense, but not on a motion to dismiss. Rather, this is an issue of fact and credibility.

Likewise, Sillerman's factual assertions in the Memorandum of Law that (1) the independent directors convinced Sillerman to enter the Note Exchange Agreement and (2) that the independent directors negotiated with Sillerman are facts contradictory to facts alleged by plaintiff in the SAC. (*See id.* at 2-3.) As a matter of law, the court cannot consider defendant's facts at this juncture; the court is bound by plaintiff's allegations in the SAC on this motion. Defendants cannot inject facts on a motion to dismiss, defendants' attorney is not a person with knowledge of the facts,[2] and the Memorandum of law is not the place to assert facts. (*Leon v Martinez*, 84 NY2d 83, 87-

[2] *See* NYSCEF 226, Robert A. Horowitz affd.

88 [1994] [citation omitted] [On a CPLR 3211 (a) (7) motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."]) Fact affidavits from defendant are not acceptable on a motion to dismiss. (*J.D. v Archdiocese of New York*, 214 AD3d 561, 561 [1st Dept 2023].)

Finally, Sillerman challenges plaintiff's delay in asserting the entrenchment claim in this 2016 action. Specifically, Sillerman objects that the entrenchment facts have been known to plaintiff since 2016. Because these facts have, likewise, been known to Sillerman since 2016, Sillerman cannot assert surprise. Since Sillerman fails to assert prejudice, the court rejects the objection. (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014].) The only prejudice Sillerman mentions in a footnote, appears to be the statute of limitations because the SAC expands the original class of shareholders to include shareholders holding shares between July 12, 2016 and March 1, 2017. (NYSCEF 215, Sillerman's MOL n 5 at 15.) However, this action, filed on September 21, 2016, would not be precluded by the statute of limitations. (NYSCEF 1, September 21, 2016 Complaint.) Sillerman fails to explain in the footnote the issue with applying the relation back doctrine to plaintiff's initial claim for dilution.

Accordingly, it is

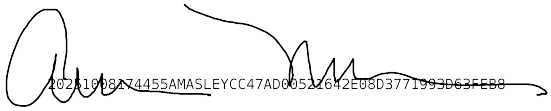
ORDERED that plaintiff's motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers (NYSCEF 210) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint by October 28, 2025; and it is further

ORDERED that counsel are directed to submit a discovery schedule by October 17, 2025. If the parties cannot agree, they may submit competing proposals; and it is further.

ORDERED that defendants' cross motion is granted to the extent that plaintiff's claim for entrenchment in the FAC is granted; the claim for entrenchment against Sillerman in the FAC is dismissed and superseded by the SAC; and it is further

ORDERED that parties are directed to preserve evidence.



10/8/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**X**	**NON-FINAL DISPOSITION**		
	X	**GRANTED**	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**