STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: March 18, 2019]

MICHAEL SILVEIRA and	:	
CHARLOTTE JASON,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-2018-6036**
	:	
START, INC. d/b/a START TRAFFIC	:	
and BARNABY START,	:	
Defendants.	:	

DECISION

STERN, J. The instant matter comes before the Court on Defendants Start, Inc. d/b/a Start Traffic (the Corporation), and Barnaby Start's (Barnaby) (collectively, Defendants) Motions to Dismiss. Defendants move to dismiss Plaintiffs Michael Silveira (Silveira) and Charlotte Jason's (Jason) (collectively, Plaintiffs) Verified Complaint for failure to state a claim upon which relief can be granted. Jurisdiction is pursuant to Super. R. Civ. P. 12(b)(6).

I

Facts and Travel

The instant action was brought by the Plaintiffs on August 22, 2018 as shareholders and former officers of the Corporation. Verified Compl. (Compl.) ¶ 1. In 2014, Barnaby and Silveira agreed to create a corporation in the United States, and included Jason as an equity partner. Compl. ¶¶ 9-12. According to Plaintiffs, the parties agreed that Plaintiffs would each be granted a ten percent share and Barnaby would have an eighty percent share. Compl. ¶ 14. The parties discussed the Plaintiffs receiving "sweat equity" before the Corporation became

profitable, and Plaintiffs allege Barnaby represented that he would provide $500,000 in funding for the Corporation. Compl. ¶¶ 13, 15. Plaintiffs assert they believed they would be paid salaries in lieu of dividends, as well as a $750 per week stipend and housing accommodations. Compl. ¶¶ 18, 20. On December 9, 2014, the parties signed a Shareholder Agreement. Def.'s Ex. A. The Corporation began operating on December 14, 2014. Compl. ¶ 21. Barnaby provided $50,000 in secured loans with a promissory note from the accounts of his business located in the United Kingdom as start-up funds for the Corporation. Plaintiffs allege the Corporation became self-sufficient in March of 2016, and that as of September 1, 2017, the Corporation surpassed one million dollars in annual sales. Compl. ¶¶ 42, 43.

Beginning in January, and again in May and September of 2017, Plaintiffs claim they discussed redistributing the equity with Barnaby. Compl. ¶ 45. On October 29, 2017, Plaintiffs and Barnaby met to discuss redistributing the equity, and Plaintiffs informed Barnaby they did not intend to continue to work for the Corporation unless the equity was redistributed. Compl. ¶¶ 46, 47. The parties did not reach a finalized, written agreement at that time, and at a subsequent meeting on October 31, 2017, again did not reach a finalized, written agreement. Compl. ¶¶ 48-51. On November 5, 2017, Barnaby and the Plaintiffs met again. According to Plaintiffs, Barnaby indicated he would agree to equity redistribution in exchange for unrestricted access to the Corporation's records and finances. Compl. ¶ 62. Barnaby subsequently granted access to said records and finances to Barnaby's private accountant, Timothy Gordon (Gordon). Compl. ¶ 64.

On January 5, 2018, Barnaby noticed a shareholders meeting to take place on January 22, 2018. Compl. ¶ 74. At the meeting, Plaintiffs allege they were accused of "irregular and negligent management," and "outright embezzlement and fraud." Compl. ¶ 78. Plaintiffs also

allege that at the meeting, Gordon claimed the Corporation had a $140,000 deficit, and Barnaby and his attorney, Miriam Ross, discussed the possibility of a buyout. Compl. ¶¶ 79, 81, 82. Plaintiffs claim they left the meeting early, and that when they arrived at their house—which also served as the Corporation's headquarters—there was a security team on the premises removing items related to the Corporation at Barnaby's request. Compl. ¶¶ 87-90. Later that day, Plaintiffs claim they were served with an eviction notice by Barnaby. Compl. ¶ 94.

According to Plaintiffs, on February 13, 2018, Plaintiffs were given letters stating, in part,

> "[t]he results of this investigation show that your conduct and performance disregarded the [Corporation's] interest and resulted in substantial financial loss to the [Corporation]. Further, it also appears you used [the Corporation's] funds and resources under your care and charge by virtue of your position for personal benefit and use. Therefore, your employment with the [Corporation] is terminated effective immediately." Compl. ¶ 96.

Following this letter, Plaintiffs assert that Barnaby began eviction proceedings against them. Compl. ¶ 98. Plaintiffs claim they came to an agreement with Barnaby in which Plaintiffs agreed to voluntarily vacate the house if Barnaby paid them $850, but that Barnaby subsequently breached the terms of said agreement. On March 7, 2018, Plaintiffs sent a letter to Defendants demanding that they preserve evidence related to this impending matter. Compl. ¶¶ 99-102.

According to Plaintiffs, since the above-detailed events, Barnaby has hired a new employee, sold the property previously used as housing accommodations for the Plaintiffs and as the offices for the Corporation, and has been improperly transferring corporate assets. Plaintiffs assert they have been requesting to inspect the Corporation's books and records pursuant to G.L. 1956 § 7-1.2-1502, but that the Corporation has only provided "superficial summaries of

accounts." Plaintiffs allege they made repeated attempts to review and copy the Corporation's books and records, and all attempts were rebuffed. Compl. ¶¶ 123-135.

As such, Plaintiffs asserted thirteen claims in their Complaint against Defendants: (1) Breach of Contract; (2) Promissory Estoppel; (3) Unjust Enrichment; (4) Breach of Fiduciary Duty; (5) Fraud and Deceit; (6) Conversion; (7) Waste, Misuse and Misappropriation of Corporate Assets, and Ultra Vires Acts; (8) Negligent Misrepresentation; (9) Wrongful Discharge; (10) Defamation; (11) Violation of R.I.G.L. § 7-1.2-1502; (12) Breach of the Implied Covenant of Good Faith and Fair Dealing; and, (13) Dissolution.

II

Standard of Review

"[T]he 'sole function of a motion to dismiss is to test the sufficiency of the complaint.'" *Multi-State Restoration, Inc. v. DWS Properties, LLC*, 61 A.3d 414, 416 (R.I. 2013). "'When ruling on a Rule 12(b)(6) motion [to dismiss], the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" *Laurence v. Sollitto*, 788 A.2d 455, 456 (R.I. 2002) (internal quotations omitted) (quoting *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). "[A] motion to dismiss should be granted only 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Rein v. ESS Group, Inc.*, 184 A.3d 695, 702 (R.I. 2018) (quoting *Goddard v. APG Security—RI, LLC,* 134 A.3d 173, 175 (R.I. 2016)). "The plaintiff is not required to plead the ultimate facts that must be proven in order to succeed on the complaint. The plaintiff is also not obligated to set out the precise legal theory upon which his or her claim is based." *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992).

Instead, "[a]ll that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted." *Id.*

Rule 12(b)(6) has a narrow and specific purpose: "'to test the sufficiency of the complaint.'" *Multi-State Restoration, Inc.*, 61 A.3d at 416 (quoting *Laurence*, 788 A.2d at 456). "'[W]hen the motion justice receives evidentiary matters outside the complaint and does not expressly exclude them in passing on the motion, then Rule 12(b)(6) specifically requires the motion to be considered as one for summary judgment.'" *Multi-State Restoration, Inc.*, 61 A.3d at 416 (citing *Martin v. Howard*, 784 A.2d 291, 298 (R.I. 2001)). Recently, the Supreme Court has adopted[1] the First Circuit Court of Appeals' exception to this rule that "if 'a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), [then] that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).'" *Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 22 (R.I. 2018) (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005)).

III

Analysis

First and foremost, despite not being included in Plaintiffs' complaint, Defendants ask this Court to consider documents outside the four corners of the complaint: the Shareholder Agreement, a Promissory Note, and an email dated October 25, 2017. Plaintiffs included in their supporting memorandum and ask that this Court consider a letter demanding inspection of the

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[1] *See Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 973 (R.I. 2017) ("'[t]here is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint'") (internal quotations omitted) (quoting *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001)).

Corporation's records, and the letter they received in response. Plaintiffs include in their complaint a number of counts which are expressly linked to both the Shareholder Agreement, and thus this document "effectively merges into the pleadings" and can be reviewed by this Court. *See Mokwenyei*, 198 A.3d at 22. The other documents that both Plaintiffs and Defendants request this Court consider, however, will not be considered in this motion to dismiss. The allegations are not "dependent upon" these documents, and the Court's consideration of said documents would be beyond the narrow scope of a motion to dismiss. *See id.* at 23*; see also Multi-State Restoration, Inc.*, 61 A.3d at 418.

Turning now to the individual counts of the Complaint, the Defendants move to dismiss all thirteen counts.[2] In the event that any of the counts in the Complaint are insufficient and the Court grants the Defendants' motion, Plaintiffs ask that this Court grant leave to amend the Complaint pursuant to Rule 15(a).[3]

A

Count I: Breach of Contract

Barnaby asserts that Plaintiffs' breach of contract claim (Count I) fails to state a claim for which relief can be granted for the following reasons: (1) the Shareholder Agreement does not mandate redistribution of equity, and (2) the alleged agreement the parties entered into on

[2] Both Defendant Barnaby and Defendant Corporation moved to dismiss the Complaint. Defendant Corporation's supporting memorandum addressed all counts, despite some counts being individually brought against Defendant Barnaby and not the Corporation itself. Barnaby later individually submitted a memorandum supporting his motion to dismiss and incorporated the Corporation's memorandum by reference therein.

[3] "'[T]rial justices should liberally allow amendments to the pleadings,'" and "'leave shall be freely given when justice so requires.'" *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 530 (R.I. 2011) (quoting *Medeiros v. Cornwall*, 911 A.2d 251, 253 (R.I. 2006)). While "the decision as to whether or not to grant leave to amend is confided to the sound discretion of the hearing justice, . . . discretion is *inherently constrained* by the plain language of Rule 15(a)." *Id.* at 531 (emphasis in original). As such, "the proverbial scales are tipped at the outset in favor of permitting the amendment." *Id*.

October 29, 2017 was not valid and cannot be enforced. Plaintiffs contend that the Shareholder Agreement did provided for transfer of shares between shareholders, and that the October 29, 2017 agreement was both valid and enforceable.

"It is well established that a valid contract requires 'competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" *DeAngelis v. DeAngelis*, 923 A.2d 1274, 1279 (R.I. 2007) (quoting *Rhode Island Five v. Med. Assocs. of Bristol Cty., Inc.*, 668 A.2d 1250, 1253 (R.I. 1996)). Sufficient, legal consideration exists when "something is bargained for . . . [and] 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" *DeAngelis*, 923 A.2d at 1279 (quoting *Filippi v. Filippi*, 818 A.2d 608, 624 (R.I. 2003)). Consideration may consist of "either a benefit to the party promising or a prejudice or trouble to the party to whom the promise is made." *Id*. In order to prevail on their claim for breach of contract, Plaintiffs "must not only prove both the existence and breach of a contract, [they] must also prove that [Barnaby's] breach thereof caused [them] damages." *Petrarca v. Fid. & Cas. Ins. Co.*, 884 A.2d 406, 410 (R.I. 2005).

Here, Plaintiffs have alleged that the October 29, 2017 oral agreement (October Agreement) was a valid and enforceable contract, and that Barnaby's breach of the October Agreement caused them damages. Plaintiffs first allege the October Agreement is valid because the Shareholder Agreement provides that "[s]hareholders may, without first offering such Shares for sale to the Company, transfer all or a portion of their Shares to other Shareholders on a Pro Rata basis . . . <u>upon such terms and conditions as such Shareholders shall mutually agree</u>." Shareholder Agreement § 2.7, at 4 (emphasis added). Additionally, Plaintiffs allege the October Agreement is valid and enforceable because "[a]fter several hours of negotiations, the parties

agreed to the following terms," (Compl. ¶ 48)[4] that "Plaintiffs reasonably interpreted Barnaby's silence as a representation that he intended to abide by [the October Agreement,]" (Compl. ¶ 72) and Plaintiffs "have suffered substantial harm including, but not limited to, lost profits, lost equity in Start Traffic and lost benefits as contemplated by the [October Agreement]." (Compl. ¶ 145). By the express language of the Complaint, the Plaintiffs have sufficiently alleged a claim for breach of contract needed to withstand Barnaby's motion to dismiss. *See Petrarca*, 884 A.2d at 410.

The Court's duty when considering a motion to dismiss is solely "'to test the sufficiency of the complaint.'" *Audette v. Poulin*, 127 A.3d 908, 911 (R.I. 2015) (quoting *Ho-Rath v. R.I. Hospital*, 115 A.3d 938, 942 (R.I. 2015)). Rule 8(a) requires only that a complaint provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Super. R. Civ. P. 8(a). Taking the Plaintiffs' allegations as true and resolving any doubts in their favor, the motion as it relates to Count I is denied.

B

Count II: Promissory Estoppel

Barnaby next asserts that Count II fails to state a claim for which relief can be granted because Plaintiffs fail to establish they changed their position or relied to their detriment based on the October Agreement. Plaintiffs claim that Barnaby's repeated representations and failure

[4] Plaintiffs allege the October Agreement consisted of the following terms:

> "(a) Redistribution of equity in Start Traffic in equal, 25% shares to Silveira, Jason, Danny and Barnaby;
> "(b) Silveira, Jason and Danny would continue in their respective positions managing the day-to-day affairs of Start Traffic; and
> "(c) The terms of the agreement would be memorialized in writing and the new arrangement ratified by the Corporation during a shareholders meeting on October 31, 2017 at the offices of Attorney Miriam Ross." Compl. ¶ 48.

to repudiate the terms of the October Agreement caused Plaintiffs to rely on said representations and in turn remain in their professional positions with the Corporation, believing the Corporation's equity would be redistributed in their favor.

"'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of its promise.'" *E. Providence Credit Union v. Geremia*, 103 R.I. 597, 601, 239 A.2d 725, 727 (1968) (quoting Restatement (First) of *Contracts* § 90 (1932)). The Rhode Island Supreme Court requires the following to show promissory estoppel: "'1. A clear and unambiguous promise; 2. Reasonable and justifiable reliance upon the promise; and 3. Detriment to the promisee, caused by his or her reliance on the promise.'" *Cote v. Aiello*, 148 A.3d 537, 547 (R.I. 2016) (quoting *Filippi*, 818 A.2d at 626).

In the Complaint, Plaintiffs allege Barnaby agreed to the terms of the October Agreement, that Plaintiffs reasonably relied on that agreement or promise, as well as Barnaby's alleged subsequent representations, and that such reliance was to Plaintiffs' detriment. Plaintiffs assert they "continued to prudently manage the Corporation and to faithfully fulfill their fiduciary duties," and that they had made it clear they would not do so if Barnaby did not fulfill his promises in the October Agreement. Compl. ¶¶ 47, 73. Barnaby asserts his alleged promises are unenforceable and that Plaintiffs did not reasonably rely on these alleged promises to their detriment.

Whether Plaintiffs' reliance was reasonable, or whether Barnaby's alleged promises are enforceable are not issues for this Court to decide at this time. See *Multi-State Restoration, Inc.*, 61 A.3d at 416 ("the sole function of a motion to dismiss is to test the sufficiency of the

complaint.”). Plaintiffs need not “set out the precise legal theory upon which [their] claim is based,” nor must they “plead the ultimate facts that must be proven in order to succeed on the complaint.” *Haley*, 611 A.2d at 848. Instead, Plaintiffs provided Barnaby with fair and adequate notice of their promissory estoppel claim. As such, Barnaby failed to meet his burden as it relates to Count II.

C

Count III: Unjust Enrichment

In Count III of the Complaint, Plaintiffs assert that “Defendants have been unjustly enriched at the expense of the Plaintiffs and the Plaintiffs demand just compensation therefor.” Compl. ¶ 153. In their memorandum, Plaintiffs allege that Barnaby’s “failure to pay the fair value of a benefit gives rise to an unjust enrichment claim even where some token payment has been made.” Defendants, on the other hand, contend Plaintiffs fail to state a claim upon which relief can be granted because Plaintiffs were compensated for their services and initially agreed to said compensation.

In order to establish unjust enrichment, a plaintiff must show: “‘(1) a benefit must be conferred upon the defendant by the plaintiff, (2) there must be appreciation by the defendant of such benefit, and (3) there must be an acceptance of such benefit in such circumstances that would be inequitable for a defendant to retain the benefit without paying the value thereof.’” *McKenna v. Guglietta*, 185 A.3d 1248, 1252 (R.I. 2018) (quoting *Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997)). Plaintiffs point to the federal court holding in *Century Indemnity Company* that an unjust enrichment claim existed when “‘one of two or more guarantors’ . . . [had] to bear more than [its] fair share of a common burden.” *Century Indem. Co. v. Liberty Mut. Ins. Co.*, 815 F. Supp. 2d 508, 513-14 (D.R.I. 2011) (quoting *Thomas v. Jacobs*, 751 A.2d

732, 734 (R.I. 2000)). Plaintiffs' reliance on this case, however, is misplaced. This case does not involve multiple guarantors, and therefore, that reasoning is inapposite here.

Unjust enrichment is "[t]he retention of a benefit conferred by another, *who offered no compensation*, in circumstances where compensation is reasonably expected." Black's Law Dictionary 1771 (10th ed. 2014) (emphasis added). Additionally, "'[i]t is well established that recovery for unjust enrichment is predicated upon the equitable principle that one shall not be permitted to enrich himself at the expense of another by receiving property or benefits *without making compensation for them*.'" *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 213 (R.I. 2015) (emphasis added) (internal quotations omitted) (quoting *Emond Plumbing & Heating, Inc. v. BankNewport*, 105 A.3d 85, 90 (R.I. 2014)). While Plaintiffs allege they were not compensated for the ultimate *value* of their services, Plaintiffs were, in fact, compensated. Additionally, Plaintiffs agreed, at least initially, to their compensation of "$750 per week in addition to the benefit of living in the house being used at Start Traffic's headquarters." Compl. ¶ 20. Plaintiffs' belief—that the value of the services they provided is now worth more than the amount they originally agreed to be paid for—does not amount to an unjust enrichment claim. *Cf. S. Cty. Post & Beam, Inc.*, 116 A.3d at 212 (affirming a finding of unjust enrichment where plaintiff performed work on defendant's property and defendant failed to pay "*the undisputed value*" of plaintiff's work in full) (emphasis added). Here, Plaintiffs simply assert their compensation was not fair—an allegation which does not amount to a claim of unjust enrichment, and ultimately does not provide any indication to this Court that Plaintiffs could succeed on this claim. *See Rein*, 184 A.3d at 702. Therefore, the motion to dismiss as to this count is granted.

D

Count IV: Breach of Fiduciary Duty[5]

In Count IV, Plaintiffs allege both they and Barnaby were "shareholders in a closely held corporation and owed fiduciary duties between and amongst themselves." Compl. ¶ 156. As such, "Barnaby breached fiduciary duties owed to Start Traffic by mismanaging corporate assets, wrongfully terminating the employment of corporate shareholders and generally failing to meet his duty of care." Compl. ¶ 159. Finally, Plaintiffs "suffered substantial damages" due to "Barnaby's breaches of his fiduciary duty." Compl. ¶ 160. Plaintiffs claim they had a reasonable expectation of employment as shareholders. Additionally, in their memorandum, Plaintiffs assert "Barnaby manufactured a pretext to terminate the Plaintiffs' employment, inquiring about a buyout at the very same meeting, and is now actively obstructing the Plaintiffs' access to documents necessary for them to calculate the fair value of their shares." Defendants contend that Plaintiffs did not have a reasonable expectation of employment, and Plaintiffs failed to show Barnaby's actions were not legitimate based on the sound business judgment rule.

"Rhode Island has long recognized that corporate officers and directors stand in a fiduciary capacity to the corporation and the corporation's shareholders." *Grady v. Grady*, No. PB 09-0367, 2012 WL 171006, at *4 (R.I. Super. Jan. 17, 2012) (citing *Boss v. Boss*, 98 R.I. 146,

[5] Neither party addresses whether Count IV is a derivative claim, but Plaintiffs state in their Complaint under Count IV that "*Barnaby breached fiduciary duties owed to Start Traffic* by mismanaging corporate assets, wrongfully terminating the employment of corporate shareholders and generally failing to meet his duty of care." Compl. ¶ 159 (emphasis added.) If Plaintiffs intended this Count, in full or in part, to be a derivative claim, Count IV is improperly pled as such, and Plaintiff must amend the Complaint accordingly. *See Heritage Healthcare Servs. v. The Beacon Mut. Ins. Co.*, No. PB 02-7016, 2012 WL 2335643 (R.I. Super. June 11, 2012) (If Plaintiffs did not issue a written demand on the corporation prior to filing suit for a derivative action, Plaintiffs must demonstrate why such demand would be futile; otherwise, the derivative claim is dismissed for failure to comply with the requirements for derivative claims under Super. R. Civ. P. 23.1.).

152, 200 A.2d 231, 235 (1964)). A breach of fiduciary duty exists when there is oppression in closely held corporations. *Hendrick v. Hendrick*, 755 A.2d 784, 791 (R.I. 2000); *see Tomaino v. Concord Oil of Newport, Inc.*, 709 A.2d 1016, 1021 (R.I. 1998) ("[s]hareholders in a closely held corporation . . . often also act as that corporation's directors and officers"). Oppression includes "conduct 'that substantially defeats the reasonable expectations held by minority shareholders,'" "actions designed to disadvantage or freeze out a minority shareholder," or "where the majority shareholders have engaged in waste of the corporate assets, or where relevant financial information is withheld from shareholders." *Hendrick*, 755 A.2d at 791-92 (internal citations and quotations omitted). Finally, "the denial of employment is a well-accepted form of shareholder oppression in close corporations." *Grady*, 2012 WL 171006, at *4.[6]

In the Complaint, Plaintiffs allege the following: Barnaby agreed that "[a]s Start Traffic became self-sustaining, the Plaintiff's [*sic*] would be awarded greater shares"; not all employees were offered shares; "Barnaby continued moving forward with his plans for freezing Plaintiffs out of Start Traffic"; "Barnaby and Attorney Ross inquired regarding the possibility of a buyout"; and, "Start Traffic has repeatedly and wrongfully refused to allow the Plaintiffs access to records." Compl. ¶¶ 16, 63, 82, 124. Though Defendants deny these allegations and point to other facts they claim Plaintiffs did not meet, the Court may only assume Plaintiffs' allegations are true. *Laurence*, 788 A.2d at 456. As such, Defendants fail to prove beyond a reasonable

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[6] Both parties also reference Justice Silverstein's holding, which mentioned,

> "factors used in other jurisdictions to determine the existence of reasonable expectation of employment" including "whether (1) a shareholder's salary and benefits constitute de facto dividends, (2) a shareholder procured shares of the corporation in part to ensure continued employment, (3) a shareholder owns a significant portion of the corporation's stock, (4) a shareholder's shares are not part of a general benefits package offered to most if not all of the corporation's employees and (5) the existence of a shareholders' agreement governing shareholder expectations." *Id.*

doubt that Plaintiffs would not be entitled to relief under any set of facts in Count IV. *Rein*, 184 A.3d at 699.

E

Count V: Fraud and Deceit

In Count V, Plaintiffs allege "Barnaby made repeated statements of fact to the Plaintiffs which were false, which he knew were false, which he intended the Plaintiffs would rely on and which the Plaintiffs did reasonably rely on to their detriment." Compl. ¶ 162. Additionally, Plaintiffs claim Barnaby failed "to disclose information to the plaintiffs which he was under a duty to disclose," and finally, "Plaintiffs have suffered substantial damages" due to this alleged fraud and deceit. Compl. ¶¶ 164-165. Barnaby claims Count V fails to state a claim upon which relief can be granted because Plaintiffs failed to meet the heightened pleading standard for fraud claims, and because Count V does not allege any false statements of fact giving rise to fraud.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Super. R. Civ. P. Rule 9(b). To establish a *prima facie* case of fraud, "'the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon, and that the plaintiff justifiably relied thereon to his or her damage.'" *Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 160 (R.I. 2001) (quoting *Travers v. Spidell*, 682 A.2d 471, 472-73 (R.I. 1996)). "However, 'the general rule is that mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves.'" *Cote*, 148 A.3d at 548 (quoting 37 Am. Jur. 2d *Fraud and Deceit* § 87 (Feb. 2019 Update)). Additionally, "'*allegations based on information and belie* [*sic*] . . . do not satisfy the particularity requirement unless the complaint sets forth the facts on which the belief

is founded.'" *Przygoda, M.D. v. Clifford J. Deck, CPA, Inc.*, No. PB 09-1336, 2010 WL 1956239, at *5 (R.I. Super. May 12, 2010) (emphasis added) (quoting *New England Data Servs., Inc. v. Becher,* 829 F.2d 286, 288 (1st Cir. 1987)) (internal quotations omitted).

Here, Plaintiffs' claims center both around "unfulfilled promises to do a particular thing in the future" and "allegations based on information and" belief. *See Cote*, 148 A.3d at 548; *Przygoda*, 2010 WL 1956239, at *5. For example, the Complaint repeatedly refers to allegations such as, "Barnaby's representation that he would . . ."; "Barnaby never had any intention of following through"; and, "Barnaby intended to delay." *See* Compl. ¶¶ 15, 52, 53. Additionally, a number of the statements Plaintiffs make to support their allegations of fraud and deceit begin with "upon information and belief." *See* Compl. ¶¶ 57-59, 66. Plaintiffs have failed to meet the heightened pleading standard for fraud as detailed under Rule 9(b), and thus without more particularity, Count V is dismissed.

F

Count VI: Conversion

In Count VI, Plaintiffs allege Defendants have "converted and wrongfully taken confidential information, intellectual property and other property belonging to the Plaintiffs." As a result, Plaintiffs contend they "were deprived of this property as a result of the Defendants' unauthorized acts. . . [and] have suffered substantial damages." Specifically, Plaintiffs point to a credit card "issued in Jason's name" as being used by Defendants after Jason's employment with the Corporation was terminated. Defendants, on the other hand, counter that Defendants only reclaimed the Corporation's property from the Corporation's office, and thus Plaintiffs failed to state a claim upon which relief may be granted.

In order to establish conversion, a plaintiff must show "an ownership or possessory interest in the property at the time of the conversion," and "identify the allegedly converted property with reasonable certainty, in order to render it capable of identification, for the purpose of determining whether the property in fact belonged to the plaintiff at the time of its conversion." *DeChristofaro v. Machala*, 685 A.2d 258, 263 (R.I. 1996). The central issue of conversion is "whether [a] defendant has appropriated to his own use the chattel of another without the latter's permission and without legal right." *Terrien v. Joseph*, 73 R.I. 112, 115, 53 A.2d 923, 925 (1947).

Here, Plaintiffs admit in their memorandum that they "are still unsure of the full extent of personal property converted when their home (which also served as Start Traffic's offices) was plundered by security contractors working for the Defendants." While Plaintiffs' Complaint included some allegations to possibly support a claim of conversion, such allegations are insufficient. *See Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008). Recognizing this, Plaintiffs stated in their memorandum that "additional items of converted personalty will come to light in the course of discovery and . . . request leave to amend the *Complaint* to more precisely identify the converted items." Therefore, this Court dismisses Count VI in its current state.

G

Count VII: Waste, Misuse and Misappropriation of Corporate Assets and Ultra Vires Acts

In Count VII, Plaintiffs allege Barnaby "appropriated corporate assets to his own use; used corporate property, resources, and funds to his personal benefit and advantage or to the benefit and advantage of entities in which he has personal or financial interests; and misapplied and wasted corporate assets to the financial loss and detriment of the Corporation and plaintiffs." Plaintiffs then proceed to detail a number of actions Barnaby has taken which they allege have

either harmed the corporation or have harmed the Plaintiffs. In their memorandum, Defendants claim this count is "an improperly pleaded derivative action on behalf of the Company without compliance with Rule 23.1." Plaintiffs, on the other hand, contend they need not comply with Rule 23.1, because the futility exception applies.

A claim is derivative in nature if the claim "seeks to redress a wrong done to the corporation or if the claim arises solely as a consequence of a corporate wrong." *Halliwell Assocs., Inc. v. C.E. Maguire Servs., Inc.*, 586 A.2d 530, 533 (R.I. 1991). "The relevant inquiry, as enunciated in *Tooley*, is two-fold: '(1) who suffered the alleged harm ([the Corporation] or the suing [shareholders], individually); and (2) who would receive the benefit of any recovery or other remedy ([the Corporation] or the [shareholders], individually)?'" *Heritage Healthcare Servs., Inc.*, 3d at 378 (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004)).

Prior to bringing suit on a derivative claim, claimants must first comply with both § 7-1.2-711(c) and Rule 23.1 prior to bringing suit. Specifically,

> "Section 7-1.2-711(c)(1) provides, in pertinent part, that a corporate shareholder may not initiate suit against the corporation until '[a] written demand ha[s] been made upon the corporation to take suitable action.' Further, Rule 23.1 requires that '[t]he *complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.*'" *Heritage Healthcare Servs., Inc.*, 109 A.3d at 380 (citing Sec. 7-1.2-711(c)(1); Super. R. Civ. P. 23.1)) (emphasis added).

If a plaintiff fails to meet these requirements, the derivative action must be dismissed. *Id.* at 380 (citing *Giuliano v. Pastina,* 793 A.2d 1035, 1037 (R.I. 2002); *Hendrick*, 755 A.2d at 793).

Throughout Count VII, Plaintiffs repeatedly allege harm suffered by the Corporation. *See* Compl. ¶ 171 a-f. Additionally, the majority of the Plaintiffs' prayer for relief consists of remedies or recoveries which would directly benefit the corporation. *See* Compl. ¶¶ 26-27. Plaintiffs refer to Count VII as an "actionable derivative claim[]." Plaintiffs claim they did not make a written demand on the Corporation prior to filing suit because such demand would be futile since Barnaby "is the majority shareholder," and "Barnaby is himself a defendant and was and is the instigator and beneficiary of the wrongs alleged." Compl. ¶ 172. Therefore, Plaintiffs claim "demand upon the Corporation would require [Barnaby] to institute suit against himself." *Id.* However, Plaintiffs do not address what efforts, if any, they took to obtain their desired remedy prior to filing suit, and instead merely allege reasons why they believe such a demand would be futile. *See Heritage Healthcare Servs., Inc.*, 109 A.3d at 380 (dismissing for noncompliance with Sec. 7-1.2-711(c)(1) and Rule 23.1 because "complaint [was] silent as to what efforts [plaintiffs] took to obtain their desired remedy before they filed suit"). Therefore, Count VII is dismissed.

H

Count VIII: Negligent Misrepresentation

In Count VIII of the Complaint, Plaintiffs allege "the Defendants, made a number of misrepresentations of material fact to the Plaintiffs"; "[s]aid representations were made under such circumstances where the Defendants should have known of their truth or falsity"; and, "Defendants made these representations with the intention of inducing the Plaintiffs to act, or refrain from action upon them." Defendants claim said "misrepresentations" and "representations" were merely promissory statements Barnaby allegedly made. As such,

Defendants assert Plaintiffs may not base a claim for negligent misrepresentation on future promises.

"To establish a prima facie case of negligent misrepresentation, the plaintiff must establish the following elements: '(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.'" *Zarrella v. Minnesota Mut. Life Ins. Co.*, 824 A.2d 1249, 1257 (R.I. 2003) (quoting *Mallette v. Children's Friend and Serv.*, 661 A.2d 67, 69 (R.I. 1995)). Additionally, statements regarding "[f]uture events or promises are not considered factual." *Cote*, 148 A.3d at 549 (citing 37 C.J.S. *Fraud* § 76 at 263-64 (2008) ("[T]o give rise to a liability for negligent misrepresentation, an alleged misrepresentation must be factual and not promissory or related to future events.")).

As explained in section E of this Decision, Plaintiffs allege Barnaby's said "misrepresentations" were made regarding future events and were almost entirely promissory statements. Plaintiffs' allegations are general regarding the "misrepresentations," and thus, it is unclear whether Plaintiffs were referring to statements other than the promissory statements they refer to in Count V. Since statements regarding future events or promises may not be considered "factual," Plaintiffs did not provide a set of allegations under which they could be entitled to relief. As such, Defendants met their burden to prove beyond a reasonable doubt that given the allegations as currently stated in Plaintiffs' Complaint, Plaintiffs would not be entitled to relief.

Rein, 184 A.3d at 699. Therefore, Defendants meet their burden on the motion to dismiss for Count H.

I

Count IX: Wrongful Discharge

In Count IX, Plaintiffs allege wrongful discharge by Defendants, particularly due to their "reasonable expectation of continued employment as an aspect of their beneficial ownership interest in Start Traffic, a closely held corporation." Compl. ¶ 180. In explaining this claim, Plaintiffs use the same explanation as that used for Count IV: Breach of Fiduciary Duty. Defendants ask this Court to dismiss Count IX, as no cause of action exists for wrongful discharge in Rhode Island.

"[I]n Rhode Island, there is no cause of action for wrongful discharge." *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993). As such, Plaintiffs' Count IX is dismissed.

J

Count X: Defamation

In Count X, Plaintiffs allege "Barnaby made false and defamatory statements concerning the Plaintiffs, including but not limited to alleging they had engaged in acts of fraud and embezzlement during their tenures as officers of Start Traffic. . . . These statements were published without privilege by the Defendants and their agents in the presence of third parties at the 'shareholders meeting' held on January 22, 2018." Compl. ¶¶ 185-86. Additionally, Plaintiffs claim these "statements were published with a level of fault that was either negligent or intentional and malicious"; that Plaintiffs "have been defamed per se"; and, "have been harmed thereby." Compl. ¶¶ 187-189. Defendants assert Plaintiffs' claim does not amount to defamation, and that Plaintiffs failed to establish causation and damages in its Complaint.

Plaintiffs claim Defendants' statements were defamatory *per se*. In order to establish defamation, a plaintiff must show "'(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages, unless the statement is actionable irrespective of special harm.'" *Marcil v. Kells*, 936 A.2d 208, 212 (R.I. 2007) (quoting *Lyons v. R.I. Pub. Emps. Council 94*, 516 A.2d 1339, 1342 (R.I. 1986)). Additionally, "[t]o be actionable as slander *per se*—without proof of special damages—the false statement must impute to the other: (1) a 'criminal offense.'" *Marcil,* 936 A.2d at 212 (quoting Restatement (Second) of *Torts* § 570 at 186 (1977)).

Here, Plaintiffs allege that Barnaby made defamatory statements about them, accusing them of committing at least one criminal offense, and made those statements in front of a third party. Taking all of Plaintiffs' allegations as true and resolving all doubts in Plaintiffs' favor, Plaintiffs provide sufficient allegations to substantiate a claim of defamation *per se*. *See Marcil,* 936 A.2d at 212. Therefore, Defendants failed to meet their burden on this count.

K

Count XI: Violation of R.I. Gen. § 7-1.2-1502

In Count XI of the Complaint, Plaintiffs assert they made demands upon Defendants to "inspect and make extracts of Start Traffic's corporate records on several occasions," and were repeatedly denied access to said records in violation of G.L. 1956 § 7-1.2-1502. Defendants, on the other hand, contend that they produced the required books and records pursuant to the statute, and that Plaintiffs have failed to assert a proper purpose for their requested inspection.

Section 7-1.2-1502 provides, in pertinent part:

> "Any director, shareholder or holder of voting trust certificates for shares of a corporation, upon written demand stating the purpose

> for the demand, has the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes, and record of shareholders and to make extracts from those books and records of account, minutes, and record of shareholders." Sec. 7-1.2-1502(b).

The right to inspect books, accounts, and records "is not unfettered." The purpose must be "proper," and the shareholder must make a "written demand stating the purpose thereof." *Gregson v. Packings & Insulations Corp.*, 708 A.2d 533, 536 (R.I. 1998). Courts have found proper purposes when the request involves "the valuation of a corporation's stock, the investigation of improper transactions, the investigation of mismanagement and the clarification of unexplained discrepancies in a corporation's financial statement." 5A Fletcher Cyclopedia Corporations § 2222 at 296-97 (2012); *see Gregson*, 708 A.2d at 536 (finding proper purpose based on concerns that a proposed divided distribution would compromise the corporation's "proprietary information to its competitive detriment).

Here, Plaintiffs allege in their complaint they made numerous demands based on their concerns regarding, in part, the mismanagement and the financial condition of the Corporation. Therefore, under the 12(b)(6) standard for a motion to dismiss, Plaintiffs have provided " fair and adequate notice of the type of claim being asserted," and thus survive the motion to dismiss. *Haley,* 611 A.2d at 848.

L

Count XII: Breach of the Implied Covenant of Good Faith and Fair Dealing

Count XII consists of allegations that "Barnaby breached the implied covenant by, among other things, denying the Plaintiffs their reasonable expectation of continued employment with Start Traffic." Compl. ¶ 198. Barnaby asserts that a claim for breach of the implied covenant of good faith and fair dealing is not an independent cause of action.

"'Virtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" *Dovenmuehle Mortg., Inc. v. Antonelli*, 790 A.2d 1113, 1115 (R.I. 2002) (quoting *Centerville Builders, Inc. v. Wynne*, 683 A.2d 1340, 1342 (R.I. 1996)). "[A] claim for breach of the implied covenant of good faith and fair dealing does not create an independent cause of action separate and apart from a claim for breach of contract." *McNulty v. Chip*, 116 A.3d 173, 185 (R.I. 2015). Therefore, Plaintiffs' Count XII fails, as it is not a valid independent cause of action in Rhode Island.

M

Count XIII: Dissolution

The final count of Plaintiffs' complaint alleges that Barnaby "has acted fraudulently, illegally, and in a manner unfairly prejudicial toward the Plaintiffs in his capacity as a shareholder, director, and officer of the Corporation," and "has been guilty of mismanagement in the conduct of the Corporation and misapplication and waste of Corporation assets." Additionally, Plaintiffs claim "the value of Plaintiffs' stock in the Corporation has diminished and continues to diminish and the Corporation and its assets continue to be wasted." Therefore, Plaintiffs ask that the Court dissolve the Corporation. Defendants contend that Plaintiffs do not allege "imminent danger" to the Corporation and that there does not exist any "illegal or fraudulent conduct."

Section 7-1.2-1314 provides in part that:

> "(a) The superior court has full power to liquidate the assets and business of a corporation:
> "(1) In an action by a shareholder when it is established that, whether or not the corporate business has been or could be operated at a profit, dissolution would be beneficial to the shareholders because:
> "(ii) The acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent; or

> "(iv) The corporate assets are being misapplied or are in danger of being wasted or lost." Sec. 7-1.2-1314(a)(1)(ii), (iv).

In the Complaint, Plaintiffs allege as shareholders that Barnaby's acts were fraudulent, illegal, and unfairly prejudicial, that he mismanaged the Corporation, and that he is misapplying and wasting the Corporation's assets. Defendants failed to prove beyond a reasonable doubt that Plaintiffs would not be entitled to relief under any set of facts, and therefore do not prevail on their motion to dismiss as it relates to this count. *See Rein*, 184 A.3d at 699. Therefore, Defendants' motions to dismiss on this count are denied.

IV

Conclusion

For the foregoing reasons, this Court denies Defendants' Motions to Dismiss on the following counts: (I) Breach of Contract; (II) Promissory Estoppel; (X) Defamation; (XI) Violation of § 7-1.2-1502; and (XIII) Dissolution. This Court grants Defendants' Motions to Dismiss and grants Plaintiffs' request for leave to amend on the following counts: (III) Unjust Enrichment; (V) Fraud and Deceit; (VI) Conversion; (VII) Waste, Misuse and Misappropriation of Corporate Assets, and Ultra Vires Acts; (VIII) Negligent Misrepresentation; (IX) Wrongful Discharge; and, (XII) Breach of the Implied Covenant of Good Faith and Fair Dealing. Defendants' Motions to Dismiss for Count IV, Breach of Fiduciary Duty, are denied as this Court assumes that Plaintiffs did not intend to plead this Count as a derivative claim. Counsel shall prepare the appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Michael Silveira and Charlotte Jason v. Start, Inc. d/b/a Start Traffic and Barnaby Start
CASE NO:	PC-2018-6036
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 18, 2019
JUSTICE/MAGISTRATE:	Stern, J.

ATTORNEYS:

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