

FOX FACTORY HOLDING CORP

FORM 8-K (Current report filing)

Filed 11/16/15 for the Period Ending 11/16/15

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CIK	0001424929
Symbol	FOXF
SIC Code	3751 - Motorcycles, Bicycles, and Parts

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM 8-K

**Current Report
Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934**

**November 16, 2015 (November 13, 2015)
Date of Report (date of earliest event reported)**



Fox Factory Holding Corp.
(Exact name of Registrant as Specified in its Charter)

Delaware
(State or Other Jurisdiction of
Incorporation or Organization)

001-36040
(Commission
File Number)

26-1647258
(IRS Employer
Identification Number)

915 Disc Drive
Scotts Valley, California 95066
(Address of Principal Executive Offices) (Zip Code)

(831) 274-6500
(Registrant's Telephone Number, Including Area Code)

N/A
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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Section 1 Registrant's Business and Operations
Item 1.01 Entry into a Material Definitive Agreement

On November 13, 2015, Fox Factory Holding Corp. (the "**Company**"), through its wholly owned subsidiaries Fox Factory, Inc. ("**Fox**"), RFE Holding (US) Corp. ("**US Buyer**"), RFE Holding (Canada) Corp. ("**CA Buyer**") and Fox Factory IP Holding Corp. ("**KY Buyer**," and collectively the "**Buyer**"), entered into a Second Amendment to Asset Purchase Agreement (the "**Amendment**") with 1021039 B.C. Ltd. ("**CA Seller**"), Easton Cycling (USA), Inc. ("**US Seller**," and together with CA Seller, the "**Seller**") and the owners of the Seller. The Amendment entered into (i) guarantees the maximum earn-out payable for the fiscal year ended October 31, 2015 (CAD 9,000,000) (the "**2015 Earn-Out**") and the maximum earn-out payable for the fiscal year ending October 31, 2016 (CAD 10,500,000) (the "**2016 Earn-Out**" and together with the 2015 Earn-Out, the "**Earn-Outs**"), to be paid in the time and manner as set forth in the original Asset Purchase Agreement, (ii) requires that Chris Tutton remain employed by the CA Buyer through the dates the Earn-Outs are payable to not subject any such Earn-Outs to forfeiture (unless Mr. Tutton is terminated without Just Cause or for Good Reason) and (iii) removes all operational, financial and any other post-closing covenants placed on the Company and its subsidiaries. All terms not defined herein shall have the meaning ascribed to them in the Amendment, attached hereto as Exhibit 10.1.

Based on performance to date and projections, the Seller's business ("**RFE**") has achieved the maximum 2015 Earn-Out and is on target to achieve the maximum 2016 Earn-Out. Because of this, the Company has agreed to guarantee the payment of the Earn-Outs in order to allow it to accelerate integration and allow for closer cooperation between the legacy Fox business and the RFE business (per the original Asset Purchase Agreement, Fox was required to separately operate and track the RFE business and such integration was limited). The anticipated integration should allow for (i) the ability to commercially bundle Fox and RFE solutions and discount where appropriate, (ii) the ability to better align international distribution, (iii) a deeper technology collaboration across the business lines, (iv) the inclusion of RFE in a potential expansion in Taiwan to increase its production capacity, (v) a simplification of the Company's accounting along with back office integration, (vi) RFE's operations executive, Chris Tutton, to focus on broader initiatives (rather than just the RFE business), and (vii) an alignment of long-term goals.

The foregoing description of the Amendment does not purport to be complete and is qualified in its entirety by reference to the Amendment, which is attached to this report as Exhibit 10.1 and incorporated herein by reference.

Cautionary Note Regarding Forward-Looking Statements

Certain statements in this Current Report on Form 8-K may be deemed to be forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended and Section 21E of the Securities Exchange Act of 1934, as amended. The Company intends that all such statements be subject to the "safe-harbor" provisions contained in those sections. Forward-looking statements generally relate to future events or the Company's future financial or operating performance. In some cases, you can identify forward-looking statements because they contain words such as "may," "might," "will," "would," "should," "expect," "plan," "anticipate," "could," "intend," "target," "project," "contemplate," "believe," "estimate," "predict," "likely," "potential" or "continue" or other similar terms or expressions and such forward-looking statements include, but are not limited to, statements about RFE being on target to achieve the maximum 2016 Earn-out, statements about what the anticipated integration should allow for and any other statements in this 8-K that are not of a historical nature. Many important factors may cause the Company's actual results, events or circumstances to differ materially from those discussed in any such forward-looking statements, including but not limited to: the Company's ability to complete any acquisition and/or incorporate any acquired assets into its business; the Company's ability to improve operating and supply chain efficiencies; the Company's future financial performance, including its sales, cost of sales, gross profit or gross margin, operating expenses, ability to generate positive cash flow and ability to maintain profitability; factors which impact the calculation of the weighted average number of diluted shares of common stock outstanding, including the market price of the Company's common stock, grants of equity-based awards and the vesting schedules of equity-based awards; the Company's ability to develop new and innovative products in its current end-markets and to leverage its technologies and brand to expand into new categories and end-markets; the Company's ability to increase its aftermarket penetration; the possibility that the

Company could experience a disruption in its planned transition of the majority of the Company's mountain bike suspension component manufacturing operations to Taiwan or unexpected difficulties in connection with such transition; the possibility that the Company may not be able to accelerate its international growth; the Company's ability to maintain its premium brand image and high-performance products; the Company's ability to maintain relationships with the professional athletes and race teams that it sponsors; the possibility that the Company may not be able to selectively add additional dealers and distributors in certain geographic markets; the overall growth of the markets in which the Company competes; the Company's expectations regarding consumer preferences and its ability to respond to changes in consumer preferences; changes in demand for high-end suspension and ride dynamics products; the Company's ability to successfully identify, evaluate and manage potential acquisitions and to benefit from such acquisitions; future economic or market conditions; and the other risks and uncertainties described in "Risk Factors" contained in its Annual Report on Form 10-K or Quarterly Reports on Form 10-Q or otherwise described in the Company's other filings with the Securities and Exchange Commission. New risks and uncertainties emerge from time to time and it is not possible for the Company to predict all risks and uncertainties that could have an impact on the forward-looking statements contained in this Current Report on Form 8-K. In light of the significant uncertainties inherent in the forward-looking information included herein, the inclusion of such information should not be regarded as a representation by the Company or any other person that the Company's expectations, objectives or plans will be achieved in the timeframe anticipated or at all. Investors are cautioned not to place undue reliance on the Company's forward-looking statements and the Company undertakes no obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as required by law.

Section 9.01 Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits

d) Exhibits

The following exhibits are filed herewith:

Exhibit	Description
10.1	Second Amendment to Asset Purchase Agreement, by and among Fox Factory, Inc., RFE Holding (US) Corp., RFE Holding (Canada) Corp., Fox Factory IP Holding Corp., 1021039 B.C. Ltd., Easton Cycling (USA), Inc. and the other parties thereto dated November 13, 2015.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Fox Factory Holding Corp.

Date: November 16, 2015

By: /s/ Zvi Glasman

Zvi Glasman

Chief Financial Officer, Secretary and Treasurer

SECOND AMENDMENT TO ASSET PURCHASE AGREEMENT

This **SECOND AMENDMENT TO ASSET PURCHASE AGREEMENT** (this "**Amendment**"), dated as of November 13, 2015 (the "**Effective Date**"), is by and among Fox Factory, Inc., a California corporation ("**Fox**"), RFE Holding (Canada) Corp., a corporation organized under the laws of British Columbia ("**CA Buyer**"), RFE Holding (US) Corp., a Delaware corporation ("**US Buyer**"), Fox Factory IP Holding Corp., an exempted company incorporated under the laws of the Cayman Islands ("**KY Buyer**" and together with the Fox, CA Buyer and US Buyer, each individually a "**Buyer**" and collectively the "**Buyers**"), 1021039 B.C. Ltd., a corporation amalgamated under the laws of British Columbia ("**CA Seller**"), and Easton Cycling (USA), Inc., a Delaware corporation ("**US Seller**" and together with CA Seller, each individually a "**Seller**" and collectively the "**Sellers**"). Each of Buyers and Sellers are sometimes individually referred to herein as a "**Party**" and collectively as the "**Parties**".

WITNESSETH:

WHEREAS, the Parties are party to that certain Asset Purchase Agreement dated as of December 5, 2014, as amended by that certain letter agreement dated March 10, 2015 (the "**Purchase Agreement**");

WHEREAS, the Parties acknowledge and agree that the 2015 earn-out amount has been earned and is equal to \$9,000,000 and the 2016 earn-out amount is hereby deemed to have been earned, subject to certain forfeiture restrictions contained herein, and is equal to \$10,500,000; and

WHEREAS, in accordance with Section 12.13 of the Purchase Agreement, the Parties have determined to amend the Purchase Agreement as set forth in this Amendment.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. Certain capitalized words and phrases used herein and not otherwise defined have the meanings set forth or referenced in the Purchase Agreement.

2. Amendments.

(a) Section 1.2 of the Purchase Agreement is hereby amended by deleting the following rows:

"2015 Earn-Out"	2.10(a)
"2015 Actual EBITDA"	2.10(a)
"2015 EBITDA Maximum"	2.10(d)
"2015 EBITDA Minimum"	2.10(b)
"2015 EBITDA Threshold"	2.10(c)
"2016 Earn-Out"	2.10(a)
"2016 Actual EBITDA"	2.10(a)
"2016 EBITDA Maximum"	2.10(d)
"2016 EBITDA Minimum"	2.10(b)

"2016 EBITDA Threshold"	2.10(c)
"Amount in Controversy"	2.10(j)
"Arbitration Panel"	2.10(j)(ii)
"Audited EBITDA Statement"	2.10(h)
"Breach Acceleration Payment"	7.13(e)
"Earn-Out Period"	7.13(b)
"EBITDA Statement"	2.10(h)
"Electing Party's Earn-Out Statement"	2.10(j)
"Installment Sale Payment"	2.10(n)(i)

(b) Section 1.2 of the Purchase Agreement is hereby further amended by inserting the following rows in their appropriate alphabetical order:

"2015 Max Earn-Out Amount"	2.10(a)
"2016 Max Earn-Out Amount"	2.10(a)

(c) Section 2.3 of the Purchase Agreement is hereby amended by deleting the phrase "if earned" and replacing such phrase with "if payable."

(d) Section 2.10 of the Purchase Agreement is hereby amended and restated in its entirety to read as follows:

"2.10 Earn-Out .

(a) Subject to Section 7.13, Article 8 and the terms and conditions set forth in this Section 2.10, Buyers will pay to (i) CA Seller, on behalf of the Sellers, the 2015 Max Earn-Out Amount within five (5) Business Days after April 1, 2016 and (ii) CA Seller, on behalf of the Sellers, the 2016 Max Earn-Out Amount within five (5) Business Days after April 1, 2017 (collectively, the "**Earn-Out Amounts**"). For purposes hereof, "**2015 Max Earn-Out Amount**" shall mean \$9,000,000, "**2016 Max Earn-Out Amount**" shall mean \$10,500,000.

(b) Buyers shall have the right to withhold and set off against any amount due to be paid pursuant to this Section 2.10 the amount of any Damages to which any Buyer Indemnified Persons may be entitled under Article 8 hereof and which (for greater certainty) have been finally determined by a court of competent jurisdiction or mutually agreed between the Buyer Representative and the Seller Representative.

(c) The Earn-Out Amounts will be allocated to goodwill in a manner consistent with the Tax Purchase Price Allocation in Section 2.5 and paid by the applicable Buyer to the appropriate Seller.

(d) U.S. Tax Treatment of Earn-Out .

(i) US Buyer and US Seller agree that the sale and purchase of the Acquired Assets pursuant to the terms of this Agreement represents a contingent payment sale with a stated maximum selling price as contemplated by Treasury Regulations Sections 15A.453-1(c)(1) - (2). As a result, any payment of the Earn-Out Amounts allocable to the Acquired Assets purchased by the US Buyer (each an "**Installment Sale Payment**") will constitute an installment sale for purposes of Code Section 453.

(ii) In calculating the portion of each Installment Sale Payment that constitutes interest, each Buyer and each Seller agree that each applicable Buyer shall impute interest to the Installment Sale Payment by applying the mid-term applicable federal rate, as determined by Code Section 1274(d), for interest

compounding annually for the month in which the Closing Date occurs, and shall in writing inform Seller Representative of the amount of the imputed interest in each tax year.

(iii) Each Buyer and each Seller agree that, for United States federal income tax purposes, each Installment Sale Payment shall be treated as additional purchase price paid to or on account of such Seller for the Acquired Assets except to the extent a portion of an Installment Sale Payment constitutes interest for United States tax purposes pursuant to this Section 2.10(d).

(e) Canadian Tax Treatment of Earn-Out. Earn-Out Amounts allocated to the Acquired Assets purchased by the CA Seller will be taxed in accordance with the provisions of the ITA. To the extent any Earn-Out Amounts are subject to Canadian withholding tax under the ITA, subject to a reduction in the applicable rate of withholding tax under the *Canada-U.S. Income Tax Convention*, such withholding tax will be withheld from such Earn-Out Amounts and remitted to the Canadian government.

(f) Forfeiture of Earn-Out Amounts. If Chris Tutton's employment with RFE Holding (Canada) Corp. is (i) terminated for Just Cause (as such term is defined in his Employment Agreement), or (ii) if Mr. Tutton terminates his employment without Good Reason (as such term is defined in his Employment Agreement), then Sellers shall forfeit all rights to the 2015 Max Earn-Out Amount and the 2016 Max Earn-Out Amount to the extent such amounts are not yet due. The Sellers will not forfeit any rights to the 2015 Max Earn-Out Amount or the 2016 Max Earn-Out Amount by reason of Mr. Tutton's (i) death or (ii) his disability or incapacitation."

(e) Section 7.13 of the Purchase Agreement is hereby amended and restated in its entirety to read as follows:

"7.13 Operation of the Business.

(a) In General. Subject to the terms of this Section 7.13 and Section 7.15, Buyers shall have sole discretion with regard to all matters relating to the operation of the Business following the Closing. For the avoidance of doubt, in no event shall any Buyer be obligated to:

(i) operate the Business as a standalone business of such Buyer in accordance with sound business practices;

(ii) maintain separate books and records for the Business and any additional books and records necessary to calculate EBITDA of the Business and the other components thereof, including the calculation of EBITDA attributable to RF Canada and Easton Canada separately; and

(iii) allow the Business to retain working capital sufficient to satisfy the reasonable business needs of the Business consistent with the operation of the Business by Sellers prior to Closing.

Furthermore, nothing herein shall prevent any Buyer from making a material modification to the Business or its operations (including taking any action that would reasonably be expected to result in the diversion of any material portion of the customers or business of the Business away from the Business, whether by the transfer of any customer contract to Related Persons of Buyer or otherwise).

(b) Acceleration Payments upon Change of Control. Without the prior consent of Seller Representative (but subject to the last sentence of this paragraph), promptly upon the consummation of (A) the sale, lease, exchange or other transfer of substantially all of the Acquired Assets (on an aggregate basis and in one transaction or in a series of related transactions) to a person or entity that is not controlled, directly or indirectly, by Buyer Guarantor, (B) a direct or indirect (whether by the sale of stock or merger of a Related Person, or otherwise) sale, exchange, or other transfer of more than 50% of the capital stock of Buyers (excluding Fox) (on an aggregate basis and in one transaction or in a series of related transactions) to a person or entity that is not controlled by Buyer Guarantor, or (C) a merger or consolidation to which any of the Buyers (excluding Fox) (on an aggregate basis and in one transaction or in a series of related transactions) are a party if the Buyer Guarantor or any of its Subsidiaries does not have "beneficial

ownership" (as defined in Rule 13d-3 under the Exchange Act) immediately following the effective date of such merger or consolidation of more than 50% of the combined voting power of the surviving corporation's or corporations' outstanding securities (that in either case, as applicable, directly or indirectly hold the Acquired Assets) ordinarily having the right to vote at elections of directors, in each case on or prior to October 31, 2016, then Buyers shall pay to Seller Representative, on behalf of Sellers, the 2016 Max Earn-Out Amount plus any unpaid 2015 Earn-Out Amount (such payment, as applicable, referred to herein as the "**Change of Control Acceleration Payment**"). For the avoidance of doubt, a Change of Control Acceleration Payment shall not be triggered upon the consummation of any transactions or series of related transactions pursuant to which there is a change in control of either Buyer Guarantor or Fox or a sale or other transfer by either Buyer Guarantor or Fox of substantially all of its assets; provided, that if Chris Tutton's employment with RFE Holding (Canada) Corp. is (i) terminated without Just Cause (as such term is defined in his Employment Agreement), or (ii) if Mr. Tutton terminates his employment with Good Reason (as such term is defined in his Employment Agreement) in connection with a change in control of either Buyer Guarantor or Fox or a sale or other transfer by either Buyer Guarantor or Fox of substantially all of its assets, then the Change of Control Acceleration Payment shall be promptly paid."

(c) Acceleration Payments upon Breach. In the event that Chris Tutton's employment with RFE Holding (Canada) Corp. is (i) terminated without Just Cause (as such term is defined in his Employment Agreement), or (ii) if Mr. Tutton terminates his employment with Good Reason (as such term is defined in his Employment Agreement), then Buyers shall promptly pay to CA Seller, on behalf of Sellers, the 2016 Max Earn-Out Amount, plus any unpaid 2015 Max Earn-Out Amount."

(f) Section 7.15 of the Purchase Agreement is hereby amended and restated in its entirety to read as follows:

"7.15 German Utility Model Suit. Each Seller, on behalf of itself and each of its Related Persons, agrees that it shall be responsible for defending itself against the Specified Claims and that no Buyer shall be responsible for any Liability arising therefrom, including any fees and expense of attorneys or other professionals; provided, that, for the avoidance of doubt, if a Buyer is subject to a Third-Party Claim with respect to a Specified Claim for sales of "narrow-wide chain rings" that occurred prior to the Closing Date, such Buyer shall be afforded the rights and protections set forth in Section 8.7. In no event shall any Seller have an indemnity obligation in favor of Buyers with respect to a Specified Claim to the extent that such indemnify obligation (or the portion thereof) relates to product(s) sold by Buyers after the Closing Date."

3. CA Seller and CA Seller Owners' Agreement. CA Seller and each owner of CA Seller represent and warrant to each Buyer that they have agreed to a specific dollar amount that each owner of CA Seller will receive with respect to the 2015 Max Earn-Out Amount and the 2016 Max Earn-Out Amount. Furthermore, CA Seller and each owner of CA Seller agree that under no circumstances for the fiscal year ended October 31, 2016 and thereafter shall any Buyer be required to track separately the Race Face and Easton business (including revenues, expenses, results from operations or any other metric), nor shall such owner's share of the 2016 Max Earn-Out Amount be dependent upon the results of either the Race Face or Easton business. For greater certainty and notwithstanding that the Earn-Out Amounts are payable, the Buyer will track separately the Race Face and Easton businesses for the October 31, 2015 fiscal year just ended (including revenues, expenses, and results from operations) and deliver these results to the CA Seller as soon as practicable.

4. Conditions to Effectiveness. This Amendment shall become effective as of the date and time at which Buyers shall have received an executed amendment to his current employment agreement from Chris Tutton and with terms and conditions reasonably satisfactory to Buyers and Mr. Tutton and consistent with their prior understanding.

5. Meaning of "Agreement". The term "**Agreement**" as used in the Purchase Agreement, shall, unless otherwise specified or unless the context otherwise requires, mean and include the Purchase Agreement and this Amendment, together, it being the intent of the Parties that each of the foregoing be applied and construed as a single instrument.

6. **Ratification and Confirmation of the Purchase Agreement**. The Parties do hereby ratify and reaffirm all of the terms and provisions of the Purchase Agreement, which, as amended and supplemented by this Amendment shall remain in full force and effect.

7. **Miscellaneous**. Article 12 of the Purchase Agreement shall apply to this Amendment, *mutatis mutandis* .

[Signature Page Follows]

IN WITNESS WHEREOF , the parties hereto have caused this Amendment to be duly executed by their respective authorized officers as of the day and year first above written.

CA Buyer:

RFE HOLDING (CANADA) CORP.,
a British Columbia corporation

By: /s/ David Haugen
Name: David Haugen
Title: Vice President

US BUYER:

RFE HOLDING (US) CORP.,
a Delaware corporation

By: /s/ David Haugen
Name: David Haugen
Title: Vice President

FOX AND BUYER REPRESENTATIVE:

FOX FACTORY, INC.,
a California corporation

By: /s/ Larry Enterline
Name: Larry Enterline
Title: CEO

KY BUYER:

FOX FACTORY IP HOLDING CORP.,
a Cayman Island corporation

By: /s/ David Haugen
Name: David Haugen
Title: Vice President

BUYER GUARANTOR:

FOX FACTORY HOLDING CORP.,
a Delaware corporation

By: /s/ John Boulton
Name: John Boulton
Title: Vice President

SELLERS:

1021039 B.C. LTD.,
a British Columbia corporation

By: /s/ Chris Tutton
Name: Chris Tutton
Title: President

EASTON CYCLING USA, INC.,
a Delaware corporation

By: /s/ Chris Tutton
Name: Chris Tutton
Title: President

SELLER REPRESENTATIVE:

/s/ Chris Tutton

Chris Tutton, *an individual residing in British Columbia*

ACKNOWLEDGED AND AGREED BY THE OWNERS:

401821 BRITISH COLUMBIA LTD.

/s/ Stan Fuller

By: Stan Fuller

980109 BRITISH COLUMBIA LTD.

/s/ Christopher J. Tutton

Christopher J. Tutton

/s/ Darren Mabbot

Darren Mabbot , *an individual*

/s/ Derek M. Wills

Derek M. Wills , *an individual*