IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| LILY H. BENTAS, BYRON HASEOTES and CUMBERLAND FARMS, INC., | ) | |
| Plaintiffs, | ) | C.A. No. 17223 NC |
| v. | ) | |
| DEMETRIOS B. HASEOTES and GEORGE HASEOTES, | ) | |
| Defendants. | ) | |

**MEMORANDUM OPINION**

**Date Submitted: January 10, 2003**
**Date Decided: March 27, 2003**

Jesse A. Finkelstein and Catherine G. Dearlove, Esquires of RICHARDS LAYTON & FINGER, P.A., Wilmington, Delaware; Jeffrey B. Rudman, John F. Batter, III and Peter Kolovos, Esquires of HALE AND DORR, LLP, Boston, Massachussetts; Attorneys for Plaintiffs.

William D. Johnston and John J. Paschetto, Esquires of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington Delaware; Robert J. Valihura, Jr., Esquire of ROBERT J. VALIHURA, JR., PA, Wilmington, Delaware; Rosanna Sattler, Esquire of POSTERNAK BLANKSTEIN & LUND, LLP, Boston, Massachusetts; and William F. Griffin, Jr. and Thomas S. Fitzpatrick, Esquires of DAVIS MALM & D'AGOSTINE, PC of Boston, Massachusetts; Attorneys for Defendants.

Martin P. Tully, Esquire of MORRIS NICHOLS ARSHT & TUNNELL, Wilmington, Delaware; David E. Johnston, Esquire of MORRIS MANNING & MARTIN, Charlotte, North Carolina; Attorneys for the Custodian.

**JACOBS, VICE CHANCELLOR**

Pending is the defendants' motion for a determination of an appropriate plan of liquidation for Cumberland Farms, Inc. ("Cumberland Farms" or "the Company"). The plaintiff director-stockholders and the Court-appointed custodian seek an order directing that the Company be sold in an auction. The defendant director-stockholders seek the approval of a plan that would divide most of Cumberland Farms's operating assets between two new companies, each of which would be separately owned by one of the director-stockholder factions. For the reasons discussed below, the Court concludes that the Custodian should conduct an auction on the terms discussed herein.

## I. FACTS

### A. The Parties

Cumberland Farms is a closely-held, family-owned Delaware corporation engaged in the business of operating and leasing gasoline stations and convenience stores throughout New England, the Mid-Atlantic states, and Florida. The Company's principal place of business is located in Canton, Massachusetts. The Company's four directors – Lily Bentas ("Bentas"), Byron Haseotes ("Byron"), Demetrios B. Haseotes ("Demetrios"), and George Haseotes ("George") – are siblings who

collectively own all of the issued and outstanding shares of the Company's Class A voting stock.

At this stage of the case, the plaintiffs are Cumberland Farms, Bentas, Byron, and the Court-appointed Custodian, R. Timothy Columbus, Esquire (the "Custodian"). Plaintiffs Bentas and Byron constitute a director faction that owns half of the Company's Class A stock. Bentas is the Chairman of the Board, Chief Executive Officer, and President of Cumberland Farms. The defendants, Demetrios and George, own the remaining half of the Company's Class A stock and constitute the director faction that opposes Bentas and Byron.[1]

**B. The Background Of The Dispute**

In December 1993, the Company underwent a federal bankruptcy reorganization. Since 1998, when the Company emerged from bankruptcy, the directors have been in conflict over what direction the Company should take. The result was a deadlocked board with Demetrios and George on one side, and Bentas and Byron on the other. Between December 1998 until April 2000, the Board was unable to have a productive meeting at which

[1] The Company has a series of Class B nonvoting shares that are owned by the directors and three other siblings, who are not parties to this case.

meaningful decisions were made, and the factions were unable to agree upon, or to cooperate to resolve, many critical issues.

In June 1999, Bentas and Byron brought this action seeking the appointment of a custodian to end the board deadlock. On March 6, 2000, this Court issued an Opinion determining that a custodian should be appointed.[2] The Custodian was appointed in April 2000. The Order appointing the Custodian, as amended on October 6, 2000, empowered the Custodian to recommend alternatives that might end the deadlock between the directors. The Custodian has now recommended that the Company be sold.

The Custodian hired Salomon Smith Barney ("Smith Barney") as his financial advisor to evaluate various methods to liquidate the Company. Smith Barney evaluated several alternatives, including an initial public offering ("IPO"), a sale of the entire Company or of distinct packages of its assets, and a division of the Company.

The Custodian then asked both director-stockholder factions to submit proposals on how best to liquidate the Company. The defendants proposed a geographic division in which most of the Company's operating assets would be divided between two new companies having approximately equal value,

[2] *Bentas v. Haseotes*, 769 A.2d 70 (Del. Ch. 2000).

and the remaining assets would be sold or shared.[3] To ensure the fairness of that division, Bentas and Byron would be allowed to choose whatever part of the (divided) assets they desired, and the defendants would take the remaining portion. The defendants also expressed their willingness to consider whatever different plan to divide the Company the plaintiffs might propose.

Bentas and Byron proposed plans to liquidate the Company. The plaintiffs prefer to sell the entire Company as a means of liquidation, but they also proposed a plan to partition the assets, since they knew the defendants would oppose a sale. In their asset division plan, Bentas and Byron sought to keep the "core" New England stores for themselves, on the basis that breaking up that group of stores would diminish the Company's value. The defendants rejected the plaintiffs' asset division plan, claiming

[3] The two companies would have approximately equal value, measured by operating cash flow at the time the proposal was made in October 2001. The North Region, consisting of Massachusetts, Maine, and New Hampshire, had an annual cash flow of $28,500,000. The South Region, consisting of Connecticut, Rhode Island, Vermont, New York, Delaware, Florida, New Jersey, and Pennsylvania, had an annual cash flow of $26,800,000. Reallocating debt obligations would make up the difference in value. Defendants' Post-Hearing **Br. at** 4. Under the defendants' plan, the Company's equity interest in Gulf Oil would be sold and the proceeds distributed to the directors, while the parties would share the Company's intellectual property rights, including the right to the Cumberland Farms name.

that it was unfair and imbalanced in the plaintiffs' favor.[4]

On November 30, 2001, the defendants moved for an Order directing that the Company's assets be divided. On December 4,200 1, the Company held a board meeting at which the Custodian announced that the director-stockholder factions were still at an impasse. The Custodian informed the board that he would submit to the Court a report recommending the course of action he believed appropriate.

On February 5, 2002, the Custodian filed his report, concluding that liquidation was necessary and desirable, and recommending an auction of the Company's assets as a single package or as a series of asset packages. The next day, the defendants filed a motion for a determination of an appropriate plan of liquidation.[5] This is the decision of the Court, after briefing and oral argument, on the motions to approve the competing plans of liquidation.

[4] Bentas and Byron proposed a division in which they would retain the Cumberland Farms corporation and its "New England Core Operations" in Massachusetts, Maine, New Hampshire, Vermont, Connecticut, and Rhode Island. The defendants would receive a new corporation that would include the Delaware, Pennsylvania, New Jersey, New York, and Florida operations. It is undisputed that the New England operating assets constitute more than half of the value of the Company.

[5] The defendants' motion for a determination of an appropriate plan of liquidation is a sequel to their November 30, 2001 motion seeking to divide the Company.

## II. THE CONTENTIONS AND ISSUES

Each side now contends that its proposal for liquidating the Company is the best way to maximize stockholder value. The plaintiffs contend that (i) an auction is required under Delaware law and also by this Court's Order appointing the Custodian, (ii) an auction would attract many potential buyers and bids, and (iii) therefore, an auction would furnish the Court and the parties with the most reliable information about the Company's value in the market. The plaintiffs also urge that adopting the defendants' asset division plan could not, by its very nature, provide comparable information. Moreover, the plaintiffs contend, the proposed asset division plan is ill-conceived on its merits, on numerous grounds?

The defendants' position is that an auction would not maximize stockholder wealth, because current market conditions are highly adverse, and because a sale of the entire Company would likely result in significant tax liabilities. Their asset division plan, the defendants argue, has the dual

[6] The plaintiffs advance several arguments criticizing the asset division plan: (i) the proposed sharing of the intellectual property rights to the trademark and Cumberland Farms name will require complex agreements between the parties and a continued business relationship having the potential to cause more litigation and the continued involvement of the Court; (ii) the asset division plan has the potential to confuse customers and destroy the brand recognition of the Company; and (iii) the management of two companies would produce operational inefficiencies, in that it would destroy synergies and goodwill, would duplicate overhead, and would reduce the purchasing power available to a single larger entity.

advantage of avoiding both under-valuation in the market and capital gains taxes.

These arguments and counter-arguments boil down to a single basic issue: which liquidation method will maximize value for all of the Company's stockholders? What follows is the Court's best effort to answer that question, given the limited information available.

## III. ANALYSIS

### A. The Ability Of The Market To Support An Auction

A major point of contention is the whether the current market is too depressed to support a successful auction. The defendants argue that the poor performance of the market for all publicly-traded companies, and specifically the market for convenience stores, would inevitably cause any auction to fail.[7] The defendants emphasize that since Smith Barney first developed its list of potential bidders for the Company, the market value of publicly-traded convenience store companies has fallen dramatically, and

[7] The defendants' expert witness, Michael G. Lederman ("Lederman"), who is the Managing Partner of the Spectrum Capital Group, opines that the plaintiffs' position fails to account for (i) the decline in corporate earnings, (ii) the downturn in the stock market, (iii) the impact of corporate accounting scandals on investor attitudes, (iv) the impact of the September 11, 2001 events, and (v) the impact of conflict in Iraq. Moreover, the defendants point out that the plaintiffs' evidence of the robust nature of the M&A market for convenience stores in fact addresses the convenience store market in the United Kingdom, not in the United States.

that many investments in that industry have performed poorly? The defendants also point out that even though the Company is presently healthy and profitable, to sell it at this time would be unwise, because Cumberland Farms's income, EBITDA, and profit margins were lower in 2002 than in 2001 .[9] As a consequence, the defendants argue, the marketplace may (mis)perceive that the Company is experiencing a downturn and value it accordingly.

The defendants insist that very few bidders, if any, would likely participate in an auction. In particular, oil companies are unlikely to be in a position to acquire the Company at this time, and the tightening of credit markets will make it more difficult and costly for any potential buyer (including the defendants themselves) to obtain financing. Defendants further claim that if Bentas and Byron participate in the auction, that will discourage bids from third parties, who would believe that the insiders have a potential advantage.

The defendants' expert witness estimates that in the current market, a sale of the Company would yield 20-30% less than the sale price that would

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[8] **Specifically, the defendants point out that the stock prices of companies in the convenience store industry (e.g., Casey's, The Pantry, 7-Eleven, UniMarts) have lost approximately 26% of their value, and that investments in the convenience store industry** by **Freeman Spogli have performed poorly, while investments by Devon Partners and Soros Private Equity Partners II were made worthless by bankruptcy.**

[9] **Plaintiffs' Joint Post-Hearing Br. at 5.**

have been achieved at the time the market reached its height three to four years ago. That (defendants add) is why Bentas and Byron would prefer a sale now, which would enable them to buy the Company cheaply.

**B. The Tax Consequences Of An Auction**

A second point of contention concerns the tax consequences of the two competing proposals. The defendants insist that an auction will result in negative tax consequences that would needlessly reduce stockholder value. Specifically, the defendants argue, federal and state capital gains taxes could be as high as $178.5 million. On the other hand, their asset division plan could be structured as a tax-free transaction." The defendants do concede that an auction might possibly yield bids if the proposed acquisition were structured as a tax-free stock-for-stock merger. Defendants argue, however, that a stock-for-stock transaction is unlikely, because the stock of potential acquirers is currently less valuable as consideration than would have been the case under healthier market conditions."

[10] The parties also disagree about the taxability of the defendants' asset division plan. On this record, the Court is not equipped to address the tax issue without evidence furnished by tax experts or an opinion of the Internal Revenue Service.

[11] There are other types of transactions that can be accomplished on a tax-free basis and which might be suggested by bidders in the auction.

## C. The Rationale For An Auction

Each side presents facially plausible reasons why its proposed plan would best serve the interests of all the stockholders. Each side offers evidence in the form of affidavits and reports from its respective expert witnesses.[12] Normally, factual issues of this kind would have to be resolved at a trial, but in this case neither side desires a trial, which (they urge) would only further delay the resolution of this four-year-old director deadlock. Although the Court is sympathetic to that view, by the same token, it is unable to adjudicate the relative merits of the experts' conflicting analyses and conclusions concerning the strength of the market, the tax issues, and the other aspects of the competing plans, on the basis of the experts' affidavits alone.

Absent a trial, there is only one way, in the Court's view, to resolve the issues posed by the two pending motions – to conduct an auction. The reason is that only an auction will provide reliable information about what range of values is currently achievable in this market, without forcing the

[12] The expert witness for the Custodian is Garfield L. Miller, who is the President and Chief Executive Officer of Aegis Energy Advisors ("Aegis") and an Executive Director of Aegis Muse Assocs ("AegisMuse"). Aegis is an investment bank that specializes in the energy industry, and AegisMuse is a partnership that provides strategic and M&A advisory services to the refining, marketing, and transportation segment of the energy industry. Bentas and Byron retained Lee H. Henkel, Jr. ("Henkel") as their expert witness. Henkel is the Managing Director of the investment banking firm Century Capital Group.

parties to incur irreversible risk. After an auction, the parties and the Court will know for certain whether a viable market for the Company (or any of its lines of business) exists, and whether a sale of the entire Company will generate bids that reflect the Company's intrinsic value. If (as the defendants speculate) the auction fails to attract any bidders (or any bidders willing to offer a fair price), the Court is free to decline to approve any sale, and to order a division of the assets according to the defendants' plan, or some other plan.[13]

[13] The parties dispute whether this Court has the power to order an asset division under 8 *Del. C.* § 226 (b). The plaintiffs argue that the language of that statute prohibits the Court from granting remedies other than a sale of the Company or its assets, because any other remedy would not constitute a "liquidation." Section 226 grants a custodian "all of the powers and title of a receiver appointed under section 291," but denies the Custodian the authority "to liquidate [the corporation's] affairs and distribute its assets," unless the Court specifically grants the custodian that power.

*In Rosan v. Chicago Milwaukee Corp.*, 1990 Del. Ch. LEXIS 19, * 11 (Del. Ch. Feb. 6, 1990), the Court held that one of the central characteristics of a liquidation was a winding up the corporations' affairs. *In Quadrangle Offshore (Cayman) LLC v. Kenetech* Corp., 1998 Del. Ch. LEXIS 200, at *30-*31 (Del. Ch. Oct. 21, 1998), the Court defined liquidation as the (1) sale of assets (or subsidiaries); (2) paying off of creditors; (3) otherwise winding up business affairs, (4) distribution of remaining proceeds to shareholders; and (5) abandonment of corporate form. The Court also held that all of these elements need not be established.

The plaintiffs show no reason why an asset division plan could not be structured so as to satisfy the *Quadrangle* requirements for a "liquidation." The plaintiffs argue, nonetheless, that an asset division should not be found to be a "liquidation," because Section 226 authorizes the Court to grant the Custodian the power "to liquidate [a corporation's affairs] and distribute its assets," and that if an asset division was considered to be a liquidation, then the statutory language "and distribute its assets" would be redundant.

I cannot agree. As this Court recognized in *Fulk v. Washington Serv. Assocs.*, 2002 Del. Ch. LEXIS 78, at *32-*33 (Del. Ch. June 21, 2002), nothing in 8 *Del. C.* § *273* limits the Court to a single structure for discontinuing a joint venture in the absence of an agreed-upon plan. Similarly, here, neither the language of Section 226 nor the language of the Order appointing the Custodian limits the Court's power to approve an asset

Unfortunately, the reverse is not true. If the Court were to order an asset division, there is no way that the Court and the parties could be assured that value had been maximized. Moreover an asset division, once carried out, would be irreversible. The only basis for the defendants' insistence that an asset division would maximize value is the untested opinion of their expert – an opinion controverted by the opinion of the plaintiffs' experts. In effect, the defendants are asking the Court to make an irreversible decision concerning the optimal way to liquidate the Company based on blind acceptance of one expert's opinion. On the other hand, a decision to conduct an auction would not require the Court to accept the views of either side's expert. The results of the auction would, by themselves, afford the necessary objective proof of whether or not a fair price for the Company can

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division (assuming the auction fails). My interpretation of Section 226 is consistent with the equitable powers of the Court, which has broad discretion to craft remedies as justice and equity require. ***Universal Studios, Inc. v. Viacom, Inc., 705*** A.2d 579,583 (Del. Ch. 1997).

Nor does Delaware law require that the Company be sold in an auction. An auction is one of several alternatives that a board may consider when informing itself of the various transactional possibilities. ***City Capital Assocs. v. Interco Inc., 55*** 1 A.2d 787, 802-03 (Del. Ch. Nov. 1, 1988). Although competitive bidding is highly desirable, where it is possible and appropriate to the circumstances involved, the fiduciary who is selling the asset should adopt whatever course of action persons of "prudence, discretion, and intelligence" would choose under the circumstances to assure that the asset brings the best price obtainable. ***Lockwood v. OFB Corp., 305*** A.2d 636,638 (Del. Ch. 1973) (holding that a fiduciary had a responsibility to obtain the highest price for the assets after the corporation was dissolved and its remaining assets were transferred to a trust).

be achieved. An asset division, however, would not – and could not – afford that assurance.[14]

Finally, the risk of determining whether or not the market will generate a fair price is significantly smaller than the risk that would inhere in an irreversible division of the Company's assets."

## IV. CONCLUSION

For the foregoing reasons, the Custodian's motion to order an auction will be granted, and the defendants' motion to order an asset division will be denied. Counsel shall submit an implementing form of order, which shall require the Custodian to submit a proposed auction plan for approval by the Court within forty-five days of the date of the order. Under that auction plan, the Custodian shall fix a minimum reservation price that all bids must equal or exceed, based on valuation advice furnished by the Custodian's financial advisors. The plan shall also set forth the procedure for conducting the auction. For any sale of the Company in the auction to be approved, the

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**[14] As the plaintiffs and the Custodian point out, there is a risk (the magnitude of which cannot be evaluated on this record) that an asset division could destroy valuable synergies inherent in the Company as an undivided whole – value that might not be captured if the stockholders were later separately to sell the two portions of the Company that they receive in the asset split.**

**[15] One potential drawback to conducting an auction is that potential bidders must have the ability to review confidential information. That is problematic if the bidder is also a competitor, but that risk is present in many auctions and can be minimized by an appropriate confidentiality agreement.**

record must establish that the after-tax value of the proceeds of the auction exceeds the reservation price.