

<b>Khan v Mediamorph, Inc.</b>
2022 NY Slip Op 31182(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 656125/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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 IMTIAZ KHAN, BRUCE MEYERS, WINDSOR STREET  
 CAPITAL, L.P. F/K/A MEYERS ASSOCIATES, L.P.,  
 FATOS MUCHA, CHASSMAN BLECH 2013 TRUST,  
 SPRING CHARITABLE REMAINDER TRUST, MICHAEL  
 STONE, ROBERT SEGUSO, and WARIS IRREVOCABLE  
 TRUST,

Plaintiffs,

- v -

MEDIAMORPH, INC., WHIP NETWORKS, INC., TV TIME,  
 WHIP MEDIA GROUP, ROB GARDOS, MICHAEL  
 HUSEBY, MICHAEL SID, KENT JARVI, SHAHID KHAN,  
 JONATHAN LERNER, NOMI BERGMAN, ROBERT  
 TOMS, BOB GREENE, STEWART TILL, BARRY  
 BARKER, SMEDVIG CAPITAL LTD. (AS NOMINEE FOR  
 SMEDVIG CAPITAL FUND X LP, and LIBERTY GLOBAL  
 PLC, ADVANCE NEWHOUSE,

Defendants.  
 -----X

INDEX NO. 656125/2019

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
 MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 32, 52, 54, 58, 59, 60, 63

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 53, 55, 57, 61

were read on this motion to/for DISMISS.

In motion sequence 001, defendants Mediamorph, Inc. (MMI), Robert Gardos, Michael Huseby, Michael Sid, Kent Jarvi, Shahid Khan, Jonathan Lerner, Nomi Bergman, Robert Toms, Robert Greene, Stewart Till and Barry Baker (collectively, MMI Defendants) move to dismiss the complaint pursuant to CPLR 3211 (a)(1), (5), and (7).

In motion sequence 002, defendant Smedvig Capital Ltd. (Smedvig) moves to dismiss the complaint pursuant to CPLR 3211 (a)(1), (5), and (7).

## Background

Unless indicated otherwise, the following facts are taken from the complaint and for the purposes of this motion are accepted as true.

Plaintiffs are a limited partnership,<sup>1</sup> a principal to that limited partnership, an employee of that limited partnership, three trusts, and various individuals who all owned MMI common stock. (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶¶ 4-17.) Plaintiffs invested approximately \$4.5 million in MMI in exchange for approximately 15 million shares of common stock at the early or seed stage. (*Id.* ¶ 3.)

Defendant MMI is a digital rights and tracking business that provides software products and services for entertainment, media and information services. (*Id.* ¶ 4.) Defendants Gardos, Shahid Khan, Baker, Bergman, Greene, Toms, Lerner, Huseby, Till, Jarvi, and Sid were all officers or directors of MMI (collectively, MMI Officers and Directors), who allegedly had a large financial interest in the merger transaction at issue. (*Id.* ¶¶ 21-31.) Defendant Smedvig was a large holder of MMI preferred shares. (*Id.* ¶ 32.) Plaintiffs allege that MMI became a wholly owned subsidiary of defendant Whip Networks, Inc (WNI) when it merged with WNI's wholly owned subsidiary, nonparty Morpheus Acquisition Corp. (*Id.* ¶ 19.) Plaintiffs allege that defendants TV Time and Whip Media Group are either trade names used by WNI or were involved in the merger. (*Id.* ¶ 20.)

Plaintiffs allegedly invested \$600,000 as an initial capitalization for MMI. (*Id.* ¶ 33.) Between June 2008 and December 2011, following plaintiffs' initial capitalization, plaintiff Windsor Street Capital, L.P. (Windsor) conducted five separate financings for

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<sup>1</sup> The limited partnership has since ceased operations. (NYSCEF 2, Complaint ¶ 7.)  
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MMI. (*Id.*) In 2011, Windsor identified Smedvig as a possible MMI investor with Smedvig agreeing to purchase \$3 million of MMI Series A Preferred Stock with an option to purchase an additional \$4.5 million worth. (*Id.* ¶ 34.)

On December 16, 2011, MMI, Smedvig, Sid, Shahid Khan, and nonparty Motorola Mobility Investments LLC (Motorola) entered into a Preferred Stock Purchase Agreement (Purchase Agreement) consummating Smedvig's \$3 million investment and a \$1.5 million investment by Motorola. (*Id.* ¶ 35.) On that same date, the parties to the Purchase Agreement and the principal common stockholders executed a Stockholders' Agreement. (*Id.* ¶ 36; *see also* NYSCEF 38, Stockholders' Agreement.) Section 4.1 of the Stockholders' Agreement, set MMI's Board of Directors at seven directors. (NYSCEF 38, Stockholders' Agreement § 4.1.) Section 4.2 provides that the Board shall consist of "one individual selected by the holders of a majority of the Series A Preferred Stock," naming Toms, "two Founders Directors" comprised of Sid and Shahid Khan, and up to four individual designated as independent and selected by the majority of the Board, initially naming Tsvi Gal, Wahid Hamid and Till. (*Id.* § 4.2 [a]-[c].)

Also on December 16, 2011, MMI, Smedvig and Motorola entered into an Investor Rights Agreement (IRA). (*Id.* ¶ 42; *see also* NYSCEF 41, IRA.) Section 4.1 of the IRA provides for a right of first offer stating:

"[w]ith respect to each Major Investor, subject to the terms and conditions of the Restated Certificate, the Stockholders' Agreement, the Purchase Agreement, this Section 4.1 and applicable securities laws, if the Company proposes to offer or sell any New Securities, the Company shall first offer such New Securities to each such Major Investor."

(NYSCEF 41, IRA § 4.1.)

Section 4.1(c) elaborates:

“If all New Securities referred to in the Offer Notice are not elected to be purchased or acquired as provided in Section 4.1(b), the Company may... offer and sell the remaining unsubscribed portion of such New Securities to any Person or Persons at a price not less than, and upon terms no more favorable to the offeree than, those specified in the Offer Notice.”

(NYSCEF 41, IRA § 4.1[c].)

Plaintiffs assert that, pursuant to Section 4.1(c), they are entitled to purchase certain new securities once the major investors (defined as Smedvig and Motorola) decline to exercise their right to purchase new securities offered by MMI. Plaintiffs allege that MMI issued Series B and Series C Preferred Stock, which the major investors did not purchase; however, despite this triggering plaintiffs’ right purchase, MMI never offered plaintiffs the Series B and C shares. (*Id.* ¶ 49.)

Plaintiffs further allege that, at the time of Smedvig and Motorola’s December 2011 investment, and on several subsequent occasions, plaintiffs were told that their common stockholder interests would be protected. (*Id.* ¶ 50.) However, plaintiffs allege that MMI’s management granted no such protections or additional rights. (*Id.*) On July 11, 2013, Sections 4.1 and 4.2 of the Stockholders’ Agreement were allegedly amended to increase the MMI Board to eight members and change the structure to include two Series A Preferred Stock Directors, initially Toms and Lerner, two Founding Directors, Sid and Khan, and up to three independent directors, initially Till and Huseby. (*Id.* ¶ 37.)

Hamid, who was elected as an independent director to represent the common stockholders, resigned in 2014, and MMI allegedly refused to allow the appointment of another director to represent the common stockholders. (*Id.* ¶ 38.) The common

stockholders allegedly have not been able to vote on the election of any director since July 11, 2013. (*Id.* ¶ 39.)

Section 8.7(b) of the Stockholders' Agreement provides, in relevant part:

“For so long as the holders of Common Stock which are not Affiliates of either Investor collectively own at least 1% of the voting shares of the Company measured on a fully diluted basis, the Company shall invite one representative of such holders of Common Stock to attend all meetings of its Board and its committees (and any board of directors or similar governing bodies and committees of any subsidiaries) in a nonvoting observer capacity; provided, however, that at any time the Board, acting with the consent of the Series A Director, may require that the holders of such Common Stock vote for a new observer. Such observer shall initially be Raana Khan.”

(NYSCEF 38, Stockholder's Agreement § 8.7[b].)

Section 3.3(b) of the IRA also provides:

For so long as the holders of Common Stock which are not Affiliates of either Major Investor collectively own at least 1% of the voting shares of the Company measured on a fully diluted basis, the Company shall invite one representative of such holders of Common Stock to attend all meetings of its Board and its committees (and any board of directors or similar governing bodies and committees of any subsidiaries) in a nonvoting observer capacity; provided, however, that at any time the Board, acting with the consent of the Series A Director, may require that the holders of such Common Stock vote for a new observer. Such observer shall initially be Raana Khan.

(NYSCEF 41, § 3.3[b].)

Plaintiffs allege that although Raana Khan was initially appointed as the observer for the common stockholders, Khan was removed after Windsor engaged in litigation with MMI. (*Id.* ¶¶ 44-45.) Raana Khan allegedly offered the Board replacement options for the Observer role, but a new Observer was never appointed. (*Id.* ¶ 46.)

On September 17, 2018<sup>2</sup>, MMI filed a Seventh Amended and Restated Certificate of Incorporation (Amended COI) in Delaware which granted the common stockholders one vote per share at all stockholder meetings. (*Id.* ¶ 51; *see also* NYSCEF 39, Amended COI, § A[2].) On October 11, 2019, WNI, MMI, Morpheus, and Shareholder Representative Services LLC, solely in its capacity as Stockholder Representative, executed an Agreement and Plan of Merger (Merger Agreement). (NYSCEF 16, Merger Agreement.) Pursuant to the merger WNI acquired MMI through the merger of Morpheus with and into MMI, whereby MMI would be the surviving corporation of the merger. (*Id.* at Recitals.) The merger closed on October 15, 2019. (NYSCEF 2, Complaint ¶ 54.) The merger announcement allegedly did not include any financial information about the transaction. (*Id.*)

Plaintiffs allege that the MMI Directors and Officers were interested in the merger transaction based on their huge financial stake and did not “shop” the merger transaction around for a better price. (*Id.* ¶¶ 55-56.) Moreover, plaintiffs allege they did not have the opportunity to approve or reject the merger. (*Id.* ¶ 57.) Plaintiffs contend the MMI Directors and Officers structured the merger transaction to provide a windfall for the preferred stockholders, while inadequately compensating the common stockholders. The merger allegedly valued MMI at \$100 million<sup>3</sup>, but the common

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<sup>2</sup> The complaint alleges that MMI filed its Seventh Amended and Restated Certificate of Incorporation on August 17, 2018. (NYSCEF 2, Complaint ¶ 51.) However, Smedvig submits MMI’s Seventh Amended and Restated Certificate of Incorporation certified as filed on September 17, 2018, by the Secretary of State of Delaware. (NYSCEF 39, Amended COI.)

<sup>3</sup> Plaintiffs allege that preferred shareholders received almost the entirety of the almost \$100 million sale price paid as consideration of the merger. (NYSCEF 2, Complaint ¶ 1.)

stockholders received less than \$1 million despite their initial \$4.5 million investment. (*Id.* ¶ 60.) Plaintiffs further allege that \$3 to \$4.5 million exchanged as part of the merger transaction was allocated to the MMI Directors and Officers as a golden parachute, which amounts to a waste of corporate assets. (*Id.* ¶¶ 62-63.) Plaintiffs allege the MMI Directors and Officers failed to meet their statutory obligations for interested transactions. (*Id.* ¶ 66.) The Board allegedly employed a special committee to advise on the merger but did not follow the special committee's recommendation on how to structure the merger transaction relating to common shareholder compensation. (*Id.* ¶ 78.)

After the merger was completed, plaintiffs were sent a package of materials that included a Letter of Transmittal (LOT), which informed plaintiffs that the only way to receive compensation from the merger for their common stock shares was to sign the LOT. (*Id.* ¶ 67; *see also* NYSCEF 42-49, LOTs.) The LOTs contained a provision that released defendants from any claim of impropriety in connection with the merger transaction. (*Id.* at ¶ 68; *see also* NYSCEF 42-49, LOTs, ¶ h.) Some plaintiffs signed the LOT while others signed the LOT under protest in order to receive compensation for their shares. (*Id.* ¶¶ 70-72; *see also* NYSCEF 42-49, LOTs at 13.)

On October 18, 2019, plaintiffs commenced this action by summons with notice. (NYSCEF 1, Summons with Notice.) On December 2, 2019, plaintiffs filed a complaint, alleging claims for (1) breach of fiduciary duty against MMI and MMI's officers and directors; (2) aiding and abetting a breach of fiduciary duty against Smedvig; (3) breach of contract against all defendants; (4) conversion against all defendants; (5) tortious interference against Smedvig; and (6) unjust enrichment against all defendants.

Plaintiffs also seek (7) an accounting and a (8) declaratory judgment, declaring that the release contained in the Letters of Transmittal is void and unenforceable. (NYSCEF 2, Complaint ¶¶16-24.)

### Discussion

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “‘essentially undeniable.’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to “‘support the ground on which the motion is based.’” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

Pursuant to CPLR 3211(a) (5), “[a] party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the cause of action may not be maintained because of . . . [a] release.” (*Carew v Baker*, 175 AD3d 1379, 1380 [2d Dept 2019] [internal quotation marks and citation omitted].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

“New York choice-of-law rules provide that substantive issues such as issues of corporate governance, including the threshold demand issue, are governed by the law of the state in which the corporation is chartered.” (*Lerner v Prince*, 119 AD3d 122, 128 [1st Dept 2014] [citations omitted].) New York’s choice-of-law rules impose New York law over matters of procedure. (*Id.* at 127.) The parties agree that Delaware law applies to the substantive issues here.

#### Letters of Transmittal

Plaintiffs allege the post-merger LOTs are unenforceable because the release language is a breach of defendants’ fiduciary duties, void as a matter of public policy, and lacked adequate consideration in exchange for the release. (NYSCEF 2, Complaint ¶¶ 67-73.) Plaintiffs assert that the LOT’s signature page was presented as a separate document, resulting in some plaintiffs signing without knowledge of the content. (*Id.* at 71.) Plaintiffs Imtiaz Khan, Meyers, Windsor Street Capital, Mucha, Chassman Trust, Seguso, Waris Trust, and Baum signed the LOTs. (NYSCEF 42-49, LOTs.) Plaintiffs Imtiaz Khan and Waris Trust signed the LOTs under protest. (NYSCEF 42, Khan LOT; NYSCEF 48, Waris Trust LOT.) Defendants argue any claims made by plaintiffs who

signed the LOT must be dismissed because the LOTs were part of the Merger Agreement and unambiguous. The MMI Defendants maintain the unambiguous language of the LOTs release them from claims related to the merger and Series B and C shares.

The court cannot determine the enforceability of the LOTs as a matter of law. It is unclear from complaint whether the plaintiffs received the merger agreement along with the LOT in the “package of material”. (NYSCEF 2, Complaint ¶ 67.) Additionally, the LOTs submitted by defendants only include the LOT agreement. (NYSCEF 18-25, and 42-49, LOTs.) Therefore, a factual issue exists as to whether the signed LOT was part of the bargained for exchange of the merger consideration.

#### Breach of Fiduciary Duty Against MMI, WNI, and MMI’s Officers and Directors

Plaintiffs allege that the MMI Defendants and WMI breached their fiduciary “duty of trust, good faith, fair dealing, and loyalty.” (NYSCEF 2, Complaint ¶ 77.) Specifically, plaintiffs allege that those defendants breached their duty by (1) failing to provide plaintiffs the opportunity to purchase Series B and C Preferred Stock<sup>4</sup>; (2) failing to protect the interest of the common stockholders in connection with the merger; (3) favoring personal, affiliate and controller interests at plaintiffs’ expense by directing profits from the merger transaction to themselves; (4) approving interested director transactions without assuring that plaintiffs’ interests were protected; (5) approving a

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<sup>4</sup> The court notes that plaintiffs state that defendants breached their fiduciary duty by “failing to provide the opportunity for *defendants* to purchase Series B and C Preferred stock issuances – a right to which the plaintiffs were entitled” (emphasis added). (NYSCEF 2, Complaint, ¶ 78[a].) From the context of the complaint, the court can surmise that plaintiffs were allegedly denied the opportunity to purchase the preferred stock, and this is a typographical error.

\$4.5 million golden parachute to MMI Officers in connection with the merger transaction; (6) excluding common stockholders from their voting and observer rights; (7) failing to maximize shareholder value by not shopping for a greater sale price; (8) refusing to follow the special committee's recommendation to structure the merger transaction so that the initial/seed investors were at least made whole in connection with their purchase of common stock; and (9) failing to address safeguards that are required for self-interested director transactions. (*Id.* ¶ 78.)

The MMI Defendants argue that plaintiffs have failed to state a claim or plead facts that rebut the protection of the business judgment rule. They assert that, because the Amended COI contains an exculpatory provision, permitted by 8 Del. C. § 102(b)(7), protecting the MMI Directors from alleged violations of their fiduciary duties, plaintiffs must plead facts that support the inference that the majority of the MMI Directors were self-interested and not independent or acted in bad faith. Plaintiffs, on the other hand, contend that the MMI Directors and Officers are not protected by the business judgment rule. Rather, enhanced scrutiny applies to their decision-making surrounding the merger.

Defendants first rely on 8 Del. C. § 102(b)(7) for protection against personal liability of a director to the stockholders for breach of fiduciary duty. The plain language of the statute states, in pertinent part, that an exculpatory provision "shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit."

(8 Del. C. § 102(b)(7).) However, an exculpatory provision, pursuant to 8 Del. C. § 102(b)(7), only protects the directors from personal liability for breaches of the duty of care, and not the duty of loyalty or good faith. (*Lyondell Chem. Co. v Ryan*, 970 A2d 235, 239 [Del 2009].) “Our jurisprudence since the adoption of the statute has consistently stood for the proposition that a Section 102(b)(7) charter provision bars a claim that is found to state only a due care violation.” (*Malpiede v Townson*, 780 A2d 1075, 1095 [Del 2001].) Plaintiffs do not allege a breach of the duty of due care, and therefore, the exculpatory provision in the Amended COI is inapplicable to this cause of action.

“The fiduciary duties owed by directors of a Delaware corporation are the duties of due care and loyalty.” (*In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 745 [Del Ch 2005].) The third triad of a director’s fiduciary duty is good faith. (*Cede & Co. v Technicolor*, 634 A2d 345, 361 [Del 1993].) This “triparte fiduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided.” (*Malone v Brincat*, 722 A2d 5, 10 [Del 1998].) The “duty of loyalty “requires an undivided and unselfish loyalty to the corporation” and “demands that there shall be no conflict between duty and self-interest.” (*City of Fort Myers Gen. Employees’ Pension Fund v Haley*, 235 A3d 702, 721 [Del 2020] [citations omitted], quoting *Guth v Loft, Inc.*, 5 A2d 503, 510 [Del 1939].)

The Delaware business judgment rule protects the decisions made by a board of directors on behalf of a corporation. (*Aronson v Lewis*, 473 A2d 805, 812 [Del 1984].) The business judgment rule presumes that the directors acted on an informed basis, in

good faith, and in honest belief their action was in the best interest of the corporation.

(*Id.*) Under the business judgment standard,

“the plaintiffs have the burden to plead facts sufficient to rebut that presumption. On a motion to dismiss, the pled facts must support a reasonable inference that in making the challenged decision, the board of directors breached either its duty of loyalty or its duty of care. If the plaintiff fails to satisfy that burden, a court will not substitute its judgment for that of the board if the ... decision can be attributed to any rational business purpose.”

(*Gantler v Stephens*, 965 A2d 695, 706 [Del 2009] [internal quotation marks and citations omitted].)

“As a general matter, the business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders.

(*Orman v Cullman*, 794 A2d 5, 22 [Del Ch 2002] [citations omitted].) The alleged benefit to the board must be significant enough to make it improbable the director could perform their duties to the shareholders. (*Id.* at 23.) An interested director is defined as one that appears on both sides of a transaction or receives personal financial gain from self-dealing, as opposed to from a benefit that runs through the corporation or all stockholders generally. (*Aronson*, 473 A2d at 812.) In the absence of allegations of self-dealing, an interested director is one who receives a material benefit, not merely any benefit. (*Orman* 794 A2d at 23.) Materiality in connection to the director’s economic situation and must be significant enough to make it improbable for the director to override their personal interest and perform their fiduciary duty. (*Id.*; *see also*, *Solomon v Armstrong*, 747 A2d 1098, 1118 [Del Ch 1999], *affd*, 746 A2d 277 [Del 2000].) Conclusory statements about material benefits to directors or affiliates does not

rebut the business judgment presumption. (*H-M Wexford LLC v Encorp, Inc.*, 832 A2d 129, 150 [Del Ch 2003].)

When there is a change of control transaction, the court looks beyond the business judgment rule to analyze if the board's actions were reasonable. (*Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173, 180 [Del 1986].) This is because a sale creates a potential conflict of interest for fiduciaries when considering the transactions parties and terms. (*In re Rural Metro Corp.*, 88 A3d 54, 83 [Del Ch 2014], *decision clarified on denial of rearg sub nom. In re Rural Metro Corp. Stockholders Litig.* [Del Ch 2014] [citations omitted].) When directors engage in a change of control transaction, the duty of loyalty and care requires the directors to pursue the highest sale price for the corporation. (*Malpiede*, 780 A2d at 1083.)

“Enhanced scrutiny is Delaware's intermediate standard of review.” (*Reis v Hazelett Strip-Casting Corp.*, 28 A3d 442, 457 [Del. Ch. 2011].) The intermediate enhanced scrutiny standard is used to review a transaction resulting in a sale of control. (*Paramount Communications Inc. v QVC Network Inc.*, 637 A2d 34, 42 [Del 1994].) “Enhanced scrutiny applies when the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested directors”. (*Reis*, 28 A3d at 457.) This standard of review contemplates recurring and identifiable business situation where potential conflict of interest may arise. (*Firefighters' Pension Sys. of City of Kansas City*, 251 A3d at 249.)

This standard places the burden on the fiduciaries, requiring them to prove that they “(i) followed a reasonable decision-making process and based their decisions on a reasonable body of information, and (ii) acted reasonably in light of the circumstances

then existing.” (*In re Del Monte Foods Co. Shareholders Litig.*, 25 A3d 813, 830 [Del. Ch. 2011], citing *Paramount Communications Inc.*, 637 A2d at 45.) When the enhanced scrutiny standard is applied, “the Court’s ordinarily deferential ‘rational basis’ review gives way to an objective ‘reasonableness’ standard of review, both to the process and the result, under which the Court evaluates whether the board has complied with its fundamental fiduciary duties.” (*Binks v DSL.net, Inc.*, 2010 WL 1713629, \*6 [Del Ch 2010].) “Although the *Revlon* doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control, it does not eliminate the requirement that plaintiffs plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale”. (*Malpiede v Townson*, 780 A2d 1075, 1083-84 [Del 2001].)

Both the business judgment rule and enhanced scrutiny have a common initial requirement: the plaintiff must plead sufficient facts to support their underlying breach of fiduciary claim. This is the fundamental element of a motion to dismiss.

“For a duty of loyalty claim to survive a motion to dismiss, the complaint must state facts that reasonably support the inference that a majority of the directors (1) were self-interested or not independent or (2) acted in bad faith.” (*Miramar Firefighters Pension Fund v AboveNet, Inc.*, 2013 WL 4033905, \*3 [Del Ch July 31, 2013] [citations omitted].)

Here, plaintiffs have failed to sufficiently allege facts to support the fiduciary duty claims against MMI, WNI<sup>5</sup>, or the MMI Directors. Plaintiffs’ allegations are either conclusory or sound in breach of contract. The complaint includes allegations of the

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<sup>5</sup> The complaint is devoid of any allegations against WNI supporting this claim.

defendants' failures such as: failing to protect common shareholders interest, favoring personal interest and funneling profits from the sale transaction, failing to comply with required procedures to approve directors or the merger, golden parachute payments to directors, failing to maximize shareholder value, depriving common shareholders of voting rights, and failing to follow the special committee's recommendation to pay the common stockholders at least \$4.5 million. (NYSCEF 2, Complaint ¶ 78.) However, these allegations are absent any detail as to the common questions of who, what, when, where, and how. The complaint contains blanket allegations about defendants without sufficient detail.

For example, plaintiffs do not allege the directors were on both sides of the merger transaction and engaged in self-dealing. Without those allegations, plaintiffs must allege and identify how the directors received a benefit so material that it makes it improbable they could independently perform their duties. (See, e.g. *Aronson*, 473 A2d at 817; *Malpiede* 780 A2d at 1084; *H-M Wexford LLC.*, 832 A2d at 150; *Miramar Firefighters Pension Fund*, 2013 WL 4033905, \*3.) Allegations the directors received a \$4.5 million golden parachute payout, without identifying what amount each director was paid or how that payment is material is insufficient to allege they were interested in the transaction. (See, e.g. *Solomon* 747 A2d at 1118; *Orman*, 794 A2d at fn. 44.) Simply stating the defendants failed to maximize value for the shareholders does not meet the pleading standard.

The breach of fiduciary duty claim is dismissed with leave to replead due to inadequate pleading to allege MMI's board's breach of its duties. Defendants' other arguments need not be addressed.

### Aiding and Abetting against Smedvig

As the underlying breach of fiduciary duty is dismissed, this claim cannot be sustained.

### Breach of Contract against all Defendants

Plaintiffs allege defendants breached the Stockholders Agreement and the IRA by denying the common stockholders' right to vote, failing to seat a common stockholder observer, and failing to appoint an independent director. (NYSCEF 2, Complaint ¶¶ 93.) Further, plaintiffs allege defendants breached the IRA by failing to offer newly issued Class B and Class C shares to the common stockholders. (*Id.* ¶¶ 92.) Plaintiffs argue they are third-party beneficiaries to the IRA and may enforce their right to purchase the Class B and Class C shares. Plaintiffs also allege that the defendants owed duties based on implied terms in the Merger Agreement.<sup>6</sup> (*Id.* ¶¶ 95-97.)

Defendants jointly argue plaintiffs have not identified any provision in the IRA that obligated the defendant to offer Class B and C shares to plaintiffs. Defendant Smedvig additionally argues that plaintiffs do not allege Smedvig had any obligations to plaintiffs in the identified agreements.

The elements of a breach of contract claim are: (1) existence of a contract, whether express or implied, (2) the breach of an obligation imposed by that contract, and (3) resulting damages to the plaintiff. (*VLIW Tech., LLC v Hewlett-Packard Co.*, 840 A2d 606, 612 [Del 2003] [citations omitted].)

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<sup>6</sup> Plaintiffs did not submit any factual or legal argument concerning this claim in their Memorandum of Law in Opposition to the Motions to Dismiss.

A third party may enforce a contractual promise if the contract was made for their benefit. (*Triple C Railcar Serv., Inc. v City of Wilmington*, 630 A2d 629, 633 [Del 1993] [citations omitted].) “To qualify as a third-party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.” (*Madison Realty Partners 7, LLC v Ag ISA, LLC*, CIV.A. 18094, 2001 WL 406268, at \*5 [Del Ch Apr. 17, 2001] [citations omitted].)

The Stockholders Agreement was entered into by MMI, Smedvig, Sid, Shahid Khan, and Motorola. The IRA was entered into by MMI, Smedvig, and Motorola. As a preliminary matter, in the complaint, plaintiffs fail to allege that they are third party beneficiaries. Further, the defendants who are not parties to these agreements cannot be liable for a breach of these agreements. Thus, those defendants are dismissed.

Nevertheless, even if they are third party beneficiaries to these Agreements, their breach of contract claims, as plead, also fail for the following reasons.

Plaintiffs first claim that defendants breached the Stockholders Agreement by refusing to allow the common stockholders to vote for an observer or vote on any matter which required a vote. Plaintiff cites to section 8.7 of the Stockholders' Agreement which states:

#### 8.7 Observer Rights

(b) For so long as the holders of Common Stock which are not Affiliates of either Investor collectively own at least 1% of the voting shares of the Company measured on a fully diluted basis, the Company shall invite one representative of such holders of Common Stock to attend all meetings of its Board and its

committees (and any board of directors or similar governing bodies and committees of any subsidiaries) in a nonvoting observer capacity; provided, however, that at any time the Board, acting with the consent of the Series A Director, may require that the holders of such Common Stock vote for a new observer. Such observer shall initially be Raana Khan.

(c) Observers provided for in Section 8.7(a) or Section 8.7(b) shall (i) be given copies of all notices, minutes, consents, and other materials that the Company provides to its (and its subsidiaries') directors provided that such observers agree in writing to hold in confidence all information so provided to the same extent as provided in Section 8.8 and (ii) shall be reimbursed by the Company for all reasonable costs and expenses incurred by such representative in attending any meetings and traveling on Company business. Notwithstanding the foregoing, the Company reserves the right to withhold any information and to exclude any observer from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Company and its counsel or result in disclosure of trade secrets or a conflict of interest, or if such observer is or is affiliated with a competitor of the Company.

(NYSCEF 38, Stockholders' Agreement.)

Plaintiffs allege that they have not been permitted to vote on the election of any directors since July 2013 or have an observer represent the common stockholders since 2014 after the initial observer was removed. (NYSCEF 2, Complaint ¶¶ 38-39, 45.) However, plaintiffs fail to adequately plead the damages they suffered as a result of these breaches. The complaint is devoid of any alleged damages suffered as a result of the absence of a non-voting observer at board meetings. Additionally, the clear, unambiguous language of the cited provision only refers to MMI as the Company. This provision does not impose an express or implied obligation onto any other defendant. Therefore, the breach of contract claim in relation to the Stockholders' Agreement is dismissed.

Next, plaintiffs allege that defendants breached the IRA which contains an Observer Rights provision, identical to the Stockholders' Agreement, and a Rights to

Future Stock Issuances provision. (NYSCEF 2, Complaint, at ¶ 42 and ¶¶ 47-53.)

Again, plaintiffs fail to allege that they suffered damages by not having an observer.

Plaintiffs also allege a breach of Section 4 of the IRA which states:

“4. Rights to Future Stock Issuances.

4.1 Right of First Offer. With respect to each Major Investor, subject to the terms and conditions of the Restated Certificate, the Stockholders' Agreement, the Purchase Agreement, this Section 4.1 and applicable securities laws, if the Company proposes to offer or sell any New Securities, the Company shall first offer such New Securities to each such Major Investor. A Major Investor shall be entitled to apportion the right of first offer hereby granted to it among itself and its Affiliates in such proportions as it deems appropriate.

Section 4.1(c) of the IRA reads as follows: (c) If all New Securities referred to in the Offer Notice are not elected to be purchased or acquired as provided in Section 4.1(b), the Company may, during the ninety (90) day period following the expiration of the periods provided in Section 4.1(b), offer and sell the remaining unsubscribed portion of such New Securities to any Person or Persons at a price not less than, and upon terms no more favorable to the offeree than, those specified in the Offer Notice. If the Company does not enter into an agreement for the sale of the New Securities within such period, or if such agreement is not consummated within thirty (30) days of the execution thereof, the right provided hereunder shall be deemed to be revived and such New Securities shall not be offered unless first reoffered to the Major Investors in accordance with this Section 4.1.”

(NYSCEF 41, IRA, at 19-20.)

Defendants argue plaintiffs have not alleged that they are “Major Investors,” and the plain text of the section utilizes the word “may”, which permits the company to offer and sell the Class B and Class C shares to anyone. In the complaint, plaintiffs allege that the common stockholders had the right to purchase if the Major Investors did not, and by denying this right, the plaintiffs suffered a dilution. (*Id.* at ¶ 49.) Plaintiffs’ allegation that defendant breached the IRA by failing to offer them the new shares creates a new obligation that goes beyond the plain text of the contract. Other than a

“Major Investor”, MMI was not obligated to offer the new securities to any other parties. The word “may” provides the option, but does not impose a required contractual duty.

Finally, plaintiffs allege defendants breached the Stockholders’ Agreement because the common stockholders had the right to vote but did not have the opportunity to vote on any matter. (NYSCEF 2, Complaint at ¶¶ 51-52.) Plaintiffs allege the defendants owed a statutory duty as a matter of law in connection with implied terms of the Merger Agreement. (NYSCEF 2, Complaint at ¶ 95.) However, plaintiffs fail to identify what statute imposes this duty.

Defendants argue that plaintiffs failed to allege any instance where plaintiffs were not permitted to vote, denied the opportunity to exercise any rights proscribed in the Amended COI, or identify an implied term in the Merger Agreement that created a duty. Rather, defendants contend plaintiffs’ allegations are conclusory and do not identify any specific contractual breach. In addition, Smedvig argues the provisions of the IRA, Stockholders’ Agreement, and Amended COI that plaintiffs rely on do not impose any obligation onto Smedvig because the provisions explicitly refer to defendant MMI.

While plaintiff does not specifically allege that defendants breached the Amended COI, they do allege that “the defendants owed plaintiff contractual duties arising from the various agreements that had been executed, including but not limited to the stockholders agreement and the IRA.” (NYSCEF 2, Complaint ¶ 91.) The Amended COI grants the common stockholder the right to one vote for each share of common stock held at all meetings for stockholders. (NYSCEF 39, Amended COI, § A[2].) However, in the complaint, plaintiffs fail to identify a stockholder meeting where their right to vote was denied. Further, the allegation that “the common shareholders

were completely deprived of any vote to approve the transaction, which upon information and belief, was required for the approval of the transaction” (NYSCEF 2, Complaint ¶ 78[i]) is conclusory. Plaintiffs do not allege what provision was breached when they did not vote on the merger or even whether they were permitted a vote on the merger.

The breach of contract claim is dismissed against all defendants.

#### Conversion against all Defendants

Plaintiffs allege the misdirection of the merger proceeds to defendants for personal gain amounts to a conversion of plaintiffs’ property. (NYSCEF 2, Complaint ¶¶ 101-103.) Plaintiffs allege that defendants intentionally and unlawfully exercised ownership over the plaintiffs’ property without authority. (*Id.* ¶¶ 104-105.) Plaintiffs assert MMI was sold for approximately \$100 million, with the preferred shareholders received an excess of \$90 million and between \$3-\$4.5 million paid to the MMI Officers and Directors as a golden parachute. (*Id.* ¶¶ 60-62.) Defendants argue plaintiffs fail to identify any specific property that is subject to return, and that the claim is duplicative of the breach of contract claim.

A conversion is an exercise of control over personal property belonging to someone else, denying with that person's right of possession. (*Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 889 [Del Ch 2009] [citations omitted].) The payment of money can generally not be enforced by a conversion claim unless there is an allegation of specific money. (*Goodrich v E.F. Hutton Group, Inc.*, 542 A2d 1200, 1203 [Del Ch 1988] [citations omitted].) Delaware requires the converted property to be tangible, and identifiable property, as opposed to a cash amount. (*Israel Discount Bank*

*of New York v First State Depository Co., LLC*, 2013 WL 2326875, at \*21 [Del Ch May 29, 2013], judgment entered, [Del Ch 2013].) An action for conversion of money will apply when there is an obligation to return the identical money delivered by the plaintiff to the defendant. (*Goodrich*, 542 A2d 1203.) For a conversion claim involving money, the plaintiff would have to show that they had a right to that money, independent of a right from a contract, that the defendant violated by taking control of that money. (*Id.*)

There is no allegation of specific money in defendants' possession that rightfully belongs to the plaintiffs. The specificity element for conversion has not been sufficiently pled. The conversion claim is dismissed against all defendants.

#### Tortious interference against Smedvig

Plaintiffs allege Smedvig intentionally interfered with the Stockholders' Agreement, the IRA, and the Merger Agreement. (NYSCEF 2, Complaint ¶¶ 109-112.) Smedvig argues plaintiffs fail to allege a breach as to any of those contracts, that Smedvig is actually a party to the Stockholders' Agreement and the IRA, and therefore cannot tortiously interfere, there are no allegations that Smedvig was the reason for any breach of contract, and that if Smedvig did breach the Merger Agreement, plaintiffs must allege malice due to Smedvig's financial interest in the transaction. Plaintiff did not respond to Smedvig's arguments in their Opposition. Thus, this claim is dismissed in the absence of opposition.

#### Unjust Enrichment against all Defendants

Plaintiffs generally allege that defendants "received and taken monies and other things of value to which they were not entitled and are required to repay the amounts due and owing to plaintiffs." (NYSCEF 2, Complaint ¶ 117.) Plaintiffs assert the MMI

Officers and Directors negotiated the \$3-4.5 million golden parachutes as part of the merger. Plaintiff contends these funds should have been allocated to the common stockholders. Defendants argue this claim is duplicative of the breach of contract and breach of fiduciary duty claims.

Although this claim echoes the damages alleged in the breach of fiduciary duty and breach of contract claims, since those claims are dismissed, this claim may stand at this pleading stage. The court notes that defendants only asserted that this claim is duplicative.

#### Accounting

Plaintiffs allege that “[t]he defendants have misallocated and misappropriated the merger consideration paid to MMI and has diverted much of the consideration to their own personal use and possession.” (NYSCEF 2, Complaint ¶ 121.) Defendants argue an accounting is a remedy, not a cause of action. Plaintiff does not address this claim in their opposition. Thus, it is dismissed in absence of opposition.

#### Declaratory Judgment

Plaintiffs additionally seek a declaratory judgment that the release contained in the Letter of Transmittal is void and unenforceable. For the reasons previously stated, the court cannot make a determination involving the LOTs. The declaratory judgment claim cannot be resolved on this motion.

Accordingly, it is

ORDERED that the defendants’ motion to dismiss is granted, in part, in so far as the first (breach of fiduciary duty), second (aiding and abetting a breach of fiduciary

duty), third (breach of contract), fourth (conversion), fifth (tortious interference), seventh (accounting), and causes of action are dismissed in their entirety; and it is further

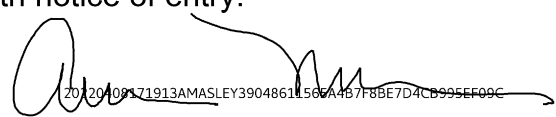
ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the first cause of action alleging breach of fiduciary duty and the second cause of action alleging aiding and abetting breach of fiduciary duty shall be repleaded in compliance with CPLR 3016(b); and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the third cause of action alleging breach of contract except as against those defendants who are not parties to the Agreements; and it is further

ORDERED that the amended complaint shall be served and filed within 20 days after service on plaintiffs' attorney a copy of this order with notice of entry; and it is further

ORDERED that in the event that plaintiffs' fail to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the first, second, and third causes of action shall be dismissed; and it is further

ORDERED that defendants shall move or otherwise answer the amended complaint, if served, within 20 days of that service, or if not served, answer the existing complaint within 40 days of a copy of this order with notice of entry.

  
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4/8/2022  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE:

656125/2019 KHAN, IMTIAZ vs. MEDIAMORPH, INC.  
Motion No. 001 002

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