SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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COLLE CAPITAL PARTNERS I, L.P., COLLE LOGISTICS ASSOCIATES LLC

Plaintiff,

- v -

AUTOMATON, INC.,

Defendant.

INDEX NO. 659292/2024

MOTION DATE 01/23/2025

MOTION SEQ. NO. MS 002

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 39, 40

were read on this motion to/for DISMISS.

In this action for breach of convertible notes and a convertible note purchase agreement, plaintiffs Colle Capital Partners I LP and Colle Logistics Associates LLC (together plaintiffs) requests as a remedy specific performance of certain contractual provisions, including governance rights in the company, issuance of stock, and certain informational rights. Defendant Automaton Inc (Automaton) now moves to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (4), and (7). For the reasons below, the motion is granted in part as to that portion of Count 2 that requests information rights under § 9 of the CNPA, and denied as to the rest of Count 2 and in all other respects.

Background

Many of the facts of this case are documented in this court's prior order on plaintiff's preliminary injunction motion (NYSCEF # 42, PI Order).

The CNPA and 2018 Promissory Notes

Plaintiffs are two Delaware companies that invested in Automaton by purchasing two identical Convertible Promissory Notes in 2018 (Notes or 2018 Notes) pursuant to a Convertible Note Purchase Agreement (CNPA) (*see* NYSCEF # 1, Complaint, ¶¶ 4, 9-10; *see also* NYSCEF #s 2 & 3, 2018 Notes). The Notes are the only members of their series, meaning plaintiffs own the entire series (Complaint ¶¶ 14-15, 22). The maturity date was February 10, 2019 (*id.* ¶ 17).

The Notes are "convertible" in that after the maturity date, a "requisite majority" of the Noteholders (i.e., plaintiffs) can elect to convert the Notes into a new series of preferred stock in Automaton (Conversion Stock[s]) (*id.* ¶ 18, quoting 2018 Notes § 2.3). This new series of Conversion Stock would have all the same "right[s], privileges, preferences and restrictions" as Automaton's "Series Seed Preferred Stock"—a powerful class of stock that, among other things, has the right to appoint a director to the Board of Directors (Complaint ¶¶ 18, 30; *see also* NYSCEF # 8, Automaton Charter, at Article IV ¶ [B] [6] [b]). As for the amount of the Conversion Stock, the Notes would convert at a rate set by an equation in § 2.3 (Complaint ¶¶ 18, 26, citing 2018 Notes § 2.3).

Perhaps most importantly, plaintiffs did not have to wait to receive Conversion Stock to have the rights of stockholders. Instead, section 3.2 of the Notes requires only that plaintiffs deliver a "conversion notice," after which they will be "treated for all purposes as the record holder of the applicable securities" (Complaint ¶¶ 23, 25, citing 2018 Notes § 3.2). Automaton is then required to issue the stock certificates "[a]s soon as practicable" (2018 Notes § 3.2).

As relevant here, the CNPA—under which the Notes were issued—states that while the Conversion Stocks "have been duly authorized by the Board of Directors," they have not yet received stockholder approval, corporate approval, nor been authorized in the Certificate of Incorporation (the Charter) (NYSCEF # 2, CNPA, § 3 [b]). However, Automaton covenanted that "[p]rior to the issuance" of the Conversion Stock, Automaton "[i] shall obtain any necessary stockholder approval . . . [ii] any necessary corporate approval," and [iii] authorize "a sufficient number of [stocks] . . . under [Automaton's] certificate of incorporation [the Charter] to provide for the issuance . . . upon conversion of the Notes" (NYSCEF # 2, CNPA, § 9 [c]). The CNPA also requires certain informational disclosures pursuant to § 9(b) and disclosure of the form of agreements for the conversion pursuant to § 2 (*id.* at §§ 2, 9[c]; Complaint ¶¶ 27, 35).

The Notes Do Not Get Converted

Plaintiffs issued a notice of conversion on September 25, 2024, several years after the maturity date (Complaint ¶ 24). They then proceeded to privately elect Douglas Benowitz as their director to Automaton's Board per their interpretation of their rights (*id.* ¶ 31). However, plaintiffs claim Automaton refused to process the conversion, recognize Benowitz as a director, or take any steps to issue stocks or produce information as required under the Notes and CNPA (*id.* ¶¶ 32-34).

But Automaton claims that it had already issued the maximum number of stock shares allowed under its Charter by the time of the conversion notice and therefore could not issue more without amending the Charter (NYSCEF # 37, Automaton mol, at 1-2, citing NYSCEF # 26, Rate Cap Table; *see also* NYSCEF # 25, Zenner Aff, ¶¶ 3-4 [explaining that all stocks in Rate Cap table are not publicly

traded]). Automaton claims it intended to "address this issue in connection with a Series B capital raise which [was] expected to begin in earnest in January 2025" (NYSCEF # 18, Automaton TRO Letter Opp, at 1-2). Plaintiffs brought this case and moved for an injunction rather than wait. At oral argument on plaintiffs' prior preliminary injunction motion on April 24, 2025, the parties revealed that Automaton had indeed amended its Charter and obtained $18 million in funding, but had not created the required Conversion Stocks (NYSCEF # 41, Hearing Tr., at 2:25-3:13, 5:19-6:1).

Earlier Filed Companion Action

As relevant here, Automaton asserts that there is an earlier-filed action between the parties pending in this court which relates to but is distinct from the issues here (Companion Case) (*see Colle Capital Partners LP et al v Automaton Inc. et al*, Index No. 650606/2022, Dkt. No. 133 [Third Amended Complaint]). Automaton asserts that the fifth cause of action in the Companion Case requests informational disclosures under § 9(b) of the CNPA (*see* Third Amended Complaint in Companion Action).

The Present Case and Motion

Plaintiffs filed this case on November 25, 2024, pleading two counts. Count 1 alleges breach of the 2018 Notes, while Count 2 pleads breach of the CNPA via failure to provide information under §§ 2 and 9(b) and failure to honor its covenant to obtain approvals under § 9(c) (Complaint ¶¶ 41, 49). Plaintiffs simultaneously brought a motion for temporary restraining order and preliminary injunction, both of which were eventually denied (*see* PI Order).

Automaton now moves to dismiss. The parties raise many of the same arguments they raised to the "likelihood of success" prong of plaintiffs' prior preliminary injunction motion. Specifically, Automaton argues that plaintiffs' claims are barred by the UCC in that the stocks plaintiffs are asking for do not exist, and therefore Automaton cannot issue them without causing an "overissuance" prohibited by UCC § 8-210 (Automaton mol, at 4-6). Automaton argues that § 8-210 limits plaintiffs to just two potential remedies: purchase of other outstanding stock (of which there is none), or money damages (*id.* 6). Automaton points out that neither of these remedies is specific performance, which is what plaintiffs are requesting in the Complaint, and so plaintiffs' claims cannot succeed (*id.* at 6-8). Similarly, Automaton argues that because there are no outstanding stocks to buy, plaintiffs are limited to just money damages under § 8-210, which is not what plaintiffs request (*id.*). Automaton further argues that § 8-210 "displaces any purported contract remedy under the 2018 Notes" (*id.* at 7-8). Finally, as to plaintiffs' Count 2, Automaton argues that this claim's request for informational disclosures is identical to a claim in the separate pending action and therefore requires dismissal under the "earlier action" rule.

Plaintiffs respond that UCC § 8-210 does not apply because it only prevents enforcement of other UCC provisions relating to issuance, not contractual provisions related to issuance (NYSCEF # 39, Pltfs' mol, at 7-8). Plaintiffs also argue that § 8-210(a) allows parties to cure overissues, which Automaton could easily do by honoring CNPA § 9(c)'s covenants (*id.* at 8). Plaintiff makes further arguments that Delaware common law and public policy militate against interpreting § 8-210 here (*id.* at 8-9). Finally, plaintiffs argue that there is no reason to deny any part of Count 2 because (i) Automaton's argument ignores the allegations that they breached CNPA § 9(c), and (ii) the court has discretion not to dismiss.

Automaton's reply largely reiterates the points made in its opening brief (NYSCEF # 40, Automaton Reply).

Discussion

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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009])

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference' " (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it' " (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

The parties' main dispute is over the application of UCC § 8-210. However, as previously recognized in the preliminary injunction order, section 8-210 does not appear to apply. "To constitute an overissue, there must be an actual issue of shares in excess of the total amount that the corporation is authorized to issue" (§ 5144.

Overissues, 11 Fletcher Cyc. Corp. § 5144). Here, Automaton has refused to issue any stock, so by definition there has not been an overissue. To the extent Automaton argues that any issue would cause an overissue and therefore require § 8-210's remedies, that argument seems to be belied by the CNPA: section 9(c) requires that "*[p]rior* to the issuance" of the Conversion Stocks, Automaton will "obtain any necessary stockholder approval . . . [and] corporate approval," and amend the Charter to "authorize . . . [and] a sufficient number of" new stocks (CNPA § 9 [c] [emphasis added]). Automaton therefore promised to make sure it could validly issue the Conversion Stocks before actually issuing them. To now claim an overissue is to effectively concede plaintiffs' breach of contract claim.[1]

Automaton's arguments to the contrary would essentially prohibit parties from contracting with § 8-210 in mind. If § 8-210 prohibits over-issuance, then parties may, as in this case, effectively contract to delay issuance until the proper approvals are made. Nothing in § 8-210's language nor the cases cites by Automaton prevents this outcome.

Automaton also cites to Comment 1 of § 8-210, which states that "[t]his section does not give a person entitled to . . . issue . . . of a security the right to compel amendment of the charter to authorize additional shares." Comment 1 goes on to say that "in a case where issue of an additional security would require charter amendment, the plaintiff is limited to the two alternate remedies set forth in subsections (c) and (d)."

Automaton interprets this comment to mean that § 8-210 *prohibits* parties from obtaining the right to compel an amendment, whether by contract or otherwise. But the comment does not appear to say this. While the language is ambiguous, comment 1 appears to suggest that § 8-210 does not itself affirmatively give litigants the power to compel an amendment to a certificate of incorporation. It does not appear to foreclose a contractual provision to that effect as there is here. In short, § 8-210 does not bar plaintiffs' action.

To the extent Automaton may be arguing that plaintiffs simply cannot request specific performance on this breach of contract, Automaton is incorrect:

> "[S]pecific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party .... Traditionally, specific performance has been held to be a proper remedy in actions for breach of contract for the sale of real property or when the uniqueness of the goods in question makes calculation of money damages too difficult or too uncertain"

[1] Automaton's reading of UCC § 8-210 also raises the specter of fraud in that Automaton promised stock under the 2018 Notes that it claims it legally had no power to make or give.

(*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]).

Here, plaintiffs bargained for unique Conversion Shares that gave them certain powerful rights and which cannot be easily converted into money damages. Plaintiffs breach of contract claim therefore survives.

Finally, as to Count 2, Automaton is correct that a portion of this claim requests the same informational disclosures under § 9(b) that are at issue in the Companion Case. The claim is dismissed solely as to § 9(b). However, Count 2 also alleges breach of § 9(c)'s covenant to obtain approvals for the Conversion Stock discussed above, as well as breach of their request under § 2 for the form of agreements for the Conversion Stocks. The claim thus survives as to those allegations.

Conclusion

Pursuant to the above, it is hereby

ORDERED that defendant Automaton Inc.'s motion to dismiss is granted in part and Count 2 is partially dismissed only to the extent it asserts informational rights under § 9(b), and the motion is otherwise denied in all other respects; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days of the e-filing of this order; and it is further

ORDERED that within 20 days of service of the answer, the parties shall contact the court's Part Clerk to schedule a preliminary conference; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website).

This constitutes the Decision and Order of the court.

7/24/2025
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE