SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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RAL CAPITAL LIMITED, YUJI TAKASHIMA, HUXLEY INVESTMENT HOLDING LTD, DORON NEVO, MICHAEL HAERTFELDER, TAKESHI YAMAMOTO, ELAN CONSULTING GROUP, EDOUARD COHEN-TANNOUDJI, JOEL BLOCH, HEATHGROVE LIMITED, YGAL SEBBAN, LIONEL SAYAG, FREDERIC FURCAJG, AYAL SHENHAV, BKL INVESTMENTS LIMITED, STEFFEN GUTMANN, FRANCK ASSERAF, CISSY YEUNG

Plaintiffs,

- v -

CHECKM8, INC., DANA GHAVAMI, SPOTIBLE, INC.,

Defendants.

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**Index No.** 650775/2016

**Motion Seq. No.** 001

**Motion Date** 3/22/2017

**DECISION AND ORDER**

**BRANSTEN, J.**

In this action, Plaintiffs, eighteen minority shareholders in Defendant CheckM8, Inc. ("CheckM8" or the "Company"), bring breach of fiduciary duty, declaratory judgment, fraud, aiding and abetting breach of fiduciary duty, conversion, and unjust enrichment claims against CheckM8, Spotible, Inc. ("Spotible"), and Dana Ghavami ("Ghavami") arising out of CheckM8's merger with Spotible. Pursuant to the terms of the merger agreement, CheckM8 cancelled all shares belonging to minority shareholders holding less than ten percent (10%) of the Company and paid the minority shareholders $0.0375 per share. Plaintiffs allege the amount CheckM8 paid to "cash out" the minority shareholders

was inadequate. Defendants CheckM8, Ghavami, and Spotible now jointly seek dismissal of the Verified Complaint pursuant to CPLR 3211(a)(1) and (7).

## I. Background

This action arises out of a merger transaction whereby CheckM8 merged with Spotible. Both CheckM8 and Spotible are Delaware corporations with principal places of business in New York. CheckM8 was founded in 2000 and was engaged primarily in the business of internet advertising. Compl. ¶ 40. In exchange for a subscription fee, CheckM8 offered internet website owners access to its proprietary software-based system for online advertisement and yield management, advertisement delivery, inventory management, and rich media management and services. *Id.* ¶¶ 40-42. Ghavami was CheckM8's chief executive officer, director, and majority shareholder. On August 31, 2015, Spotible was incorporated to facilitate CheckM8's reorganization. Ghavami Affid. ¶ 3. Spotible was incorporated by Ghavami and Ghavami was the chief executive officer, director, and sole shareholder of Spotible. Compl. ¶ 3.

Plaintiffs are eighteen investors who purchased and/or acquired shares in CheckM8 and collectively held approximately 18.37% equity in the Company as of the date of the vote for the merger transaction. *Id.* ¶ 44. Plaintiffs allege Ghavami engaged in self-dealing by diluting Plaintiffs' shares in the Company and effectuating the merger, which divested Plaintiffs of their interests in the Company for inadequate compensation.

A. Share Dilution

Plaintiffs allege Ghavami violated Plaintiffs' rights to protection against dilution of equity in the Company by issuing more shares of the Company to other investors, without providing notice to Plaintiffs that they had a right or opportunity to purchase such shares. Compl. ¶ 45. Moreover, Ghavami allegedly failed to disclose the details and terms of the proposed share redemptions arising from a Company share repurchase program. *Id.* ¶ 59. According to the Verified Complaint, Ghavami purchased some of these shares for himself for suspect consideration. *Id.*

B. The Merger with Spotible

Plaintiffs further allege Defendants engaged in a scheme to divest minority shareholders of their interests in CheckM8 for inadequate compensation. Ghavami obtained an "Irrevocable Proxy and Power of Attorney" from all or some of the Plaintiffs to implement his alleged scheme. The irrevocable proxy provided, *inter alia*, that Ghavami was the shareholder's proxy and attorney-in-fact and authorized Ghavami to vote in the proxy holder's capacity at all Company meetings. Compl. ¶ 48. According to the Verified Complaint, Ghavami improperly and fraudulently used these irrevocable proxies to vote the Plaintiffs' shares in favor of a merger transaction between CheckM8 and Spotible.

Ghavami, on behalf of CheckM8, sent a letter and Notice of Special Meeting of Shareholders, dated September 1, 2015, to Plaintiffs informing them of an anticipated

merger with Spotible and calling for a special meeting of the shareholders to be held on September 30, 2015 (the "Special Meeting"). *Id.* ¶ 54.

The letter stated a considerable percentage of shareholders sold their interests in the Company as of 2015, and a supermajority of the remaining shareholders (greater than 2/3 of the Company) were in favor of exiting by way of the announced reorganization and merger. The letter further provided the Board derived a valuation of the Company of $909,000 by applying a multiple of 1.5x to the Company's last closed earnings before interest, taxes, depreciation and amortization ("EBITDA"). In addition, the Notice stated the Company sought to cash out minority shareholders holding less than ten percent (10%) of the aggregate issued and outstanding equity of CheckM8 by paying such minority shareholders $0.0375 per share. *Id.* ¶ 55.

After receiving the letter and Notice, Plaintiffs requested information and documents from Ghavami and CheckM8 to make an informed decision regarding the merits of the propose merger. *Id.* ¶ 56. However, Ghavami and CheckM8 failed and/or refused to furnish such documents and information despite due demand. To date, the only information provided by Ghavami or CheckM8 is a list of shareholders containing partial information and the Company's Annual Reports. *Id.* ¶ 58.

On September 30, 2015, the Special Meeting was held and the shareholders voted to approve the proposed merger between CheckM8 and Spotible. At the Special Meeting, Ghavami used at least one of the proxies obtained from Plaintiffs to vote in favor of the merger transaction. *Id.* ¶ 50. The merger was effectuated on October 27, 2015.

Plaintiffs commenced this action by Summons and Verified Complaint, asserting six causes of action for breach of fiduciary, declaratory judgment, fraud, aiding and abetting breach of fiduciary duty, conversion and unjust enrichment. Presently before the Court is Defendants' motion to dismiss the Verified Complaint, pursuant to CPLR 3211(a)(1) and (7).

## II. Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed in a light most favorable to the plaintiffs, all factual allegations must be accepted as true and all inferences which reasonably flow therefrom must be resolved in favor of the plaintiff. *See Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st

Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

## III. Discussion

Defendants now move to dismiss the Verified Complaint pursuant to CPLR 3211(a)(1) and (7).

New York choice-of-law rules provide substantive issues of corporate governance are governed by the law of the state in which the corporation is chartered. *See Hart v. Gen. Motors Corp.*, 517 N.Y.S.2d 490, 492 (1st Dep't 1987), *lv. denied*, 70 N.Y.2d 608 (1987). The "internal affairs doctrine" recognizes that the state of incorporation has an interest superior to that of other states in regulating the directors' conduct of the internal affairs of its own corporations. *See id.* at 494. Here, both CheckM8 and Spotible are incorporated in Delaware and therefore Delaware law applies.

A. CheckM8's Capacity to be Sued

Defendants argue the claims against CheckM8 should be dismissed because all rights, obligations, and liabilities belonging to CheckM8 were transferred to Spotible as of October 27, 2015, the date the merger was effected. Pursuant to Delaware General Corporation Law ("DGCL") § 259, all constituent corporations cease to exist when any merger becomes effective. Plaintiffs have not proffered any evidence of CheckM8's continued existence, nor provided any rationale for maintaining the cause of action against CheckM8. Therefore, Defendants' motion to dismiss the claims against CheckM8 is granted.

B. Breach of Fiduciary Duty

Plaintiffs allege Ghavami breached his fiduciary duty by merging the Company with Spotible and cashing out the Plaintiffs' interests in the Company for inadequate compensation. Furthermore, Plaintiffs allege Ghavami breached his fiduciary duty by diluting Plaintiffs' equity in the Company, withholding the release of Company technology until after the merger was effectuated, withholding dividend distributions, and misappropriating corporate funds. Ghavami argues the merger satisfies the "entire fairness" test under Delaware law and Plaintiffs' additional allegations of breach of fiduciary duty are contradicted by documentary evidence.

Breach of fiduciary duty claims require "(1) that a fiduciary duty existed and (2) that the Defendant breached that duty." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601

(Del. Ch. 2010). Directors owe fiduciary duties of loyalty and due care to the corporation and its shareholders. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989). In addition, a shareholder owes a fiduciary duty to other shareholders if it owns a majority interest in the Company or exercises control over the business affairs of the Company. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994).

The duty of care requires a person "use that amount of care which ordinarily careful and prudent [persons] would use in similar circumstances and consider all material information reasonably available in making business decisions." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (internal citations and quotation marks omitted).

The duty of loyalty provides "the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Id.* at 751. A director or controlling shareholder's loyalty can be called into question by showing the director was interested in the transaction. *See In re Orchard Enter., Inc. Stockholder Litig.*, 88 A.3d 1, 33 (Del. Ch. 2014).

1. *The Merger with Spotible*

Where a company insider stands on both sides of the challenged transaction or a majority shareholder is the proponent of a cash out merger, the "entire fairness" test is applied. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *Kahn v. Lynch*

*Commc'ns Sys.*, 638 A.2d 1110, 1115 (Del. 1994). The entire fairness test is not a bifurcated one; fair dealing and fair price must both be pled. *Weinberger*, 457 A.2d at 711. At the pleading stage, the Plaintiffs must make factual allegations that the merger was effectuated without fair dealing or fair price. *See Monroe Cnty. Emp. Retire. Sys. v. Carlson*, No. CIV.A. 4587-CC, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010).

Plaintiffs allege Ghavami stood on both sides of the merger, as director, chief executive officer, and majority shareholder of the Company and Spotible. Thus, the "entire fairness" test would apply and Defendants bear the burden of showing the transaction was entirely fair to Plaintiffs. *See Weinberger,* 457 A.2d at 703.

a. *Fair Dealing*

The fair dealing prong of the "entire fairness" test concerns the process of the merger, i.e., timing, structure, disclosure of information to directors and shareholders, and how approvals were obtained. *See Weinberger*, 457 A.2d at 711. Here, Plaintiffs have sufficiently alleged a lack of fair dealing and Defendants have not provided evidence of fair process to rebut the allegations.

Plaintiffs allege Ghavami failed to disclose his position as chief executive officer, director, and sole shareholder at Spotible. Directors and majority shareholders owe a duty to minority shareholders to disclose information, within their knowledge, which might assist the minority in taking a position on the proposed merger. *See Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 171 (Del. 1991). In order to show fair dealing,

Defendants have the burden of establishing they completely disclosed all material facts relevant to the transaction. *Weinberger*, 457 A.2d at 703. Here, Defendants do not argue Ghavami ever disclosed his position with Spotible.

Furthermore, where the transaction is approved by a special committee of disinterested directors or an informed vote of a majority of the minority shareholders, the burden of proving the transaction was unfair shifts to the plaintiffs. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994). Here, CheckM8 did not create a special committee of directors to review and approve the proposed merger. *See* Compl. ¶ 69. CheckM8 also did not conduct a minority shareholder vote. The proposed merger was approved by the shareholders at the Special Meeting. However, Ghavami, the controlling shareholder, was entitled to participate and voted in favor of the merger. Thus, the merger was not approved by an informed majority of minority shareholders.

Therefore, Plaintiffs sufficiently plead an absence of fair dealing and Defendants fail to rebut this allegation.

b. *Fair Price*

The fair price prong of the "entire fairness" test relates to financial and economic considerations of the proposed merger. *See Weinberger*, 457 A.2d at 711. In determining fair price, the Company's "market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the

merged corporation . . . must be considered." *Id.* at 713. A fair price "means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995).

Plaintiffs allege the compensation they received for their interests in the Company was woefully inadequate. Plaintiffs rely on a valuation formula propounded by the Company in a 2006 private placement memorandum, which calculated the Company's value by multiplying the revenue from the previous year by six. Pls.' Brief in Opp. at 10. In 2014, the Company had $3,125,000 in revenue. According to Plaintiffs' calculations, the value of the Company at the time of the merger should have been $18,750,000 instead of $909,000. In addition, Plaintiffs contend Ghavami rejected two offers to acquire CheckM8 in 2011 and 2012 for $30,000,000 and $20,000,000. Lumpe Affid. ¶ 35. Thus, Plaintiffs have sufficiently alleged the compensation they received was unfair and the burden shifts to the Defendants to show the price was fair.

As an initial matter, Defendants contest the alleged offers to acquire CheckM8 ever existed and assert there were no other offers to purchase CheckM8 at the time of the merger. Defendants argue the price paid per share to the minority shareholders was fair based on the 2011 Share Repurchase Program and the acquisition price for two of CheckM8's competitors.

In 2011, CheckM8 initiated a Share Repurchase Program to address shareholder demands to have CheckM8 buy back their shares. Ghavami Affid. ¶ 13, Ex. D ¶ 62. The

Share Repurchase Program valued shares based upon a 1x multiple applied to EBITDA. *See id.*, Ex. D ¶ 63. Nine shareholders, representing nearly 25% of the then existing equity in the Company, and including CheckM8's largest and most sophisticated investors SoftBank and Sumitomo Corporation, elected to participate in the Share Repurchase Program. *See id.*, Ex. D ¶ 64. Defendants note the price per share at issue here is greater than the price per share received under the Share Repurchase Program.

Defendants also contend the acquisition of two of CheckM8's competitors, Republic Project and PointRoll, supports their argument that Plaintiffs were paid a fair price. Republic Project, a platform for bands and music labels to sell pre-orders of new music to fans, was acquired for $1.4 million in 2013. Ghavami Reply Affid. ¶ 11, Ex. D. PointRoll, CheckM8's closest "direct competitor," was acquired for $20 million in November 2015. *Id.* ¶ 11, Ex. C.

Furthermore, Defendants argue the acquisition of CheckM8's competitors exhibited underlying trends in the marketplace, as the competitors suffered from the same market forces CheckM8 faced. Specifically, Defendants note Republic Project was sold one year after receiving $1 million in Series A funding due to a dramatic shift in the company's trajectory. In addition, PointRoll, a larger and more robust company than CheckM8, was sold for 20% of what the company was previously sold for in 2005 and laid off nearly 100 employees after the acquisition. Defendants argue these difficulties evince the decline in business that motivated CheckM8's reorganization.

However, Defendants do not meet their burden of showing the price was fair. The sole support for Defendants argument is Ghavami's self-serving statements in his reply affidavit. Moreover, a fair price is defined as the price which a reasonable person would accept. A fair price is not limited to one specific value but encompasses a range of values. *See Cinerama*, 663 A.2d at 1143. The evidence Defendants proffer provides a starting point to valuate the Company. However, there is no conclusive evidence that the merger price reflected the Company's value at the time of the merger because Defendants never obtained an independent appraisal of the Company. Compl. ¶ 70.

Therefore, Defendants' motion to dismiss Plaintiffs' breach of fiduciary duty claim arising from the merger is denied.

2. *Other Alleged Breaches of Fiduciary Duty*

Plaintiffs further allege Ghavami breached the duty of loyalty by diluting Plaintiffs' interest in the Company, withholding the release of Company technology until after the merger was effectuated, withholding dividend distributions in 2013, and misappropriating Company funds.

a. *Dilution of Plaintiffs' Interests in the Company*

Plaintiffs allege Ghavami violated Plaintiffs' right to protection against dilution of their equity in the Company by issuing additional shares without providing Plaintiffs the opportunity to purchase such shares. Compl. ¶¶ 45-46. Under Delaware law, shareholders

do not inherently have anti-dilution or preemptive rights, unless expressly granted to such stockholders in the certificate of incorporation. *See* DGCL § 102(b)(3); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 172 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006). Ghavami contends Plaintiffs fail to allege breach of fiduciary duty because Plaintiffs never had anti-dilution rights or preemptive rights.

Defendants attach the Articles of Incorporation and Shareholder Purchase Agreements. *See* Ghavami Affid. ¶¶ 33-38, Exs. A & I. Under CPLR 3211(a)(1), Certificates of Incorporation and Shareholder Agreements may be documentary evidence if their contents are unambiguous. *See Fillman v. Axel*, 63 A.D.2d 876, 876 (1st Dep't 1978) (relying upon Certificate of Incorporation in CPLR 3211(a)(1) motion); *see also Taussig v. Clipper Grp., L.P.*, 13 A.D.3d 166, 167 (1st Dep't 2004) (finding interpretation of unambiguous agreement is issue of law for the court), *lv. denied*, 13 A.D.3d 166 (2005). Neither the Articles of Incorporation nor the Shareholder Agreements provide the shareholders with anti-dilution or preemptive rights. Therefore, Plaintiffs' claim for breach of fiduciary duty based on Plaintiffs' anti-dilution rights is dismissed.

b. *Delayed Release of New Technology*

Plaintiffs also allege CheckM8 had developed new products prior to the merger yet intentionally delayed the release of those products until after the merger had taken effect. Specifically, Plaintiffs refer to a new service called "Maestro."

Defendants argue Plaintiffs' allegation is contradicted by documentary evidence, which establishes Maestro was announced prior to the merger. In support of the CPLR 3211(a)(1) argument, Defendants provide a screenshot of what is purported to be the CheckM8 website in August 2014 that shows the words "MAESTRO – COMING THIS FALL." Ghavami Affid. Ex. J. In addition, Defendants provide the CheckM8 2014 Annual Report, which Defendants argue shows CheckM8's software was losing customers. Ghavami Affid. Ex. K. However, neither document unambiguously and conclusively contradicts Plaintiffs' allegations to merit dismissal pursuant to CPLR 3211(a)(1). *See Stern v. Ardachev*, 133 A.D.3d 502, 502 (1st Dep't 2015).

Nevertheless, the Court finds Plaintiffs' allegation regarding CheckM8's new technology is relevant to the entire fairness analysis of the merger, rather than an independent claim for breach of fiduciary duty. Thus, Plaintiffs' claim for breach of fiduciary duty based on Defendants' withholding new technology is dismissed.

c. *Unpaid Dividends and Misappropriation of Funds*

In 2014, the Company offered shareholders the option to receive a 2013 share dividend or a respective share repurchase. Compl. ¶ 47. Plaintiffs allege Defendants failed to pay dividends to shareholders in 2013. Defendants provide the checks and wire transfer confirmations for various amounts paid to Plaintiffs Bloch, Asseraf, Nevo, Gutmann, Haertfelder, Takashima, RAL Capital Limited, Sayag, and Cohen-Tannoudji for the 2013 dividend. Ghavami Affid. Ex. P. This evidence clearly contradicts Plaintiffs' allegation

that the Company withheld dividends in 2013. *See Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Therefore, Plaintiffs' claim based on Defendants failure to pay dividends in 2013 is dismissed as to Plaintiffs Bloch, Asseraf, Nevo, Gutmann, Haertfelder, Takashima, RAL Capital Limited, Sayag, and Cohen-Tannoudji.

Finally, Plaintiffs allege Ghavami misappropriated Company funds over the past several years. *See* Compl. ¶ 84. Plaintiffs argue Ghavami never accounted for millions of dollars of net profit the Company that were missing. Here, Plaintiffs' allegations that Ghavami misappropriated funds are conclusory and unsubstantiated by alleged facts. *See Steinberg v. Carey*, 285 A.D. 1131, 1131 (1st Dep't 1955) (dismissing conclusory allegations of breaches of fiduciary duty). Therefore, Plaintiffs fail to allege an independent claim for breach of fiduciary duty based on misappropriation of Company funds and this claim is dismissed.

C. Aiding and Abetting Breach of Fiduciary Duty

Plaintiffs allege Spotible aided and abetted Ghavami's self-dealing scheme against the Plaintiffs. To plead a claim for aiding and abetting breach of fiduciary duty, the party must allege (1) breach of fiduciary duty, (2) knowing participation in the breach, and (3) damages. *See Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

Plaintiffs allege Spotible knowingly participated in Ghavami's alleged scheme by virtue of the fact Spotible was completely controlled by Ghavami. Ghavami is Spotible's

sole officer and director. Ghavami Affid. ¶ 3. As such, it is evident Spotible had knowledge of the alleged breach.

Here, the issue is whether Plaintiffs allege Spotible actively participated in the breach. Plaintiffs allege "Spotible rendered substantial assistance in order to effectuate Ghavami's self-dealing plan to consummate the subject merger transaction." Compl. ¶ 102. Other than this conclusory statement, Plaintiffs do not allege any acts from which a claim for aiding and abetting breaches of fiduciary duty could be stated. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995). Therefore, the motion to dismiss the aiding and abetting breach of fiduciary claim against Spotible is granted.

D. Declaratory Relief/Rescission

Next, Plaintiffs allege entitlement to a declaratory judgment that the merger was the product of unfair dealing and is null and void. Pursuant to CPLR 3001, the Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Here, Plaintiffs' cause of action for declaratory judgment is duplicative of the claim for breach of fiduciary duty. Plaintiffs seek a declaration that the merger is null and void because it was effected by Ghavami's breach of fiduciary duty. Therefore, Defendants' motion to dismiss the claim for declaratory judgment is granted. *See Wildenstein v. 5H &*

*Co, Inc.*, 97 A.D.3d 488, 491 (1st Dep't 2012) (dismissing claims for declaratory judgment that duplicate breach of contract claim).

Yet, the Court finds dismissal of Plaintiffs' request for rescission and rescissory damages to be premature on a motion to dismiss. *See Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 991 (Del. Ch. 2000) (declining to address motion to dismiss rescission claim because the "determination of relief is beyond the scope of this motion and premature without an established evidentiary record"). Plaintiffs state a claim for breach of fiduciary duty and thus may seek rescission or rescissory damages as relief. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (finding elements of rescissory damages may be considered in entire fairness test).

E. Fraud

Plaintiffs allege Ghavami engaged in a fraudulent scheme to induce the Plaintiffs and other shareholders to approve the merger between CheckM8 and Spotible. Under Delaware common law, to plead a claim for fraud, plaintiffs must allege "(1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the

representation; and (5) the plaintiff was injured by its reliance." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005).[1]

Where a cause of action is based upon fraud, CPLR 3016(b) provides "the circumstances constituting the wrong shall be stated in detail." *See* CPLR 3016(b).[2] The pleading requirements of CPLR 3016(b) are a matter of procedure, governed by the law of the forum. *Westdeutsche Landesbank Girozentrale v. Learsy*, 284 A.D.2d 251, 252 (1st Dep't 2001). Plaintiffs must plead facts sufficient for the fact-finder to make a reasonable inference of fraud. *See Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 493 (2008).

Defendants argue Plaintiffs fail to allege any representations Ghavami made with adequate particularity. Plaintiffs allege Ghavami made false representations about the merger, the valuation of the Company, and the purpose of the proxies, and fraudulently concealed his conflict of interest.

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[1] The Court acknowledges New York law does not appear to be in conflict with Delaware law. To plead fraud in New York, Plaintiffs must show (1) a representation of material fact, (2) the falsity of that representation, (3) knowledge by the party who made the representation that it was false when made, (4) justifiable reliance by the Plaintiff, and (5) resulting injury. *Pope v. Saget*, 29 A.D.3d 437, 441 (1st Dep't 2006).

[2] *See also Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207 (Del. Ch. 2006) (Court of Chancery Rule 9(b) requires particularized fact pleading for fraud claims).

1. *Common Law Fraud*

Plaintiffs allege Ghavami "misrepresented" (1) "the intrinsic value of the company," (2) "the value of the Company to be 1.5x its last closed EBITDA," (3) the "business position and status of the Company," and (4) the "legitimate business purpose for the proposed merger transaction." Compl. ¶ 93. However, Plaintiffs do not reference the specific statements Ghavami made, the dates those representations were made, or to whom the representations were made. Instead, Plaintiffs offer conclusory allegations that Ghavami "misrepresented" the status of the Company and the true nature of the merger transaction. *See Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993) (dismissing conclusory allegations of fraud). Similarly, Plaintiffs fail to allege any representations Ghavami allegedly made regarding the purpose of the proxies. Thus, Plaintiffs fail to allege Ghavami's representations concerning the merger and purpose of the proxies with sufficient particularity.

2. *Fraudulent Concealment*

Plaintiffs also allege Ghavami failed to disclose that he stood on both sides of the merger transaction. A fraud claim "may occur through deliberate concealment of material facts, or by silence in the face of a duty to speak." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Where a fiduciary duty exists, the declarant's failure to disclose facts which are necessary to prevent other statements from being misleading may constitute actual fraud. *See id.* Under Delaware law, directors have a fiduciary duty to

fully and fairly disclose all material facts that would have a significant effect upon a stockholder vote." *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992). Therefore, Plaintiffs sufficiently allege Ghavami had a duty to disclose material information and failed to do so. Nevertheless, Plaintiffs fail to plead justifiable reliance.

To plead justifiable reliance, Plaintiffs must show they believed a fact to be true and justifiably took action based on that belief. *See Stephenson*, 462 A.2d at 1074; *see also Nabatkhorian v. Nabatkhorian*, 127 A.D.3d 1043, 1044 (2d Dep't 2015) (holding plaintiff must show a "change of position" to plead reliance). Here, Plaintiffs do not allege they voted in favor of the merger. Nor do Plaintiffs allege they would have voted against the merger, but Ghavami's misrepresentations induced them to alter their positions. In fact, Plaintiffs do not allege they took any action based on Ghavami's statements or omissions.[3] Therefore, Plaintiffs' fraud claim against Ghavami is dismissed. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142-43 (Del. Ch. 2003) (dismissing fraud claim for failure to allege justifiable reliance).

[3] The only Plaintiff who allegedly voted in favor of the merger was Yuji Takashima. Yet Takashima executed an irrevocable proxy in March 2010 that authorized Ghavami to vote for Takashima at shareholder meetings. Ghavami exercised that power and voted Takashima's shares in favor of the merger. Thus, Plaintiffs cannot allege Ghavami's failure to disclose caused Takashima to vote in favor of the merger.

F. Conversion

Plaintiffs allege they have legal ownership over the assets and property of the Company, which Defendants improperly took from them. A claim for conversion requires (1) plaintiff held a property interest in the stock; (2) plaintiff had a right to possession of the stock; and (3) defendant converted plaintiff's stock. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (internal quotation marks omitted). "A stockholder's shares are converted by any act of control or dominion without the stockholder's authority or consent, and in disregard, violation, or denial of his rights as a stockholder of the company." *Id.*

Under Delaware law, it is presumed that a merger results in the exercise of dominion and control over the stockholder's shares. *See id.* However, if the merger is given legal effect, the transfer is not a derogation of Plaintiffs' rights because "[a] stockholder simply has no right to shares in a disappearing corporation after an effective merger." *Id.*

In *Arnold v. Society for Savings Bancorp, Inc.*, plaintiff shareholder argued defendants wrongfully exercised control over his shares by way of a merger. Specifically, plaintiff argued defendants failed to disclose a prior bid for the defendant corporation's subsidiary and thus rendered the merger void. *See id.* at 535. The Delaware Supreme Court found the defendants complied with all the express statutory requirements for the merger and dismissed plaintiff's conversion claim. *Id.* at 536-37. In

doing so, the Court rejected plaintiff's argument that a merger which does not comply with the law constitutes conversion. *See id.* n.6.

Here, Plaintiffs do not allege Defendants failed to meet any of the express statutory requirements for the merger. Instead, Plaintiffs allege the transaction was void due to Ghavami's alleged breach of fiduciary duties and fraud. These claims arise from common law and are not based on violations of the statutory requirements. *See id.* at 537 (finding judicially imposed fiduciary duty of disclosure applies as a corollary to statutory requirements). Therefore, Plaintiffs' claim for conversion is dismissed.

G. Unjust Enrichment

Finally, Plaintiffs allege the Defendants were enriched at Plaintiffs' expense by acquiring Plaintiffs' interests in the Company for inadequate compensation. Unjust enrichment requires the plaintiff demonstrate: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

Here, Plaintiffs' claim for unjust enrichment restates the allegation that Plaintiffs' did not receive a fair price for their shares in the Company and seeks to obtain the same relief as the breach of fiduciary duty claim against Ghavami. Dismissal is warranted where the elements of proof and possible recoveries are the same. *See Frank v. Elgamal*, No. CIV.A 6120-VCN, 2014 WL 957550, at *31-32 (Del. Ch. Mar. 10, 2014) (dismissing

unjust enrichment claim as duplicative of breach of fiduciary duty claim). Therefore, the claim for unjust enrichment is dismissed.

## IV. Conclusion

ACCORDINGLY, it is hereby

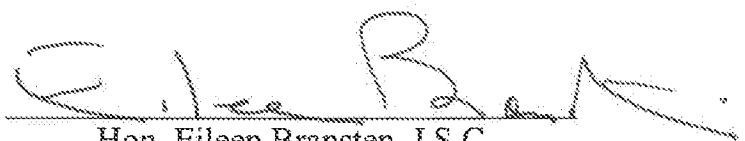
ORDERED, Defendants' motion to dismiss the Verified Complaint is DENIED IN PART as to Plaintiffs' claim for breach of fiduciary duty arising from CheckM8's merger with Spotible; it is further

ORDERED Defendants' motion to dismiss is GRANTED IN PART as to Plaintiffs' claims for declaratory judgment, fraud, conversion, unjust enrichment, and breach of fiduciary duty arising from the dilution of Plaintiffs' interests in the Company, the delayed release of new technology, non-payment of dividends, and misappropriation of Company funds.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 21, 2017

ENTER:



Hon. Eileen Bransten, J.S.C.