

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Michael Tate, Joseph Shuster, Lyle
Evanson and Jack Ayers, individually and
on behalf of all other individuals similarly
situated,

Civil No. 09-cv-02076 MJD/JJG

Plaintiffs,

v.

Restaurant Technologies, Inc., Parthenon
Capital LLC, Jeffrey R. Kiesel, John C.
Rutherford, Jonathan O. Grad, Zachary F.
Sadek, Phillip A. Clough, and Robert E.
Weil,

**MEMORANDUM IN SUPPORT
OF DEFENDANT RESTAURANT
TECHNOLOGIES, INC.'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Defendants.

INTRODUCTION

Plaintiffs began this litigation five weeks after they chose, on voting against a June 24, 2009 recapitalization merger, not to continue as shareholders in the recapitalized Restaurant Technologies, Inc. (“RTI” or the “Company”). They challenge the fairness of that transaction and contend that the Company’s majority shareholder caused various breaches of fiduciary duties which entitle them to money damages. RTI provided Plaintiffs with thousands of pages of documents related to its historical performance and the details of the proposed transaction weeks before the transaction closed. Despite having had sufficient knowledge and the opportunity to seek to enjoin the transaction before it was consummated, Plaintiffs made the tactical decision not to do so and instead to sue later primarily for money damages. Their Complaint also included, however, a claim seeking to have the Court declare—after the fact—that the recapitalization merger

transaction was void and must be rescinded. On the undisputed materials, under clear Delaware law, that claim for equitable relief should be dismissed.

RTI now seeks summary judgment dismissing that claim (Count IX of the Amended Complaint), even though discovery is not yet complete for two practical reasons: first, the material facts are undisputed and no further discovery can alter them; second, the mere existence of this claim poses an unnecessary risk to the continued operation of RTI. RTI's Board of Directors recently determined that the circumstances are now very favorable for a potential sale of the Company and that it therefore would be in the best interests of all shareholders to explore that possibility. In order to attract potential buyers and to obtain the highest possible offer for the Company, however, it is necessary to assure such potential buyers that this litigation will not interfere with the sale—that is, that there will be no equitable relief preventing or undoing the pervious transaction and that the ongoing claims will involve money damages only. A sale of the Company now most likely ensures that RTI's shareholders receive the best possible price, that its lenders will be paid in full and that most if not all of RTI's current employees will have jobs going forward. Although it clearly is in Plaintiffs' best interests to allow a sale to occur at the best price attainable, they have to this point declined to stipulate to the dismissal of their one equitable claim. RTI accordingly seeks partial summary judgment at this time, and on an expedited basis, dismissing Count IX.¹

Delaware courts routinely reject claims made after a transaction has been consummated seeking to have the transaction declared void, holding that equitable relief

¹ RTI has filed a separate motion for an expedited hearing and briefing schedule.

is not appropriate and that money damages are sufficient to remedy any injury. On the undisputed material facts presented here, the case law dictates that the requested equitable relief, as a matter of law, should be dismissed. Put simply, the relief Plaintiffs seek in Count IX is both impractical and unnecessary: the June 24, 2009 transaction is inextricably intertwined with financing that if lost would cause the Company's collapse; in any event, money damages, the primary remedy Plaintiffs request, is sufficient to fully redress any alleged wrongs they have suffered.

The Court accordingly should dismiss Count IX. Doing so will allow the current sales process—which is in the best interests of all parties—to proceed unfettered by the specter of an unnecessary and unfounded claim for equitable relief.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. RTI's History

RTI is in the business of supplying bulk cooking oil and oil-handling equipment to restaurants nationwide and removing and reselling the used oil. (Am. Compl. ¶¶ 5, 22.) It is headquartered in Eagan, Minnesota but incorporated under the laws of Delaware. (*Id.* ¶ 5.) As a result of its sales growth and a continuing need for capital, RTI over the past ten years issued several rounds of preferred stock, in addition to common stock. (*Id.* ¶¶ 22 and 25.) Two private equity firms, Parthenon Capital and ABS Capital Partners, through affiliated funds, purchased the majority of the preferred stock. Prior to the

recapitalization in June 2009, Parthenon held a 45.4 percent interest in RTI and ABS held 11.6 percent. (Proxy Statement Offering Memorandum (“Proxy”) at 56-57.)²

RTI attempted to sell itself in 2008 but was unsuccessful. The collapse in the credit markets left it with no buyers. RTI’s financial position deteriorated significantly over the last quarter of 2008 and into 2009. (Proxy at ii.) By December 31, 2008, this deterioration caused RTI to violate certain financial covenants under its Note Purchase Agreement with its lenders, which defaults entitled the lenders to exercise their rights under the then-existing debt arrangements, including the right to accelerate the maturity of RTI’s outstanding debt. (*Id.* at i.) This could have required the Company to pursue a restructuring or liquidation in bankruptcy, which would likely have resulted in no recovery for the Company’s stockholders. (*Id.*) In order to obtain a waiver of the existing default, RTI’s lenders required the Company to raise a significant amount of cash. (*Id.*) Indeed, Sankaty Advisors, LLC (“Sankaty”), the primary lender to RTI, advised that if RTI failed to raise additional capital Sankaty would immediately exercise the remedies available to it under the Note Purchase Agreement. (Affidavit of Robert Weil (“Weil Aff.”) ¶ 9.)

II. The Recapitalization Merger

RTI’s Board thereafter approved the issuance of additional preferred shares and a recapitalization merger, a process that involved, among other things, the merger of a subsidiary of RTI into RTI (“New RTI”) and the issuance of common stock, and a new

² A copy of the Proxy was previously filed with the Court on September 16, 2009 as Doc. Nos. 11-1 through 11-6.

class of preferred stock, by New RTI such that all existing preferred shareholders and those common shareholders who wished to would become shareholders of New RTI, with the remainder of the common shareholders being cashed out (“Recapitalization Merger”). (Proxy at i-ii.) In the Board’s view, by providing both new equity and the opportunity to cure the violations under its loan covenants, the Recapitalization Merger would enable the Company to remain operational and to pursue its business plan and therefore was in the best interests of the shareholders. (*Id.*)

On or about May 13, 2009, RTI provided a Proxy Statement and Offering Memorandum (“Proxy”) to all shareholders describing the Recapitalization Merger. (Weil Aff. ¶ 2.) The Proxy explained the circumstances in which RTI found itself and the Board’s reasoning in supporting the proposed transaction. (*Id.*) In response to a May 22, 2009 books and records demand from disaffected common shareholders who had retained counsel, including Plaintiffs here, the Company also produced thousands of pages of documents in late May and early June related to its historical performance and the details of the proposed transaction. (Am. Compl. ¶ 47; Weil Aff. ¶ 3, Ex. A.) On June 4, 2009, Plaintiffs wrote a letter to all common shareholders raising a number of issues with the Recapitalization Merger and urging shareholders to vote against the transaction. (Weil Aff. ¶ 4, Ex. B.)

On June 12, 2009, the transaction was approved by the required number of the Company’s shares. (Weil Aff. ¶ 6.) The Agreement and Plan of Merger, through which the transaction was accomplished, was expressly conditioned on, among other things, (i) the Company’s successful closing on its Class Z Purchase Agreement pursuant to which

it issued Class Z shares and (ii) the execution by the Company's lender of the Second Amendment and Waiver to Note Purchase Agreement by which it agreed to waive certain defaults under the existing Note Purchase Agreement. (Weil Aff. ¶ 7, Agreement and Plan of Merger at 5.01) Both conditions were satisfied. (Weil Aff. ¶ 7.) On June 24, 2009, the transaction closed.

The transaction resulted in all assenting Series A preferred shareholders, and those common shareholders who wished to (instead of receiving cash), becoming common shareholders of New RTI. (Proxy at iii.) The dissenting shareholders, including certain of the named Plaintiffs, tendered their RTI shares and did not become shareholders of New RTI.³ Common shareholders who chose to cash out received their merger consideration after the closing.

At no time did Plaintiffs attempt to enjoin the Recapitalization Merger prior to its closing. Instead, Plaintiffs chose to file the instant lawsuit on July 17, 2009, three weeks after the transaction closed.

III. RTI Now Believes that a Sale of the Company is in the Best Interest of All Shareholders.

RTI's Board of Directors has now determined, in the good faith exercise of its business judgment, that it would be in the best interest of all shareholders—including those who are members of the class Plaintiffs seek to represent—to explore the sale of the Company. (Affidavit of Kenneth D. Larson ("Larson Aff.") ¶ 2.) The Board's business judgment is based on, among other things, the current financial position of the Company,

³ Lyle Evanson, who represents the Series A preferred shareholders, elected to receive common shares in New RTI. (Am. Compl. ¶ 4.)

the recent strengthening of the capital markets, the relatively short-term nature of the Company's agreement with its lenders, and advice received from financial advisors. (*Id.* ¶ 3.)

The Company's goal is to maximize the sales price, and the Board believes that pursuing a transaction now—rather than waiting until later—is most likely to result in the best price possible, which in turn means obtaining the best value for shareholders. (*Id.* ¶ 4.) The Board has been told by its investment banker that it will be difficult, if not impossible, to interest a buyer in the Company and to obtain the best price for shareholders so long as injunctive relief could interfere with the sale. (Affidavit of Kelley Drake (“Drake Aff.”) ¶¶ 5-6; Larson Aff. ¶ 6.)

The Company has also been told by its lenders that were the Recapitalization Merger declared void they would immediately protect their own interests by pursuing contractual remedies as against RTI, leaving RTI with little choice but to file bankruptcy. (Weil Aff. ¶¶ 10-11.) In addition, were the transaction declared void, the Company would be unable to repay the additional capital it obtained through the related share issuances and still be able to operate the Company on an ongoing basis. (Weil Aff. ¶¶ 10-11.)

ARGUMENT

I. Summary Judgment Standard

A court shall grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court must consider

the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Yet “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issues of *material fact*.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The party opposing summary judgment may not establish genuine issues by relying on unverified and conclusory allegations, or evidence that may be later developed. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

II. Summary Judgment Should be Granted on Count IX Because the Recapitalization Merger Cannot be Undone and the Plaintiffs are not Unfairly Prejudiced by Money Damages.

Rescission in its purest form seeks to “unmake” or “cancel” an agreement and to return the parties to the *status quo ante*. *Norton v. Poplos*, 443 A.2d 14 (Del. 1982). Where the circumstances of a challenged transaction make rescission infeasible, and where the plaintiff is not unfairly prejudiced, a motion for summary judgment to eliminate that remedy should be granted. *See Winston v. Mandor*, 710 A.2d 831, 831 (Del. Ch. 1996) (dismissing a merger rescission claim where the merger had been consummated a year earlier, rescission would have involved disrupting good faith transactions, and a monetary award would adequately compensate the plaintiffs). Here, the Recapitalization Merger Plaintiffs seek to have declared void is so inextricably intertwined with two other transactions critical to the financial survival of the Company that it cannot be undone without severely harming all parties. In any event, money

damages are the most appropriate—and a completely adequate—remedy for any alleged wrongs Plaintiffs have suffered.

A. Rescission of the Recapitalization Merger is Impractical.

In determining whether rescission is infeasible, courts look to the complexity of that transaction and thus the difficulty of undoing it as well as possible unfair prejudice to the defendant if the transaction were rescinded. *Winston*, 710 A.2d at 832-34. Here, the Recapitalization Merger cannot be undone without essentially destroying the Company and severely harming not just Defendants but Plaintiffs and other third parties as well.

1. The Recapitalization Merger was Complex and Would Be Infeasible to Undo.

The transaction Plaintiffs seek to have declared void was complex. The Recapitalization Merger was undertaken to satisfy the concerns of the Company's lenders. It was expressly conditioned on the injection of additional capital through the sale of more shares and the lenders' agreement to waive defaults and not pursue its remedies; the lenders' consent in turn was conditioned on the additional capital being raised. (Weil Aff. ¶¶ 7-8.) Were the Recapitalization Merger to be declared void, as Plaintiffs seek, the lenders' agreement to waive defaults and the issuance of the shares for additional capital both would be voided as well. This would leave RTI in default under its lending agreement, with an obligation to refund the additional capital—an obligation it could not fulfill. (Weil Aff. ¶ 10.) The certain outcome would be either a takeover of the Company by its lenders or a bankruptcy filing, each of which almost certainly would result in no recovery to the shareholders Plaintiffs represent and would gravely damage

RTI and the other defendants, as well as third parties, including RTI's lenders and current employees. (Weil Aff. ¶ 11.)

In these circumstances, it is clear as a practical matter that the Recapitalization Merger cannot be undone. It simply is "impossible to unscramble the eggs." *In re Lukens Inc. S'holder Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999); *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 501 (Del. 1981); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (completed transaction too involved to undo and award, if any, should be monetary damages); *Goodwin v. Live Entm't, Inc.*, 1999 Del. Ch. LEXIS 5, at *16 n.3 (belated request for rescission created massive difficulties for defendant's other stockholders and noteholders); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, No. 12883, 1995 Del. Ch. LEXIS 86, at *10 (Del. Ch. June 15, 1995) (practical considerations made rescission impossible and court granted summary judgment on plaintiffs' rescission claim).

2. Rescission of the Recapitalization Merger Would Negatively Impact RTI and Parties with Other Interests in the Company.

A rescission would severely harm the Company itself and parties with other interests in the Company. This is a substantial concern to Delaware courts. *See Goodwin*, 1999 Del. Ch. LEXIS 5, at *16 n.3 (considering impact of rescission on noteholders); *RGC Int'l Investors, LDC v. Greka Energy Corp.*, No. CIV.A. 17674, 2000 WL 1706728, at *16 n.59 (Del. Ch. Nov. 8, 2000) (noting that neither the plaintiff nor the defendant would have behaved in the same manner without the agreement); *Arnold*, 1995 Del. Ch. LEXIS 86, at *10-11 (granting summary judgment where rescission would unduly harm innocent party who has relied on the finality of the merger). Here, RTI

would essentially be destroyed by the remedy Plaintiffs seek—it would have little choice but to file bankruptcy. (Weil Aff. ¶ 11.)

Moreover, RTI's lenders, vendors, customers, accountants and employees all have relied on the validity of the Recapitalization Merger in taking (or not taking) various actions over the nearly eleven months since it occurred. Granting rescission of the Recapitalization Merger, by destroying RTI and forcing it into bankruptcy, would unduly harm them. RTI's debts would most likely not be paid in full and RTI's employees could lose their jobs. It is not necessary to impose that harm here. As set forth below, money damages provide a satisfactory remedy—indeed, the preferred remedy—for Defendants' alleged wrongs.

3. Plaintiff's Failure to Seek to Enjoin the Merger Before it was Consummated Supports Granting Summary Judgment.

The appropriate time for Plaintiffs to complain about the Recapitalization Merger was before it was consummated by moving for an injunction. They did not do so. This fact alone has been found sufficient to bar a later claim for rescission. *See Clements v. Rogers*, 790 A.2d 1222, 1238 n.45 (Del. Ch. 2001) (tactical decision not to seek to prevent the consummation of merger barred rescission claim). Accordingly, Plaintiffs cannot show irreparable harm and therefore are not entitled to an injunction. *Northland Ins. Cos. v. Blaylark*, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000) (for injunctive relief plaintiffs must first establish that irreparable harm will result without injunctive relief and that such harm will not be compensable by money damages).

The failure to have sought injunctive relief before the challenged transaction is particularly dispositive if Plaintiffs had sufficient information to have been able to raise the same types of claims as they later assert in the litigation. *See Lukens*, 757 A.2d at 728 (plaintiffs had sufficient information and opportunity but failed to seek injunction); *Goodwin*, 1999 Del. Ch. LEXIS 5, at *16 n.3 (same); *RGC*, 2000 WL 1706728, at *16 n.59 (same). Here, Plaintiffs not only had the lengthy Proxy and its many attachments describing the Recapitalization Merger, they also had extensive information obtained through a books and records request. (Am. Compl. ¶ 46, Weil Aff. ¶¶ 2-3, Ex. A.) Plaintiffs knew enough to write a lengthy letter to common shareholders before the transaction raising the very same issues that underlie the Complaint, and they knew enough to vote against the transaction and to urge other shareholders to do so. (Weil Aff. ¶¶ 4-5, Ex. B.) In short, they knew enough to be able to challenge the Recapitalization Merger but made the tactical decision not to do so and instead to sue weeks later seeking primarily money damages.⁴

Now, nearly eleven months have passed and Plaintiffs' claim for rescission still lingers. All the while, RTI and its investors, creditors, and customers have continued to make decisions relying on the finality of the merger.⁵ *See RGC*, 2000 WL 1706728, at *16 n.59; *Updyke Assocs. v. Wellington Mgmt. Co.*, No. 6298, 1982 Del. Ch. LEXIS 506,

⁴ Plaintiffs confirmed that they are primarily seeking money by damages by not seeking certification of a class under Rule 23(b)(2), which requires that injunctive relief be the primary remedy sought. (See Doc. No. 63.)

⁵ It is true that after the lawsuit was filed, RTI's counsel agreed that the time necessary to gather and produce the broad array of documents Plaintiffs demanded in this litigation would not be counted as unnecessary delay in pursuing injunctive relief. That does not gainsay the failure to seek to enjoin the transaction before it happened.

at *3-6 (Del. Ch. Feb. 3, 1982) (granting summary judgment where suit for rescission not filed until one year after the merger became effective); *Lukens*, 757 A.2d at 728 (dismissing claim for rescission because too much time had passed to undo the transaction). On the undisputed facts, then, the Court should declare as a matter of law that the Recapitalization Merger no longer can be rescinded.

B. Plaintiffs are not Prejudiced by Monetary Damages Instead of Rescission.

In addition to the impracticability of undoing the transaction, the record is clear that Plaintiffs would not be unfairly prejudiced by being relegated to a monetary equivalent (i.e. rescissory damages) rather than the equitable relief of rescission. Equitable relief is only available where there is no adequate remedy at law. *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1508, 1518 (11th Cir. 1994); *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1036 (5th Cir. 1990) (granting summary judgment on rescission claim). It is Plaintiffs' burden to prove an equitable remedy is needed. *Geiger v. United States*, 707 F.2d 157, 161 (5th Cir. 1983) (no showing that damages will not adequately reimburse plaintiff for any monetary loss sustained, nor had plaintiff otherwise demonstrated the exceptional circumstances necessary to justify the equitable remedy of rescission). As a matter of law, Plaintiffs cannot do so.

Here, it is unnecessary to unwind the transaction to provide full relief to Plaintiffs. If the Court were to unwind the Recapitalization Merger, Plaintiffs would become shareholders again, but RTI's lenders would immediately protect their own interests by pursuing contractual remedies as against RTI, and RTI almost certainly would be forced

into bankruptcy. (Weil Aff. ¶¶ 10-11.) Plaintiffs would still only receive money—if anything—through the bankruptcy. Even if the Recapitalization Merger was undone and the Company did not go into bankruptcy, Parthenon and ABS, who together held 57 percent of RTI's shares prior to the Recapitalization Merger (Proxy at 56-57), would have the ability to force another recapitalization or the immediate sale of the Company. *See* Del. Code Ann. tit. 8, § 251 (requiring majority vote), § 271 (same). Again, Plaintiffs would get nothing more than money—if anything.

In these circumstances, a rescission of the Recapitalization Merger is illusory and unnecessary. Monetary damages are sufficient. Indeed, the Amended Complaint does not articulate any reason why equivalent rescissory damages would not adequately compensate for any alleged losses. Accordingly, summary judgment on Plaintiffs' rescission claim should be granted.

CONCLUSION

For the reasons set forth above and in the supporting affidavits, RTI requests that this Court grant partial summary judgment on Count IX.

Respectfully submitted,

Dated: May 11, 2010

DORSEY & WHITNEY LLP

By *s/ Michelle S. Grant*

James K. Langdon #171931

langdon.jim@dorsey.com

Michelle S. Grant #311170

grant.michelle@dorsey.com

50 South Sixth Street, Suite 1500

Minneapolis, MN 55402-1498

Telephone: 612-340-2600

Attorneys for Restaurant Technologies, Inc.