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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RACKWISE, INC., a Nevada corporation,

Plaintiff,

v.

GUY ARCHBOLD, an individual, and DOES 1 to 25, inclusive,

Defendants.

No. 17-cv-797 WBS CKD

MEMORANDUM OF DECISION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Plaintiff Rackwise, Inc. brought this action against defendant Guy A. Archbold for conversion, fraud, breach of the duty of good faith and fair dealing, tortious interference with prospective economic advantage, and declaratory and injunctive relief arising from defendant's actions before and after his purported termination as plaintiff's President, CEO, and Chair of the Rackwise Board of Directors. After the initial Pretrial Conference, the court determined, with the agreement of the parties, that plaintiff's claims for injunctive and declaratory relief would be tried before the court separately from

1 plaintiff's common law claims.

2 After conducting a three-day bench trial, the court
3 finds in favor of plaintiff in part as to plaintiff's requests
4 for declaratory and injunctive relief. This memorandum
5 constitutes the court's findings of fact and conclusions of law
6 pursuant to Federal Rule of Civil Procedure 52(a). The court
7 expresses no opinion as to plaintiff's claims for conversion,
8 fraud, breach of the duty of good faith and loyalty, and tortious
9 interference with prospective economic advantage, which will be
10 tried before a jury on a later date.

11 I. Factual and Procedural History

12 In 2011, defendant became President, CEO, and Chair of
13 the Board of Directors of Rackwise. The parties dispute whether
14 plaintiff's employment contract (Ex. 11) was valid but do not
15 dispute that defendant served as President, CEO, and Chair from
16 2011 until his purported termination in 2017. Defendant also
17 claims that he was appointed as Secretary of Rackwise but offers
18 nothing other than his testimony in support of that contention.

19 On May 7, 2014, Rackwise Funding II, LLC ("RFII")
20 entered into a Subscription Agreement with Rackwise that entitled
21 it to appoint two members to Rackwise's Board and that created
22 warrants permitting RFII to purchase shares of Rackwise upon
23 notice and payment. (Exs. 4, 5, 20.)¹ Defendant, as Rackwise
24 CEO, also granted another company, Triple R-F, LLC ("Triple R-
25 F"), warrants to purchase shares of Rackwise stock. (Ex. 6.)

26 Over the years after the incorporation of Rackwise in
27

28 ¹ All exhibit numbers refer to the trial exhibit number.

1 2011, Rackwise achieved some business successes, including an
2 agreement with Unisys Corporation which defendant claimed had
3 potential to lead to millions or even billions of dollars in
4 revenue for Rackwise. It is undisputed, though, that Rackwise
5 continued to lose money every year. Eventually the relationship
6 between Unisys and defendant Archbold soured, and Unisys stopped
7 responding to contacts from Rackwise in 2016. Further, (1) the
8 Internal Revenue Service began taking steps to foreclose on
9 Rackwise, (2) Rackwise began to default on its leases and was in
10 danger of eviction and termination of business services, and (3)
11 Rackwise defaulted on a factoring agreement with Richert Funding,
12 LLC ("Richert Funding") (Ex. 14), on which Richert Funding could
13 have foreclosed at any time.

14 In late January 2017, plaintiff claims its Board of
15 Directors consisted of Archbold, John Kyees, and Michael
16 Feinberg. In contrast, defendant claims the Board consisted of
17 himself, Kyees, Feinberg, and Sherman Henderson, notwithstanding
18 a July 2016 email from defendant in which Archbold discussed the
19 possible removal of Henderson from the Rackwise Board and
20 explained "He's out, period," (Ex. 12), and testimony that
21 Henderson was not involved with Rackwise after July 2016.

22 On February 2, 2017, Patrick Imeson, as RFII's managing
23 member, purportedly appointed himself and Bart Richert to the
24 Rackwise Board pursuant to RFII's subscription agreement.
25 Imeson, Richert, and Feinberg then held a special telephonic
26 meeting of the Rackwise Board, at which they discussed
27 defendant's "recent and unauthorized communications with Unisys"
28 and "the potential for litigation from Unisys as a result of such

1 communications." (Ex. 15.) Imeson, Richert, and Feinberg then
2 terminated defendant for cause as Rackwise President, CEO, and
3 Chair. They also appointed Imeson as Interim Chief Restructuring
4 Officer of Rackwise.² While the minutes of the February 2, 2017
5 meeting list Imeson and Richert as directors, the minutes do not
6 discuss their appointment to the Board. Archbold was not
7 notified of the meeting and did not attend. Kyees was notified
8 of the meeting but was not able to attend.

9 Fearing that the February 2, 2017 meeting and the
10 actions taken there might be challenged as invalid, Imeson,
11 Richert, Feinberg, and Kyees held another special Board meeting
12 on February 3, 2017. (Ex. 16.) Archbold was not notified of
13 this meeting and did not attend. At this meeting, Imeson stated
14 that RFII had appointed two members to the Rackwise Board under
15 RFII's Subscription Agreement, Imeson and Richert. Kyees and
16 Feinberg ratified Imeson's and Richert's appointments and then
17 Imeson, Richert, Kyees, and Feinberg voted to remove defendant
18 for cause as President, CEO, and Chair of the Rackwise Board, and
19 appoint Imeson as Interim Chief Restructuring Officer.

20 This newly constituted Board then notified defendant of
21 his termination on February 3, 2017 (Ex. 17), though defendant
22 continued to hold himself out as Rackwise President, CEO and
23 Chair after receiving this notice, by, among other things, making
24 an SEC filing disputing the actions taken at the February 2 and 3

25 ² Imeson drafted a notice to the Rackwise Board dated
26 January 29, 2017 in which he stated RFII was exercising its right
27 to appoint two Board members to Rackwise (Ex. 18), but it appears
28 that this notice was not presented to Rackwise or any Rackwise
employees, officers, or directors until the February 2, 2018
Board meeting.

1 meetings. (See, e.g., Ex. 22.) Seeking to address defendant's
2 actions and remove any doubt about the validity of the
3 appointment of Imeson and Richert and the termination of
4 defendant, Imeson and other Rackwise shareholders formed a
5 strategy to obtain over 75% of Rackwise stock so that they could
6 then ratify the actions taken at the February 2 and 3 meetings
7 through a shareholder vote.

8 Under this strategy, RFII and Triple R-F, through their
9 managers Imeson and Dwight Richert (brother of Bart Richert),
10 exercised their warrants (Exs. 5, 6) to purchase shares of
11 plaintiff's stock on March 22, 2017. RFII exercised its warrants
12 to purchase 1,448,400 shares of Rackwise stock at an exercise
13 price of \$.01 per share, and Triple R-F exercised warrants to
14 purchase 9,638,740 shares of Rackwise common stock at an exercise
15 price of \$.01 per share. (Exs. 25, 26.) Pursuant to this
16 exercise of warrants, RFII deposited \$14,484.00 into a Rackwise
17 bank account with First Bank in Denver, Colorado, and Triple R-F
18 wired \$96,387.40 to the same bank account. This money was later
19 used for Rackwise expenses.

20 After this exercise of warrants, RFII, Triple R-F, and
21 other entities managed by Imeson or Dwight Richert held
22 14,319,503 shares out of the 18,158,757 total Rackwise shares, or
23 about 78.9% of Rackwise's outstanding stock. These entities then
24 voted by written consent to terminate Archbold as President, CEO,
25 and Chair of the Rackwise Board. (Ex. 27.) In the written
26 consent, these shareholders also (1) removed Sherman Henderson as
27 a member of the Board, (2) appointed Patrick Imeson and Bart
28 Richert as members of the Board of Directors, effective February

1 3, 2017; and (3) ratified the actions of the Rackwise Board of
2 Directors meeting on February 3, 2017, including the termination
3 of defendant for cause and the appointment of Patrick Imeson as
4 Rackwise Acting Chief Restructuring Officer.

5 After the shareholder ratification of defendant's
6 termination in March 2017, defendant continued to act as CEO,
7 President, and Chair of Rackwise. He held himself out as the CEO
8 to Rackwise constituents and employees, held meetings with
9 purported Rackwise Board members acting on Rackwise's behalf,
10 filed documents with the SEC on Rackwise's behalf, communicated
11 and conducted business with Rackwise investors, and terminated
12 Rackwise's contract with Unisys. (See, e.g., Exs. 24, 28-31, 35-
13 50, 52-63.)

14 Plaintiff initiated this action against defendant in
15 April 2017 and shortly thereafter moved for a preliminary
16 injunction. The court granted plaintiff's motion in part on June
17 13, 2017 and enjoined defendant, his agents, and anyone acting in
18 concert with him from (1) accessing or logging into, or
19 attempting to access or log into, Rackwise's account in the U.S.
20 SEC's online EDGAR filing system; (2) representing himself to
21 anyone as being an officer, director, or employee of, or
22 otherwise affiliated with Rackwise; and (3) acting, attempting to
23 act, or purporting to act on behalf of Rackwise (Docket No. 13.)³

24
25 ³ The court later modified the injunction to clarify
26 that the injunction did not prevent Archbold or his agents from
27 "making, signing, or filing any pleading or other document, or
28 from giving any oral or written testimony, in connection with any
presently pending lawsuit or arbitration proceeding in which the
right to control or ownership of Rackwise, Inc. is in issue."
(Docket No. 53.)

1 After multiple attempts by defendant to stay proceedings under
2 various grounds, the case finally proceeded to a bench trial
3 regarding the corporate governance issues on August 21, 2018.

4 II. Analysis

5 A. Just Cause

6 The court assumes, but does not decide, that defendant
7 had a valid employment contract with plaintiff.⁴ Regardless of
8 whether defendant had a valid contract, however, the Board of
9 Directors and the Rackwise shareholders had just cause to
10 terminate defendant as President, CEO, and Chair of the Rackwise
11 Board of Directors. Rackwise continued to lose money every year
12 during defendant's tenure, and the company's poor performance
13 alone would be sufficient just cause to terminate defendant.
14 Multiple witnesses also testified regarding the poor relations
15 between defendant and Rackwise's most important customer and
16 partner, Unisys, which was additional justification for
17 defendant's removal.

18 Moreover, defendant did not disclose to the corporation
19 or the Board his felony charges and a subsequent misdemeanor
20 conviction based on a failure to file taxes. While most of the
21 counts were dismissed, and defendant received only probation,
22 defendant's charges and conviction nevertheless reflect
23 negatively on a publicly traded corporation which seeks to do
24 business with the federal government. These charges and

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26 ⁴ Whether defendant's employment contract or any
27 particular provision of the contract is or was valid, as well as
28 the parties' rights or obligations with respect to that contract,
remain issues for the jury to determine as part of plaintiff's
damage claims.

1 conviction and failure to disclose also constituted just cause to
2 terminate defendant.

3 Further, Rackwise was in great financial distress at
4 the time of defendant's removal, with the IRS threatening to
5 foreclose on the corporation. Rackwise was in default on its
6 factoring agreement with Richert Funding, and the corporation
7 facing the threat of eviction and termination of business
8 services such as telephone and Internet. For all these reasons,
9 the Rackwise shareholders had just cause to terminate defendant
10 as CEO, President, and Chair of Rackwise.

11 B. Appointment of Directors and February 2 and 3
12 Board Meetings

13 It is undisputed that RFII, though its Subscription
14 Agreement, had a right to appoint two directors to the Rackwise
15 Board. The court notes, though, that while RFII drafted a notice
16 to Rackwise that it was exercising its right to appoint two
17 directors, the notice did not identify the individuals whom it
18 was appointing, and it is not clear the notice was delivered
19 until the February 2, 2017 Board meeting. (See Ex. 18.) The
20 minutes of the February 2, 2017 meeting do not discuss the
21 appointment of directors. (See Ex. 15.) Rather, those minutes
22 simply assume that Imeson and Richert were Board members, though
23 the minutes for the February 3, 2017 meeting do discuss the
24 appointment of Imeson and Richert. (Ex. 16.)

25 As to the February 2 and 3, 2017 Board meetings, the
26 court notes that the Rackwise bylaws require that all directors
27 be notified before a special Board meeting occurs. (Ex. 9 at §
28 4.4). It is undisputed that defendant, who was a director of

1 Rackwise, was not notified of the February 2 and 3 meetings
2 beforehand.⁵ Plaintiff claims that the lack of notice was
3 justified by emergency circumstances and the fear that defendant
4 would impede business at the meetings. However, plaintiff has
5 not cited any authority which would allow a Board meeting to be
6 called and conducted without proper notice to all the directors
7 in the case of exigent circumstances, absent waiver, consent, or
8 approval by the absent director. (See, e.g., Ex. 9 at § 4.6.)⁶
9 Thus, the court will decline to grant plaintiff's request for a
10 declaration of the court that the February 2, 2017 appointments
11 of Imeson and Richert, the February 2 and 3, 2017 Board meetings,
12 and the actions taken therein, were valid in and of themselves,
13 assuming there was no later shareholder consent.

14 C. Exercise of Warrants and Shareholder Consent

15 RFII and Triple R-F had valid warrants to purchase
16 1,448,400 shares of Rackwise stock at an exercise price of \$.01
17 per share, and that Triple R-F had valid warrants to purchase
18 9,638,740 shares of Rackwise common stock at an exercise prices
19 of \$.01 per share. (See Exs. 5, 6.)

20 To exercise their warrants, RFII and Triple R-F were

21
22 ⁵ The court also notes that the evidence regarding
23 Henderson's removal as director is somewhat ambiguous, with no
24 evidence of any formal Board or corporate action, and it is
undisputed that Henderson did not receive notice of the February
2 and 3 meetings beforehand.

25 ⁶ The court expresses no opinion as to whether the
26 appointment of directors by RFII or defendant's removal complied
27 with the Nevada Revised Statutes. While the parties identified
28 this issue as one to be decided by the court, the submissions and
presentations by the parties at trial were insufficient to allow
the court to make any ruling.

1 required to (1) deliver to Rackwise an executed copy of the
2 notice of exercise of warrants, (2) surrender the warrant to the
3 Secretary of Rackwise at its principal office or any other office
4 or agency as specified by Rackwise in writing, and (3) pay the
5 applicable exercise price based on the number of shares
6 multiplied by the exercise price. Here, RFII and Triple
7 delivered notices of exercise of these warrants through Imeson
8 and Dwight Richert, respectively, on March 22, 2017. (Exs. 25,
9 26.) While the notice of exercise and the warrants were in fact
10 delivered to Imeson acting as chief restructuring officer for
11 Rackwise, or to Rackwise's corporate counsel Michael Weiner, they
12 were nonetheless delivered to Rackwise.

13 Defendant claims that notice of exercise and/or the
14 warrants were required to be delivered to him personally as
15 Secretary of Rackwise. However, there is no indication other
16 than defendant's uncorroborated assertion that he was acting as
17 Secretary of Rackwise in 2017. At any rate, the impetus behind
18 the requirement of delivery of the warrants appears to be to
19 ensure that the warrants were delivered to Rackwise, or the
20 principal office where Rackwise's corporate officers normally are
21 found. It cannot be the case that if Rackwise had no secretary,
22 or that if there was a dispute over corporate governance, as
23 there is here, that a holder of warrants would be prohibited from
24 exercising valid warrants. Accordingly, the court finds that the
25 delivery of RFII's and Triple R-F's notice of exercise and the
26 warrants themselves to Imeson, acting as chief restructuring
27 officer, or to Michael Weiner, acting as corporate counsel,
28 substantially complied with the delivery of notice of exercise

1 and surrender of warrants requirements.

2 RFII's and Triple R-F also paid \$14,484.00 and
3 \$96,387.40, respectively, into a Rackwise bank account,
4 representing the purchase price of \$.01 per share for the
5 purchase of stock under the warrants, as testified by Imeson.
6 The fact these funds were deposited into a new Rackwise bank
7 account, rather than into an existing Rackwise bank account in
8 California (controlled by defendant) does not render the payments
9 defective. Indeed, Imeson testified that the funds paid to
10 exercise RFII's and Triple R-F's payments were later used for
11 Rackwise expenses. Overall, RFII's and Triple R-F's exercises of
12 their warrants substantially complied with the warrants'
13 requirements and were therefore valid.

14 D. Shareholder Consent

15 Under the Rackwise bylaws, stockholders holding at
16 least 75% of the Rackwise common stock may remove directors by
17 either a vote at a special meeting or by written consent:

18 The holders of least seventy-five percent (75%)
19 of the outstanding shares of stock entitled to
20 vote may at any time peremptorily terminate the
21 term of office of all or any of the directors by
22 a vote at a meeting called for such purpose or by
23 a written consent filed with the secretary or, in
24 his absence, with any other officer. Such
removal shall be effective immediately, even if
successors are not elected simultaneously and the
vacancies on the Board of Directors resulting
therefrom shall be filled only by the
stockholders.

25 (Ex. 9 § 3.3.) The Rackwise bylaws also allow the shareholders
26 to "elect a director or directors at any time to fill any vacancy
27 or vacancies not filled by the directors" and the owners of 50%
28 of Rackwise stock to act by written consent in lieu of a meeting.

1 (Id. at § 3.3, § 2.10.)

2 Because RFII and Triple R-F validly exercised their
3 warrants, they, along with Rackwise Funding, LLC, Black Diamond
4 Financial Group, LLC, and Black Diamond Holdings, held at least
5 78.9% of Rackwise common stock. As holders of more than 75% of
6 Rackwise common stock, these investors were entitled to act by
7 consent to remove Archbold and Henderson as directors of the
8 Rackwise Board, appoint Imeson and Bart Richert as directors, and
9 ratify the actions taken at the March 2 and March 3, 2017 Board
10 meetings, including the termination for cause of defendant as CEO
11 and any other employment he held with Rackwise, and the
12 appointment of Imeson as chief restructuring officer.⁷
13 Accordingly, the court will grant in part plaintiff's request for
14 declaratory and injunctive relief.

15 IT IS THEREFORE ORDERED that plaintiff's request for
16 declaratory relief be, and the same hereby is, GRANTED in part,
17 and the court hereby finds and declares as follows:

18 1. On March 22, 2017, Rackwise Funding II, LLC
19 validly exercised its warrants and purchased 1,448,400 shares of
20 Rackwise common stock.

21 2. On March 22, 2017, Triple R-F, LLC validly
22 exercised its warrants and purchased 9,638,740 shares of Rackwise
23 common stock.

24 3. On March 23, 2017, Rackwise shareholders Rackwise

25 ⁷ Because the shareholders were allowed to act by written
26 consent under § 3.3 of the Rackwise bylaws, the court does not
27 decide whether the March 23, 2017 telephone conference between
28 Imeson and Dwight Richert, acting on behalf of RFII, Triple R-F,
and other shareholders was sufficient to comply with the bylaws'
requirements for special shareholder meetings.

1 Funding, LLC, Rackwise Funding II, LLC, Black Diamond Financial
2 Group, LLC, Black Diamond Holdings, LLC, and Triple R-F, LLC,
3 acting by written consent in accordance with § 3.3 of the
4 Rackwise Bylaws, ratified and approved the removal of Guy
5 Archbold and Sherman Henderson as directors of Rackwise effective
6 February 3, 2017, and ratified and approved the appointment of
7 Patrick Imeson and Bart Richert as directors of Rackwise
8 effective February 3, 2017.

9 4. On March 23, 2017, Rackwise shareholders Rackwise
10 Funding, LLC, Rackwise Funding II, LLC, Black Diamond Financial
11 Group, LLC, Black Diamond Holdings, LLC, and Triple R-F, LLC,
12 acting by written consent in accordance with § 3.3 of the
13 Rackwise Bylaws, ratified and approved the termination of Guy
14 Archbold as an officer and employee of Rackwise effective
15 February 3, 2017, and ratified and approved the appointment of
16 Patrick Imeson as chief restructuring officer for Rackwise
17 effective February 3, 2017.

18 5. No later than March 23, 2017, Defendant Archbold
19 ceased to have any legal authority to hold himself out as an
20 officer, director, or employee of Rackwise, Inc., or to act on
21 behalf of Rackwise, Inc.

22 6. The Rackwise Board, in acting to terminate
23 defendant Archbold as an officer, director, and employee of
24 Rackwise effective February 3, 2017, and as ratified by the
25 Rackwise shareholders, had just cause.

26 IT IS FURTHER ORDERED that plaintiff's request for
27 injunctive relief be, and the same hereby is, also GRANTED in
28 part, and defendant Guy Archbold, his agents, and any party

1 acting in concert with him or his agents are enjoined from:

2 1. accessing or logging into, or attempting to access
3 or log into, Rackwise, Inc.'s account in the U.S. SEC's online
4 EDGAR filing system;

5 2. representing himself to anyone as being an
6 officer, director, or employee of, or otherwise affiliated with
7 Rackwise, Inc.; and

8 3. acting, attempting to act, or purporting to act on
9 behalf of Rackwise, Inc.

10 Plaintiff's remaining requests for declaratory and
11 injunctive relief are DENIED.

12 This matter is set for status conference on September
13 24, 2018, at 1:30 p.m., to discuss the jury trial and related
14 proceedings.

15 Dated: September 5, 2018



16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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