

**Polaris Venture Partners VI, L.P. v Ad-Venture  
Capital Partners, L.P.**

2021 NY Slip Op 31423(U)

April 27, 2021

Supreme Court, New York County

Docket Number: 650623/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 650623/2018

POLARIS VENTURE PARTNERS VI, L.P., POLARIS VENTURE PARTNERS FOUNDERS' FUND VI, L.P.

MOTION DATE 02/12/2021

Plaintiff,

MOTION SEQ. NO. 008

- v -

AD-VENTURE CAPITAL PARTNERS, L.P., BRIAN ADDY,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 136, 137, 138, 139, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 173

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Polaris Venture Partners, VI, L.P. and Polaris Partners Founders' Fund VI, L.P.'s (collectively, Polaris) motion for summary judgment must be granted. The Delaware Appraisal (the Delaware Appraisal; NYSCEF Doc. No. 34) is prima face evidence of the damages due Polaris. The underlying premise which dooms Ad-Venture Capital Partners, L.P.'s (Ad-Venture) position is based on Polaris' failure to have its option shares included in the Delaware Appraisal. This theory fails as a matter of law because the sole reason Polaris did not have its option shares included in the Delaware Appraisal is that Ad-Venture frustrated their ability to do so. Thus, having failed to create an issue of fact for trial, Polaris' motion must be granted.

For completeness, previously, on August 7, 2019, the court had granted Polaris summary judgment solely with respect to liability for breach of a certain Stock Transfer Agreement and

denied summary judgment on damages to Polaris because discovery had not yet occurred (*see* Mot. Seq. No. 002; NYSCEF Doc. No. 64). At the conclusion of discovery, on December 20, 2020, this court granted leave to Polaris to renew its motion for summary judgment because it had become clear that Ad-Venture's theory of damages is premised on Polaris's failure to have its option shares included in the Delaware Appraisal. As this court previously explained, Polaris' failure occurred solely because of Ad-Venture and as such the Delaware Appraisal is *prima facie* evidence of the damages owed to Polaris (NYSCEF Doc. No. 131 at 1).

Polaris now moves for summary judgment on the issue of damages equal to the difference between what Polaris would have received for its 76 option shares of ISN Software Corporation (ISN) if they had been included in the Delaware Appraisal (\$98,783 per share) and the price under the purchase option in the Stock Transfer Agreement (\$29,783.30 per share). Ad-Venture's argument that the Delaware Chancery Court would have valued the shares differently had they actually been included in the Delaware Appraisal fails. ISN's CEO and director, Bill Addy, testified that the company's operations, financial condition, and business prospects did not change between the merger date that was used by the Delaware Chancery Court and the date of Ad-Venture's breach approximately two months later (NYSCEF Doc. No. 139 at 30). In addition, as discussed above, Ad-Venture can not claim that damages should be assessed on the basis that Polaris did not have independent appraisal rights and that the option shares might not have been included in the Delaware Appraisal (*see* NYSCEF Doc. Nos. 64, 131). To the extent that Ad-Venture asserts that a damages award should be reassessed on what knowledgeable investors anticipated the future conditions and performance would be at the time of the breach under New York law (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 11 [1st Dept 2008])

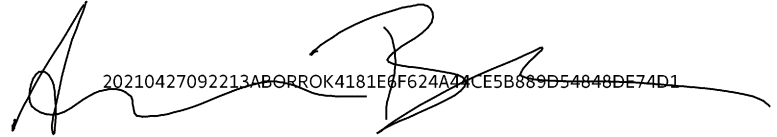
[citations omitted]), this is precisely what the Delaware Chancery Court did when it undertook a detailed analysis of ISN's fair value based on the corporation's operative reality and accounted for facts which were known or which could be ascertained as of the date of the merger (NYSCEF Doc. No. 34 at 6). Finally, Ad-Venture is judicially estopped from arguing that any transactions predating the Delaware Appraisal should be included in a valuation of the option shares. Judicial estoppel prevents a party who assumed a position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed (*Becerril v City of NY Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013]). Ad-Venture previously argued that the prior transactions were unique and distressed transactions that were unrelated to the fair value of ISN shares. This argument the Delaware Chancery Court adopted when it determined that the prior transactions were an unreliable indicator of fair value (*compare* NYSCEF Doc. No. 30 at 55-62, *with* NYSCEF Doc. No. 34 at 10-11). Thus, Ad-Venture is not permitted to take a contrary position in these proceedings that the prior transactions should be accounted for in a damages analysis before this court.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Polaris Venture Partners, VI, L.P. and Polaris Partners Founders' Fund VI, L.P. and against Ad-Venture Capital Partners, L.P. in the amount of \$5,243,977.20, plus statutory interest of 9% from March 13, 2013 until the

date of entry of judgment, plus statutory interest of 9% per annum from the date of entry of judgment, plus costs and disbursements as allocated by the Clerk. The plaintiffs shall have execution thereof.



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4/27/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE