SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JUMA TECHNOLOGY CORP., MARGERY C. RUBIN as Trustee of RUBIN FAMILY IRREVOCABLE STOCK TRUST, and ROBERT M. RUBIN,

Plaintiffs,

-against-

ANTHONY M. SERVIDIO, JOSEPH FUCCILLO, ROBERT THOMSON, VISION OPPORTUNITY MASTER FUND, LTD., VISION CAPITAL ADVANTAGE FUND, L.P., VISION CAPITAL ADVISORS, LLC AND NECTAR HOLDINGS INC.

Defendants.

INDEX NO. 151483/2016

ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANTS ROBERT THOMSON, VISION OPPORTUNITY MASTER FUND, LTD., VISION CAPITAL ADVANTAGE FUND, L.P., AND VISION CAPITAL ADVISORS, LLC TO DISMISS THE COMPLAINT

LAW OFFICES OF CYNTHIA M. MONACO
THE LAW OFFICE OF KEIR N. DOUGALL, P.C.

Attorneys for Defendants Vision Opportunity Master Fund, Ltd., Vision Capital Advantage Fund, L.P., Vision Capital Advisors, LLC and Robert Thomson

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Keir N. Dougall, Esq.

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Defendants Robert Thomson, Vision Opportunity Master Fund, Ltd. ("VOMF"), Vision Capital Advantage Fund, L.P. ("VCAF" and together with VOMF the "Vision Funds"), and Vision Capital Advisors, LLC ("Vision") (collectively the "Vision Defendants") respectfully submit this Reply Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint of Plaintiffs Juma Technology Corp., Margery C. Rubin as Trustee of Rubin Family Irrevocable Stock Trust ("Rubin Trust") and Robert M. Rubin (collectively the "Rubin Plaintiffs").

INTRODUCTION

In their Memorandum of Law in Opposition to Motion to Dismiss the Complaint (the "Plaintiffs' Opp. Memo"), the Rubin Plaintiffs concede all of the facts asserted by the Vision Defendants through the submission of documentary evidence, thus eliminating any basis for their Amended Complaint to survive the Motion to Dismiss.

Specifically, the Rubin Plaintiffs concede that the loan documentation submitted by the Vision Defendants is accurate and further concede that Robert M. Rubin personally approved the loan funding and loan terms. The Rubin Plaintiffs concede that the Vision Defendants' strict foreclosure of assets was consistent with the terms of those loan agreements and that the Vision Defendants were within their contractual rights to foreclose on the loans. Plaintiffs concede – as they must in the face of Rubin's personal signature approvals and attendance at board meetings – the falsity of their assertion that all actions relating to the loan agreements and foreclosure were done without notice to Rubin.

The Rubin Plaintiffs again concede – after facing the actual text of the loan agreements now submitted as exhibits – that there were no mandatory conversion features contained in the loan agreements requiring the Vision Funds to convert debt to equity. The Rubin Plaintiffs

similarly have abandoned their minority shareholder oppression claims in the face of a publicly-filed 10-K proving that the Vision Funds held only a small minority of Juma common voting shares.

Perhaps most significant among the Rubin Plaintiffs' concessions, is their failure to contest the mathematical fact that prior to the foreclosure, as publicly reported to the SEC, Juma had an enormous negative asset value because its debt to the Vision Funds dwarfed its assets. Without any evidence of net asset value, there can be no money to return to shareholders after the Juma debt owed to the Vision Funds was repaid. Accordingly, there are no damages to be won by shareholders in this lawsuit.

Yet, in an effort to maintain this litigation in the face of the devastating documentary evidence submitted, the Rubin Plaintiffs ludicrously state that none of the documentary evidence matters because the Juma Board of Directors was so "dominated" by Vision and/or so involved in "self-dealing" that it wrongly acquiesced to the strict foreclosure when better alternatives proposed by Rubin existed. Thus, the Rubin Plaintiffs have reduced their lengthy Amended Complaint to the argument that one business judgment made by the Juma Board at the Special Meeting on October 20, 2012 was made in breach of fiduciary duties owed.

The alternatives to the strict foreclosure trumpeted by Rubin are: (1) consideration of an alleged eleventh hour offer from Iroquois Capital to repay the over $25 million Juma debt and offer additional financing – an offer Iroquois denies making, *see Reply Affidavit of Cynthia M Monaco,* dated October 20, 2016 at ¶ 2 and *Email of Richard* Abbe, dated October 7, 2016 (attached thereto as Exhibit V-MTD-Q); (2) a public foreclosure and auction which would have succeeded in damaging the company's reputation before ultimately reaching the same foreclosure result; and (3) a public bankruptcy filing in which case Juma would again be forced

to meet the demands of its $25 million plus creditor – still without any additional financing proposals to enable Juma to continue operations.

In short, Rubin complains that he was outvoted when he offered these untenable alternatives and attributes his failure of persuasion to "domination" by the Vision Defendants and self-dealing by other Juma Board members who were trying to find a way to mitigate the outstanding Juma debt and allow the operation of its wholly-owned subsidiary, Nectar Services Corp., to continue.

I. PLAINTIFF JUMA HAS NO STANDING TO SUE

Plaintiff Juma asserts standing to bring this lawsuit by relying on the demonstrably false predicate that it "was dissolved on March 1, 2014," *Plaintiffs' Opp. Memo, at 9*, and, therefore can claim standing to sue pursuant to the three-year wind-up period granted by Delaware's dissolution scheme set forth in 8 Del. C. § 278 for corporations that "expire by their own limitation or are otherwise dissolved . . . ." However, plaintiff Juma is not a dissolved corporation. Rather, as a result of its tax delinquency, Delaware declares that Juma is a void corporation and strips Juma of its capacity to sue. *See* 8 Del. C. § 510.

Section 275 of the Delaware Corporations Law requires that a corporation seeking dissolution first obtain the appropriate stockholder and director approvals and then prepare and deliver to Delaware's Secretary of State a certificate of dissolution. *See* 8 Del. C. § 275. In order for such a certificate to be deemed filed and, thus, operative under Delaware law, Juma would be required to have paid all of its outstanding Delaware taxes and fees. 8 Del. C. §§ 103(c) & 277; *see Balotti, Del. L. of Corp. and Bus. Org.* (3rd Ed. & 2016 Supp.) § 10.13, n. 194 ("Prior to accepting the certificate of dissolution, the Delaware Secretary of State requires

the payment of any outstanding franchise taxes.") (citations omitted). Rather than a status of corporate dissolution, a search of the Delaware Secretary of State's records reveals that plaintiff Juma is "Void." *See Thomson Affidavit,* dated August 19, 2016, at ¶ 21; *Exhibit V-MTD-P.* The absence of a dissolution filing is unsurprising because of what the Secretary's records do show – namely, that Juma has owed the State of Delaware over $400,000.00 in franchise taxes since 2014. *Id.; Exhibit V-MTD-P.*

As a "void" corporation, Juma has no standing to bring this lawsuit. Delaware law expressly states: "[i]f any corporation . . . neglects or refuses for 1 year to pay the State any franchise tax or taxes . . . the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative . . ." including the power to sue. 8 Del. C. § 510. Further, the Supreme Court of Delaware has confirmed that section 510 requires that a Delaware corporation loses the privilege of bringing a lawsuit when it shirks its obligation to pay taxes for more than a year. *See Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936, 1990 WL 168276, *1 (Del.) (stating that a void corporation "has lost any standing to appeal and be heard").[1]

Because Juma has not dissolved itself pursuant to section 275, it has misplaced its reliance on *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 699 (Del. 2013) (noting that "[t]he Corporation ceased operations in 1991, and in 1999 it formally dissolved, pursuant to 8 Del. C.

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[1] The Delaware Supreme Court's 1990 holding in *Transpolymer* forecloses the contention under the Chancery Court's century-old decision in *Harned v. Beacon Real Estate Co.*, 80 A. 805, 808 (Del. Ch. 1911) that a gubernatorial proclamation repealing a corporate charter for failure to pay taxes constitutes a dissolution for purposes of § 278. The Court in *Jay Dees, Inc. v. Defense Tech. Sys., Inc.*, No. 05 Civ. 6954(SAS), 2008 WL 4501652 at *6 (S.D.N.Y. September 30, 2008) (Scheindlein, J.) (citing *First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, No. Civ.A. 2100-S, 2005 WL 2173993 at *7 (Del. Ch. Sept. 6, 2005)) incorrectly relied on *Harned* and declined to follow *Transpolymer* on the theory that *Transpolymer* was dicta and unpublished. The *Transpolymer* Court's ruling that the void corporation there had "lost any standing to appeal and be heard" was a holding on the question of the Court's own jurisdiction and, thus, was not dicta. *See Transpolymer*, 1990 WL 168276 at *1. Further, Delaware Supreme Court Rules 14(b)(vi) & 17(a, *commentary*) permit citation of the Court's unpublished orders as precedent in other unrelated cases. Moreover, the Southern District's opinion in *Jay Dees* is not binding here.

§ 275."). Indeed a search of the records of the Delaware Secretary of State reveals that Krafft-Murphy Co., Inc. was "Dissolved" on July 30, 1999. *See Reply Affidavit of Cynthia M. Monaco*, dated October 20, 2016 at ¶ 3; *Exhibit V-MTD-R.*

Thus, Juma is not a proper party plaintiff in this action. This Court should dismiss all of Juma's claims herein for lack of standing.

II. THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION

The newly-reduced contentions of the Rubin Plaintiffs center on the failure of the Juma Board to select one of the three alternatives, preferred by Rubin, to the strict foreclosure. Deploying conclusory and non-particularized allegations, the Rubin Plaintiffs contend that the Juma Board's decision to proceed with a strict foreclosure resulted from a breach of trust: either as a result of domination by the Vision Defendants or of a newly-averred expectation of employment by Defendants Fuccillo and Servidio. Plaintiffs' allegations are not sufficient, especially under the requirement that breach of trust claims must be pleaded with particularity pursuant to CPLR 3016(b). *Giuliano v. Gawrylewski*, 122 A.D.3d 477, 478 (1st Dep't 2014) (affirming dismissal under CPLR 3016(b) where complaint alleged, without elaboration, that directors were interested because their spouses were affiliated with potential equity investors). Plaintiffs' remaining theories of how the Vision Defendants supposedly dominated the Juma Board are wholly conclusory and ignore the fact that Thomson was not on the Board at the time of the foreclosure, that the Juma Board engaged independent counsel to advise the Juma Board, and that Juma acknowledged in writing it was under no coercion or duress. *See Reply Affidavit of Robert Thomson*, dated October 20, 2016 at ¶¶ 7-9; *Exhibit V-MTD-K*, at § 7.7. The Amended Complaint provides no detail of any incidents of the Vision Defendants meddling in, interfering

with or dominating Juma's daily business affairs. Nor does it provide any specific instance of the Vision Defendants "refusal to allow plaintiff to obtain outside funding from other sources," a particularly absurd allegation considering the size of the debt the Vision Defendants held and sought to have repaid. *Amended Complaint*, at ¶ 29. Not only are the Amended Complaint's allegations insufficient as a matter of law,[2] they are belied by the undisputed documentary evidence.

Without providing any specificity, the Rubin Plaintiffs contend that hedge fund Iroquois Capital was "ready, willing and able," to repay Juma's debt and offer additional financing going forward.[3] *Amended Complaint*, ¶ 36. These allegations by the Rubin Plaintiffs regarding Iroquois Capital are not only insufficient and conclusory but they belie common sense. For instance, it is indisputable that Juma's 10-K SEC filing for year-end 2010 establishes that Juma had a negative net asset value of approximately $20 million and the minutes of the Special Meeting confirm that in 2012 Juma owed the Vision Defendants over $25 million in debt. Although the basic financial condition of Juma was publicly available, the Amended Complaint does not allege the amount or even basic terms of the proposed funding that Iroquois Capital had allegedly offered to Juma. In short, the Amended Complaint supplies no facts as to the offer and simply expects the reader to accept its claims with credulity. This Court need not "accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted

[2] Analogous particularity requirements for fraud allegations under CPLR 3016(b) similarly illustrate the insufficiency of plaintiffs' claims. *E.g., Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009) (holding that "the complaint must 'allege the basic facts to establish the elements of the cause of action'" and noting that CPLR 3016 (b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (internal citations omitted)); *Meltzer v. Klein*, 29 A.D.2d 548, 548 (2d Dep't 1967) ("bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action" (internal citations omitted)).

[3] It is noteworthy that in the original Complaint filed on February 23, 2016, Rubin alleged that he had "alternate financing" from Deutsche Bank and made no mention of any offer from Iroquois Capital. *See Complaint, ¶ 34*. The alleged offer from the Iroquois Capital entity was substituted in the filing of the Amended Complaint.

by documentary evidence." *1455 Washington Ave. Assoc. v. Rose & Kiernan*, 260 A.D.2d 770, 771 (3d Dep't 1999) (citations omitted).

It should come as no surprise that the minutes of the Special Meeting on October 20, 2012, at which Rubin claims he "informed all other members that he had held discussions with a major investor – Iroquois Capital," *Affidavit of Robert M. Rubin*, dated October 1, 2016, at ¶ 12, reflect no such offer. *See Exhibit V-MTD-N.*[4] Nor should it come as a surprise that Richard Abbe, a principal of Iroquois Capital, has denied ever making any dollar-specific offer to repay the Juma debt or to finance Juma moving forward. In an email exchange with undersigned counsel, Mr. Abbe stated that he had only read a "corporate book" presumably given to him by Rubin – and had not had an opportunity to investigate the deal further. *See Exhibit V-MTD-Q.* Without signing a non-disclosure agreement or conducting due diligence on Juma and its assets and debt, Iroquois Capital was in no position to offer to repay the Juma debt and provide additional financing. The claims by Rubin that an offer was on the table from Iroquois Capital are fiction.

The two remaining options Rubin posits are a public foreclosure and bankruptcy. The Juma Board did not select these time consuming and costly alternatives because they would have drawn unnecessary public and marketplace attention to Juma's business reversals. *See Exhibit V-MTD-N.* The judgment that it was best for Juma to eliminate well over $25 million in debt from

[4] Defendant Robert Thomson had no discussions with Iroquois Capital on a proposed purchase of Vision's Juma debt although he was acquainted with and party to e-mail communications with Iroquois Capital and its principals during such time. Richard Abbe, the principal of Iroquois Capital acknowledged in an email exchange with counsel for the Vision Defendants that he had made no offer of any sum – let alone the $25 million the loan agreements required the Vision Funds must be repaid under the Juma loan agreements. Instead Mr. Abbe alleges to have reviewed a "corporate book," presumably some documents provided by Rubin – and had merely expressed an interest in reviewing the matter further. *See Reply Affidavit of Cynthia M Monaco,* dated October 20, 2016 at ¶ 2 and *Email of Richard* Abbe, dated October 7, 2016 (attached thereto as Exhibit V-MTD-Q). If Rubin made such a last minute pitch at the Special Meeting, the Board had exhausted two forebearance periods during which time no financing had appeared and working funds had dwindled. The Juma Board was well within its rights to vote in favor of the foreclosure.

its balance sheet through a comparatively fast and inexpensive strict foreclosure sale was reasonable and is protected by the Business Judgment rule.

III. THE BUSINESS JUDGMENT RULE BARS THE AMENDED COMPLAINT

Rubin seeks to avoid the consequences of the Business Judgment rule with conclusory and non-particularized allegations of self-dealing. Yet such insufficient allegations do not overcome the Business Judgment rule. *Giuliano v. Gawrylewski*, 122 A.D.3d 477, 478 (1st Dep't 2014) (affirming dismissal where allegations were insufficient "to rebut the presumptions of loyalty, prudence and good faith under the business judgment rule" (internal citations omitted)). Other than by providing a sworn affidavit, containing most of the same insufficient allegations of domination that appear in the Amended Complaint, Rubin has failed to allege that the decision to approve a strict foreclosure was in any way improper. For the first time, Rubin suggests "[o]n information and belief" that the members of the Juma Board who voted in favor of the strict foreclosure sale then had an expectation of employment with Nectar Holdings, Inc., the entity that took possession of Juma's collateral. *Affidavit of Robert Rubin*, dated October 1, 2016, at ¶ *18*. Yet even if true, such an allegation does not suffice to establish a particularized claim of an actual conflict or breach of trust in connection with the vote to approve the strict foreclosure. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 65-66 (Del. 1989) (potential conflicting interest alone does not rebut presumption that director acted in the best interests of the corporation). These allegations, which Rubin attempts to shoe-horn into the Amended Complaint at the eleventh hour, simply do not state a claim.

Also for the first time in the Plaintiffs' Opposition Memo, the Rubin Plaintiffs suggest that the Juma Board failed to obtain the approval of Juma's voting shareholders after a board

resolution and notice, purportedly required under 8 Del. C. § 271, in connection with the strict foreclosure sale. Plaintiffs' last minute allegation appears nowhere in their Amended Complaint and, thus, is not properly before the Court. Further, Plaintiffs are simply incorrect to contend that § 271 applied to the strict foreclosure sale. The foreclosure sale was not a negotiated transaction between Juma and the Vision Defendants subject to § 271. *See Odyssey Partners, L.P. v. Fleming Companies, Inc.*, 735 A.2d 386, 414 (Del. Ch. 1999) ("The governing statutory scheme did not require ABCO directors' approval of either the notice of foreclosure or the terms of the winning bid at the foreclosure sale."). Plaintiffs have failed to properly allege any dereliction of duty by the Juma Board in connection with the strict foreclosure sale.

Thus, the Rubin Plaintiffs' opposition has provided no reason to except from the Business Judgment rule the Juma Board's reasonable decision to relieve the company of over $25 million in debt through the strict foreclosure sale.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs concede that they have exceeded the three-year statute of limitations applicable to breaches of fiduciary duty generally. To avoid the dismissal that would inevitably follow from a three-year limitations period, plaintiff Juma contends that it is entitled to the benefit of CPLR 213(7)'s six-year period for certain actions by corporations. But Juma is incorrect to assert that a New York limitation period applies to its claims here. For the reasons stated in Point II of Defendant Anthony M. Servidio and Joseph Fuccillo's Reply Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint, filed in this matter on September 21, 2016 (Motion Seq. No. 002), which the Vision defendants adopt and incorporate by reference herein, the three-year limitations period under Delaware law applies to this action.

10 Del. C. § 8106. This Court should dismiss plaintiff Juma's claims because they are time-barred.

The other Plaintiffs, Rubin and the Rubin Trust, cannot and do not claim that CPLR 213(7)'s six-year period applies to their claims. Indeed, they do not oppose or contest the Vision Defendants' motion to dismiss their claims as outside the applicable three-year limitations period. *Plaintiffs' Opp. Memo*, at pp. 14-15. This Court should dismiss the claims by Rubin and the Rubin Trust for the uncontested reasons stated in the Memorandum of Law in Support of the Motion of the Vision Defendants to Dismiss the Complaint.

V. PLAINTIFFS FAILED TO OBTAIN PERSONAL JURSIDICTION OVER VOMF OR THOMSON

Plaintiffs make no mention of VOMF in their opposition to the Vision Defendants' Motion to Dismiss, effectively conceding they made no attempt at service. Accordingly, the Amended Complaint should be dismissed against VOMF.

Similarly, Plaintiffs offer no explanation for their failure to serve defendant Robert Thomson. Indeed, Mr. Thomson is being sued as a former employee of Vision Capital Advisors, LLC ("Vision") and a former member of the Juma Board. However, the Rubin Plaintiffs only attempted service in June 2016 on Mr. Thomson at an address once used by defendant Nectar Holdings Inc.'s subsidiary Nectar Services Corp. prior to that entity's lease expiring in March 2016. *See Defendants Anthony M. Servidio and Joseph Fuccillo's Reply Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint*, at p. 1-4 and *Affidavit of Fran Vinci* (attached thereto). The Rubin Plaintiffs, while thoroughly engaged in a dispute with co-defendants Servidio, Fuccillo and Nectar Holdings, Inc. over whether service was proper on those defendants at the former Nectar Service Corp. office, offer no explanation as to why

service there is proper on Rob Thomson, a former Vision employee. The Rubin Plaintiffs simply state that an alleged "co-worker" of Mr. Thomson accepted service.

Mr. Thomson had no co-workers at the empty Nectar Services Corp. offices because he himself had no office there in June 2016. Accordingly, the complaint against Mr. Thomson should be dismissed. Furthermore, because the claims of defendant Juma are time-barred, *see supra*, and because the Rubin Plaintiffs have not shown proper cause for their failure to diligently attempt service on Mr. Thomson or VOMF, they should not be afforded an additional opportunity to do so. *See Johnson v. Concourse Village, Inc.* 69 A.D.3d 410 (1st Dep't 2010); *New York State Div. Human Rights v. Oceanside Cove II Apartment Corp.*, 39 A.D. 3d 608 (2d Dep't 2007).

CONCLUSION

Based upon the foregoing and the accompanying Reply Affidavit of Cynthia M. Monaco, Esq., dated October 20, 2016, and the exhibits attached thereto, the Reply Affidavit of Robert Thomson, dated October 20, 2016, and all of the papers and proceedings had herein, the defendants respectfully request, pursuant to CPLR 3211(a)(1), (2), (3), (5), (7) and (8), that the Court enter an order (i) dismissing the Amended Complaint with prejudice against defendants

VOMF, VCAF, Vision, and Robert Thomson and (ii) for such other and further relief as the Court deems just and proper.

Dated: October 20, 2016

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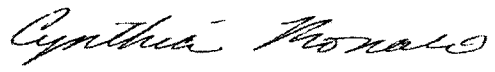

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