THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BARRIS INDUSTRIES, et al.,

Plaintiffs,

v. Ci

D. TENNANT BRYAN, et al.,

Defendants.

MEMORANDUM OPINI(

These cases come before the Court for summary judgment. By their motion, the defendants' seek dismissal of all claims alleged in the complaints in the two shareholder actions, Jasper and Shields v. Bryan, et al., No. 88-0238-R, and Rosenthal v. Bryan, et al., No. 88-0354-R, which have been consolidated with this action, No. 88-0188-R. For the reasons explained herein, the Court concludes that the motion for summary judgment should be granted in part and denied in part, as to each complaint.

I. Count I of the Jasper and Shields Complaint

In Count I of their complaint, the plaintiffs Jasper and Shields allege that the 1987 proxy statement was materially false and misleading in several respects, in violation of §§ 10(b) and 20(a) of the 1934 Act. Their allegations are detailed at paragraphs 39 - 41 of their Second Amended Complaint. Among other things, the plaintiffs claim that the 1987 proxy statement was materially misleading because it failed to advise the public that

the Bryans' interest in Media General were not for sale "for any price;" and its because its description of the voting rights of Class A and B shareholders was "false and misleading in material respects."

On this record, the Court cannot say as a matter of law that the 1987 proxy statement contained full and adequate disclosures of material information. In a recent decision, the Supreme Court held that under § 10(b), as under the proxy solicitation rules, "materiality depends on the significance a reasonable investor would place on the withheld or misrepresented information." The Court made clear that this analysis of materiality under the circumstances is a "fact-specific inquiry." Basic, Inc. v. Levinson, 485 U.S. ---, 99 L.Ed.2d 194, 214 (1988).

In short, the fact-finder will have to determine what information a reasonable investor would consider significant and whether all such material information was fully disclosed in the 1987 proxy statement. Genuine issues of material fact remain involved in this claim and, for this reason, summary judgment will be denied.

II. The Fiduciary Duty Claims in Both Complaints

As indicated from the bench, the Court will grant summary judgment on one of the fiduciary duty claims alleged in the Jasper and Shields' complaint. In paragraphs 49 and 50(d), part of Count II, the plaintiffs allege that the defendants breached their fiduciary duties to the shareholders by their:

> arbitrary rejection of the Sugarman offers and of plaintiffs' restructuring proposals solely to entrench

> themselves and to maintain all the perquisites that flow from their domination and control of Media.

On the undisputed facts in the case, the defendants are entitled to judgment on this claim as a matter of law.

The plaintiffs in effect claim that, as directors, the Bryans and other individual defendants had a fiduciary duty to investigate and consider Sugarman's merger offer and the plaintiffs' later restructuring proposal. However, as the defendants point out, such a duty to consider never came into play under the circumstances of this case.

Once the Bryans as controlling shareholders had firmly rejected Sugarman's offer, the board of directors had practically no further role to play with respect to the bid. Under Virginia law, the Bryans as shareholders have the right to sell or not to sell their stock for whatever reasons they choose. See Glass v. Glass, 228 Va. 39, 321 S.E.2d 69, 74 (1984); Fein v. Lanston Monotype Machine Co., 196 Va. 753, 85 S.E.2d 353, 360 (1955). As the majority shareholders of the Class B stock, the Bryans have effective control over all matters requiring approval by the shareholders. Therefore, in the face of the Bryans' refusal to sell, any further action by the board would have been pointless--a mere exercise in futility.

In a similar context involving a closely-held corporation, the Supreme Court of Virginia has declared that:

> The majority [stockholders] had the right to sell or not to sell. Although the exercise of the right not to sell might, and in this case did, result in the minority stockholders having to sell their stock at a discount, such a possibility is one of the inherent risks

> incident to ownership of a minority interest in a closely-held corporation.

Glass v. Glass, 321 S.E.2d at 76. In short, the controlling shareholders were entitled to "dispose of their stock as they saw fit." Glass, 321 S.E.2d at 74. See also Swinney v. Keebler Co., 480 F.2d 573, 577 (4th Cir. 1973) ("the owner of corporate stock may dispose of his shares as he sees fit. A dominant or majority stockholder does not become a fiduciary for other stockholders merely by owning stock."); Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987).

Nor does the Bryans' duty as directors obliterate their right, as shareholders, to sell or not to sell their stock as they choose. "Under ordinary circumstances, a director or an officer of a corporation has the same rights as any other stockholder to buy or sell his stock." Claggett v. Hutchison, 583 F.2d 1259, 1262 (4th Cir. 1978). The only exceptions to this rule are where the director is self-dealing or should foresee that his sale would result in a fraud on the corporation or the other shareholders. Claggett, 583 F.2d at 1262; Swinney, 480 F.2d at 578. In the case at bar, there are no allegations that the directors were guilty of self-dealing or fraud.

Accordingly, in light of the Bryans' refusal to sell, the directors had no duty to undertake the futile act of investigating and considering Sugarman's offer. See Bershad, 535 A.2d at 845. The same applies to the plaintiffs' restructuring proposal, although the record shows that in fact the board considered and rejected this proposal on its merits. This particular claim in

Count II of the Jasper and Shields complaint therefore fails as a matter of law and, as to it, summary judgment will be granted for the defendants.

For the same reasons, the Court will grant summary judgment on several fiduciary duty claims alleged in the Rosenthal complaint. To begin, Count III of the Rosenthal complaint alleges that the Bryans have breached fiduciary duties which they owe simply "as owners and controllers of a purported controlling block of Media General's Class B shares." As already explained, this fails to state a claim for relief under Virginia law. Controlling shareholders, as such, simply do not owe fiduciary duties to other shareholders. Summary judgment will therefore be granted on this claim.

Similarly, Counts I and II in the Rosenthal complaint allege, inter alia, that the director-defendants breached their fiduciary duties: (a) by discouraging and failing to provide open bidding for control of the Company, to maximize shareholder values; (b) by failing to enter into negotiations with Sugarman's group for the merger of Media General; and (c) by permitting the Bryans to assert total control over Media General and thereby lock-out and disenfranchise the other Class A shareholders.

For the reasons stated above, these allegations likewise fail to state viable claims for relief under Virginia law. Indeed, the plaintiff has cited no authority in support of these claims. Moreover, the alleged duty to "auctioneer" or to provide open bidding for the Company, does not apply in a case such as this, where the Company is not already for sale. Such a duty

applies, if at all, only once the board has decided to sell the company and the sale is "inevitable." Revlon, Inc. v. MacAndrews and Forbes, Inc., 506 A.2d 173, 182-83 (Del. 1986); Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987).

Therefore, the Court will grant summary judgment on these three of the four claims raised in Counts I and II of the Rosenthal complaint. The sole surviving claim in the Rosenthal case, then, will be the one alleging that the directors breached their fiduciary duties by "embarking on a scheme of entrenchment" without adequately considering the interests of all the shareholders. This states a viable theory of recovery and entails the factual issue whether the directors have acted with an improper purpose in creating a structure that makes takeovers impossible and serves to entrench themselves in power. Summary judgment will thus be denied on this single claim in Counts I and II of the Rosenthal complaint.

Finally, as to the remaining fiduciary duty claims alleged in Count II of the Jasper and Shields complaint, the Court will deny the motion for summary judgment. These claims do not relate to the directors' failure to consider Sugarman's offer. Instead, one is based on the adoption of the 1987 convertability amendment, which allegedly "was enacted solely to benefit the Bryan family, in derogation of the shareholders' rights, for no valid corporate purpose." Complaint, ¶ 50(a). The other claims in Count II allege that the defendants breached their fiduciary duties by failing to disclose a number of material facts to the

shareholders, and by making false and misleading statements in the 1987 and 1988 proxy statements. Complaint, ¶ 50(b)-(c).

These claims present viable theories of recovery and, at this stage of the case, the Court will not grant summary judgment. However, this tentative denial of the defendants' motion for summary judgment needs further clarification. Jasper and Shields have not identified, by specific reference to the record as made or by counter-affidavit, factual evidence that mandates submission of these claims to a jury for resolution, but through counsel they have made general representations that such evidence exists in the record or will surface once further discovery takes place. Counsel for Rosenthal to date have failed to make any meaningful response at all to the defendants' motion for summary judgment and appear to be piggybacking on the Jasper and Shields complaint. For some time now the Court has suspected that both actions were filed with the thought in mind that, if Sugarman was successful on his claims, the other shareholders might reap a corresponding windfall. Now that Sugarman has departed the field, counsel should realistically evaluate their positions and be prepared to demonstrate to the Court on September 8, 1988, specific evidence existing either in the record as made or in affidavits, showing their entitlement to have the case submitted to a jury. If this does not occur by September 8, the Court will reconsider the defendants' motion. While the Court does not favor tentative rulings, the manner in which these cases arose permits some departure from normal procedures. Counsel are thus reminded of the continuing nature of their Rule 11 obligations in this

Circuit. See Meadow Limited Partnership v. Heritage Savings and Loan Ass'n, 118 F.R.D. 432 (E.D. Va. 1987) (Williams, J.), aff'd 850 F.2d 207 (4th Cir. 1988).

Accordingly, the Court will deny summary judgment on the remaining claims in Count II of the Jasper and Shields complaint.

Between now and the pretrial conference scheduled in these cases for September 8, 1988, the parties shall confer and undertake discovery concerning whether these cases appropriately lend themselves to class certification under Rule 23, Fed. R. Civ. P.

An appropriate order shall issue.

DATE

UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BARRIS INDUSTRIES, et al., Plaintiffs,	)	
v.	)	Civil Action No. 88-0188-R
D. TENNANT BRYAN, et al., Defendants.	)	

ORDER

These cases come before the Court on the defendants' motion for summary judgment. By their motion, the defendants seek summary judgment on all claims raised in the complaints in the two shareholder actions: Jasper and Shields v. Bryan, et al., No. 88-0238-R, and Rosenthal v. Bryan, et al., No. 88-0354-R. For the reasons stated in the accompanying Memorandum Opinion, the defendants' motion for summary judgment is GRANTED in part and DENIED in part, as follows:

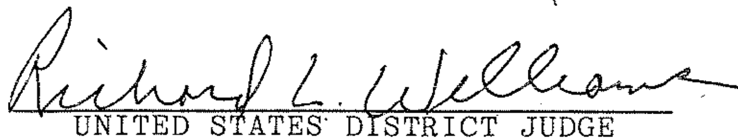
The motion for summary judgment is DENIED as to the claims raised in Count I of the Jasper and Shields complaint. However, the motion is GRANTED as to the failure-to-consider claim raised in Count II of the Jasper and Shields complaint, but DENIED as to all other claims raised in the Jasper and Shields Count II.

In addition, the motion for summary judgment is DENIED only on the claim in Counts I and II of the Rosenthal Complaint which alleges that the directors breached their fiduciary duties by "embarking on a scheme of entrenchment." As to all other claims

in the Rosenthal Counts I and II, the motion for summary judgment is GRANTED. Finally, the motion is also GRANTED on Count III of the Rosenthal complaint.

Counsel are hereby DIRECTED to comply will all suggestions of the Court set forth in the Memorandum Opinion.

It is so ORDERED. Let the Clerk send a copy of this Order and the Memorandum Opinion to all counsel of record.



UNITED STATES DISTRICT JUDGE

DATE