

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Civil No. 09-cv-02076 MJD/JJG

Plaintiffs,

vs.

**PLAINTIFFS' REPLY  
MEMORANDUM IN SUPPORT  
OF MOTION FOR  
CLASS CERTIFICATION**

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

Defendants.

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**INTRODUCTION**

Defendants' opposition to Plaintiffs' Motion for Class Certification is *not* based on the *law* governing class certification. Rather, Defendants' opposition is based on the *consequences* of class certification on Defendants' current business plans for Defendant Restaurant Technologies, Inc. ("RTI"). Apparently, Plaintiffs' claim for declaratory relief presents a threat to Defendant Parthenon Capital LLC's ("Parthenon") investment strategy for RTI and disrupts Defendants' efforts to complete their pilfering of RTI's equity. Defendants implicitly concede that Plaintiffs have met the Rule 23 requirements for the vast majority of their claims, and their objection to class certification is, in essence, a thinly-veiled, premature and inappropriate attempt to obtain a summary judgment ruling. The fact that Defendants have now filed a Motion for Partial Summary

Judgment is an acknowledgment that the class certification decision process is not the proper context for Defendants to seek disposition of claims. (*See* Memorandum in Support of RTI's Motion for Partial Summary Judgment (Dkt. # 74).)

While discovery is far from complete,<sup>1</sup> the factual record generated thus far demonstrates a stark pattern of willful misconduct by Defendants. (*See* Plaintiffs' Memorandum in Support of Motion to Amend/Correct for Punitive Damages, filed May 13, 2010 (Dkt. # 82).) Significant facts regarding the merger/recapitalization continue to emerge making Plaintiffs' rescission claim a legally justified and, potentially, an appropriate remedy which the Court may wish to employ in adjudicating this case. Equally important, there is no basis in law—whether applying that of Delaware or Minnesota—for Defendants' contentions that Plaintiffs' rescission, conversion and unjust enrichment claims are unsuitable for class-wide adjudication. Accordingly, the Court should reject Defendants' objections and should certify the proposed Class as to all Plaintiffs' claims.

**I. DEFENDANTS' OBJECTION TO PLAINTIFFS' CLAIM FOR EQUITABLE RELIEF IS DRIVEN BY ITS CURRENT BUSINESS PLANS AND IS WHOLLY INAPPROPRIATE FOR THE CLASS CERTIFICATION DECISION.**

Last week, RTI filed a Motion for Partial Summary Judgment seeking dismissal of Plaintiffs' declaratory judgment claim. (*See* Dkt. # 74.) In their supporting

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<sup>1</sup> Currently, there are approximately 15 critically important depositions scheduled to occur, including those of Defendants Kiesel, Weil, Rutherford, Grad, Sadek and Clough. Meanwhile, Defendants continue to produce documents in a protracted rolling production that began October 2009 and continues today. As recently as early last week, Defendants rolled out an additional 4,000 pages of documents in response to discovery requests served over nine months ago.

Memorandum, Defendants reveal their plans for the sale of RTI and express a newfound concern that RTI's shareholders "receive the best possible price" for the company:

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 interest of all shareholders to explore that possibility.

[\*\*\*]

[I]t 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 [sic] transactions ....

[\*\*\*]

A sale of the Company now most likely ensures that RTI's shareholders receive the best possible price ....

(Dkt. # 74, at p. 2.)<sup>2</sup>

Defendants' rationale for seeking summary judgment on Plaintiffs' rescission claim on an expedited basis is clearly motivated by their sale plans, and to that end, Defendants have demonstrated the ability to seek a summary judgment decision (albeit undeserving) under the appropriate rule and in the proper context. *See* Fed. R. Civ. P. 56. Given this situation, the Supreme Court's admonition that a court may not decide the merits of a case at the class certification stage is particularly apt. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974). Further, as this Court has stated, "[w]hen there is a question as to whether certification is appropriate, the court should give the benefit of

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<sup>2</sup> Defendants also appear to have a newly acquired commitment to "maximiz[ing] the sales price" by "pursuing a transaction now—rather than waiting until later." This purported interest in meeting basic fiduciary duties was unfortunately absent in the recent past, when RTI's plans to "maximize" RTI's value by pursuing an IPO were thwarted by Parthenon because a sale meant that "Parthenon's proceeds are higher." *Compare* Dkt. # 74, p. 2 *with* Dkt. # 82, pp. 8–9.

the doubt to approving the class.” *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 483 (D. Minn. 2003).

## II. CLASS CERTIFICATION OF PLAINTIFFS’ DECLARATORY JUDGMENT CLAIM COMPORTS WITH CONSTITUTIONAL REQUIREMENTS.

### A. Defendants’ Constitutional Due Process Objection Is Based on a Single, Distinguishable Case That Does Not Control the Court’s Decision.

The sole authority cited by Defendants for their contention that rescission is an unconstitutional class-wide remedy, *Hastings-Murtagh v. Texas Air Corp.*, is readily distinguishable and does not control the outcome of the Court’s decision here. *See Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450 (S.D. Fla. 1988) (cited in Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Class Certification (Dkt. # 69.), pp. 8–9). In *Hastings-Murtagh*, the putative lead plaintiff sought certification of a class of employee-shareholders seeking to rescind the merger of two airlines. *Hastings-Murtagh*, 119 F.R.D. at 452. The plaintiff’s proposed class was defined as airline *employees* who owed common and preferred stock. *Id.* at 455. The *Hastings-Murtagh* court’s due process concerns stemmed from the fact that the plaintiff’s proposed class excluded non-employee shareholders and, as a result, the plaintiff’s suggested outcome would affect persons not before the court. *Id.* at 456–57. The court reasoned that, because it had “no precise way to evaluate the interests of the parties that [we]re not before it,” a remedy affecting such shareholders, like rescission, would run afoul of due process requirements. *Id.* at 458. In other words, it was not because rescission is uniquely violative of due process in the class action context, but it was the

*utter absence* of potentially affected parties that led the *Hastings-Murtagh* court to its decision. When analyzed against the backdrop of the instant Plaintiffs, the distinguishing characteristics of *Hastings-Murtagh* come into sharp focus.

First, in contrast to the proposed class in *Hastings-Murtagh*, the Class proposed by the lead Plaintiffs has been defined to be as broad as possible in order to bring before the Court all RTI shareholders and option holders who were injured by Defendants and whose interests could be affected by an order of rescission. (*See* Plaintiffs' Memorandum in Support of Motion for Class Certification (Dkt. # 63.), pp. 1, 4, n.2.) Plaintiffs' proposed Class makes no categorical distinction between employee-shareholders and non-employee shareholders, (*Compare* Dkt. # 63, p. 1 with *Hastings-Murtagh*, 119 F.R.D. at 455.), and to the extent that company insiders or employees are excluded from the Class, their interests are represented by RTI and are thus before the Court.

Second, unlike the 2009 "merger"/recapitalization of RTI, the transaction in *Hastings-Murtagh* was true merger, involving *two wholly distinct* corporations with separate ownership that engaged in genuine negotiations over the terms of a \$65 million (in 1988 dollars) merger. *Hastings-Murtagh*, 119 F.R.D. at 454. In contrast, the 2009 recapitalization/merger of RTI involved only one entity and its newly-created, wholly-owned shell subsidiary under the same management that engaged in zero negotiations over the terms of the recapitalization that was intended to "resolve existing shareholder issues." (*See* Dkt. # 82, pp. 11–12.)<sup>3</sup> Unlike *Hastings-Murtagh* where the plaintiff's

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<sup>3</sup> The other party involved in the "merger" was a hastily-formed corporate entity with no assets, no operations, whose only "officers" were Defendants Kiesel and Weil and whose

grievances stemmed from a bona fide merger with genuinely consequential negotiations having occurred, RTI shareholders were cashed out and crammed down in an entirely self-contained transaction wrought by utter self-dealing. (*See generally* Dkt. # 82.)

Third, in *Hastings-Murtagh* the plaintiff shareholders sought rescission of the (bona fide) merger because the employee-shareholder unions purportedly had desired to make their own, superior offer to purchase one of the merging airlines but the unions' efforts were rejected by the board. 119 F.R.D. at 454. Here, in contrast, Plaintiffs do not seek rescission in order to purchase the company or to preserve employee stock ownership plans, *id.* at 452–54; rather, Plaintiffs have sought rescission because it is a remedy that could, once discovery is complete, provide a suitable mechanism for the Court to fashion appropriate, class-wide relief.

To summarize, the *Hastings-Murtagh* case involved a far more restrictive class definition, with the plaintiffs seeking rescission of a substantively different kind of transaction executed by truly distinct corporate entities after legitimate negotiations. Accordingly, *Hastings-Murtagh* does not control the outcome of the present decision, given the clear contextual difference for Plaintiffs' rescission claim.

B. Plaintiffs' Proposed Class Ensures That All Individuals Potentially Affected By a Rescission Order Will Be Afforded Due Process.

Both the definition of Plaintiffs' proposed Class and the decision to seek declaratory relief are the result of Plaintiffs' careful assessment of the realities of RTI's capital structure and the wrongdoing of Defendants. Accordingly, the

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existence served no purpose outside Defendants' attempt to satisfy the bare minimum technical requirements for execution of the "merger."

proposed Class and the rescission claim should be analyzed in their appropriate context.

Plaintiffs' proposed Class is defined as follows:

All individuals and entities who held RTI common stock or Series A preferred stock as of June 12, 2009 and all individuals or entities holding options to purchase RTI common stock as of May 14, 2010. Excluded from the class are the Defendants, members of their immediate family, current officers and directors of RTI, RTI's legal representatives and financial representatives, Defendant Parthenon Capital LLC, ABS Capital Partners and their affiliates, subsidiaries and individuals affiliated with those entities.

(Dkt. # 63, p.1.) The Class definition is predicated on the ownership of RTI stock or options, and thus is comprised of all RTI shareholders and option holders whose equity and ownership rights were damaged by Defendants' actions as controlling shareholders and fiduciaries. Series B preferred stock is excluded from the proposed Class because it was Series B stock that Defendants chose to employ in orchestrating the cramdown of the proposed Class in the "merger"/recapitalization. Therefore, as the majority holders of Series B stock defending against Plaintiffs' claims pertaining to Series B stock, Defendants are representing the interest of all of Series B shareholders in this action. Accordingly, the interests of all RTI shareholders are being represented before the Court.

### **III. COURTS REGULARLY GRANT CLASS CERTIFICATION WHERE PLAINTIFFS SEEK EQUITABLE RELIEF.**

Notwithstanding Defendants' thinly supported and inapposite contention regarding the constitutionality of class certification for shareholders bringing rescission claims, courts regularly certify classes bringing such equitable relief. *See, e.g., Wells Fargo & Co. v. First Interstate Bancorp.*, Civ. A. Nos. 14696, 14623, 1996 WL 32169, at \*7 (Del.

Ch. Jan 18, 1996) (“Where the remedy in a shareholder action will necessarily affect all shareholders (such as the rescission of a merger) not only is such a case permissible as a class claim (Rule 23(b)(1)) but, speaking prudentially, protection of all interests require that it be litigated once, for all (Rule 23.1).”). Delaware courts have addressed and rejected Defendants’ arguments against the certification of a class seeking rescission:

[Defendant] asserts that since the transaction attacked has now been consummated, this action can only be regarded as one for money damages, not equitable relief .... I cannot so conclude. This action was brought seeking equitable relief. If it is litigated to judgment, I cannot now conclude that equitable relief might not be granted. [T]he fact that a merger has now been consummated does not itself foreclose the remedy of rescission. Cases such as this are properly maintained as class actions ...[.]

*Amsted Indus. Inc. Litigation*, 1986 WL 12466, at \*1 (Del. Ch. Nov. 3, 1986). *See also In re Gaylord Container Corp. Shareholders Litigation*, 747 A.2d 71, 84–85 (Del. Ch. 1999) (granting class certification where plaintiffs sought to rescind four-year-old shareholders rights plan and amendments).

Further, Plaintiffs claim for a potential remedy of rescission is based, in large part, on the same allegations made with respect to the breach of fiduciary duty and entire fairness claims, respectively. Indeed, Delaware courts have asserted that “[a]n action seeking to prove a breach of [fiduciary] duty is inescapably a true class action” and “[r]elief whether it be by injunction, rescission or an award of money will be determined by reference to the effects of the fiduciary’s wrong the trust or on the corporation or all of its stockholders as a class.” *Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 575 (Del. Ch. 1991) (emphasis added). Plaintiffs, therefore, have included declaratory

judgment as one of the potentially appropriate remedies for the damages caused by Defendants' wrongdoing. (*See generally* Dkt. # 58.)

**IV. MINNESOTA'S CHOICE-OF-LAW PRINCIPLES DEMONSTRATE THAT PLAINTIFFS' CLAIMS FOR CONVERSION AND UNJUST ENRICHMENT ARE APPROPRIATE FOR CLASS CERTIFICATION.**

Defendants do not make any substantive argument that Plaintiffs' claims for conversion and unjust enrichment fall short of Rule 23 requirements. (*See* Dkt. # 69, pp. 9-10.) Rather, Defendants offer little more than a general recitation of the law regarding choice-of-law principles and citations employing clearly distinguishable cases. Because there is no conflict between the potentially applicable state laws—that of Minnesota and Delaware—and application of either state's law will not change the outcome, there is nothing that prevents the Court from granting class certification as to Plaintiffs' claims for conversion and unjust enrichment.

A. Minnesota Choice-of-Law Principles.

To the extent a choice of law question exists concerning the law to be applied to claims for conversion and unjust enrichment, Minnesota courts first look at whether there is an actual conflict between the laws of the two states. *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 93 (Minn. 2000); *Jepson v. General Cas. Co.*, 513 N.W.2d 467, 469 (Minn. 1994). A conflict exists if the choice of one forum's law over the other will determine the outcome of the case. *Id.* *See also Myers v. Government Employees Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974) (stating that before the court applies any legal standard, it must first be determined if an actual conflict exists). Only if a conflict exists, does the court proceed to the next step in choice-of-law analysis, which

is to consider certain choice-influencing factors which help reveal the reasons for choosing one state's law over another. *Jepson*, 513 N.W.2d at 470. (reciting the factors: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; and (4) advancement of the forum's governmental interest.).

Plaintiffs have consistently maintained that “[t]he claims asserted herein arise out of and pursuant to well-established violations of Minnesota and Delaware law” (Dkt. # 58, ¶ 14.), and, as discussed below, there is clearly no conflict between the laws of Delaware and Minnesota with respect to conversion or unjust enrichment claims. (*See generally* Dkt. # 58, ¶¶ 13–14.) While Defendants seem to imply that the various states of domicile for some Plaintiffs and Defendants may potentially apply to these claims, the corporate documents and the court pleadings demonstrate that the applicable law in this case is either that of Minnesota or Delaware. Minnesota is the location of RTI’s corporate headquarters, as well as the site of most RTI Board Meetings, the Merger/Recapitalization vote, the processing of votes, the transfer of shareholders’ stock certificates, etc. On the other hand, Delaware law is expressly referenced as the governing law for RTI’s Articles of Incorporation, the Release included in the Proxy, the Merger Agreement, etc.<sup>4</sup> As demonstrated below, the application of either Minnesota or Delaware law will not change the outcome.

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<sup>4</sup> *See* Declaration of James K. Langdon, filed in support of Defendants’ Memorandum of Law in Support of Motion to Dismiss, filed Sept. 16, 2009 (Dkt. # 11), Ex. 1 (hereinafter “Proxy”), at p. 21 and Ex. E to Proxy.

B. There Is No Conflict Between Minnesota and Delaware Law Regarding Conversion Claims.

Under Minnesota law, “[t]he elements of common law conversion are (1) the plaintiff has a property interest and (2) the defendant deprives the plaintiff of that interest.” *Olson v. Moorhead Country Club*, 568 N.W.2d 871, 872 (Minn. Ct. App. 1997) (internal quotation omitted). Similarly, in Delaware, conversion is the “wrongful possession or disposition of another's property as if it were one’s own.” *General Video Corp. v. Kertesz*, C.A. No. 1922-VCL, 2008 WL 5247120, at \*26 (Del. Ch. December 17, 2008); compare *Dain Bosworth Inc. v. Goetze*, 374 N.W.2d 467, 471 (Minn. Ct. App. 1985) (defining conversion as “an act of willful interference with the personal property of another which is without justification or which is inconsistent with the rights of the person entitled to the use, possession or ownership of the property.”) with *Arnold v. Society for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (“Conversion is an act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it.”) (citation omitted).

Moreover, conversion is an intentional tort requiring willfulness under both Minnesota and Delaware law. Compare *Van Dyke v. Pennsylvania R. Co.*, 86 A.2d 346, 352 (Del. 1952) (“Conversion in the broad sense consists of an act of *willful* interference with any chattel without lawful justification.”) (emphasis added); *Data Management Internationale, Inc. v. Saraga*, C.A. No. 05C-05-108., 2007 WL 2142848, at \*3 (Del. Super. Ct. July 25, 2007) (“[C]onversion is an intentional tort.”) with *Dain Bosworth Inc.*, 374 N.W.2d at 471 (defining conversion as “an act of *willful* interference with the

personal property of another which is without justification”); *Herrmann v. Fossum*, 270 N.W.2d 18, 21 (Minn. 1978) (stating that conversion is an intentional tort).

In sum, there is no conflict between Minnesota and Delaware law regarding the tort of conversion.

C. There Is No Conflict Between Minnesota and Delaware Law Regarding Unjust Enrichment Claims.

Under Minnesota law, “a claim for “[u]njust enrichment may be founded on failure of consideration, fraud, or mistake,” or “situations where it would be morally wrong for one party to enrich himself at the expense of another.” *Noble Systems Corp. v. Alorica Central, LLC*, 543 F.3d 978, 987 (8th Cir. 2008) (quoting *Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. Ct. App. 2004)). Similarly, “[u]nder Delaware law, unjust enrichment is defined as ‘the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience’.” *Transocean Group Holdings Pty Ltd. v. South Dakota Soybean Processors, LLC*, 663 F. Supp. 2d 731, 744–45 (D. Minn. 2009) (quoting *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)); see also *Jackson Nat. Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999) (“The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law.”).

Further, both Minnesota and Delaware characterize unjust enrichment as a distinct claim, and not simply a theory of recovery. *Compare Acton Constr. Co. v. State*, 383

N.W.2d 416, 417 (Minn. Ct. App. 1986) (describing the elements of unjust enrichment claim), *review denied* (Minn. May 22, 1986) *with Jackson Nat. Life Ins.*, 741 A.2d at 394 (“Plaintiffs, therefore, properly state an actionable claim for unjust enrichment....”).

Because the application of Minnesota or Delaware law will not affect the outcome of Plaintiffs’ unjust enrichment claim, no conflict of law exists.

D. Defendants’ Cited Cases Are Distinguishable Because Defendants’ Conversion and Unjust Enrichment That Damaged All Class Members Took Place in a Single Location—Minnesota.

Defendants’ objection pertaining to the domicile of Class members in various states is based on cases wherein the underlying wrongdoing occurred in or was directed at the individual plaintiff’s respective state of residence and the differences in state law were outcome determinative. For example, Defendants cite *Cruz v. Lawson Software, Inc.*, wherein the plaintiffs’ proposed class involved traveling employee-consultants bringing claims stemming from location-specific misconduct in violation of the Minnesota’s wage and hour laws and for unjust enrichment. Civil No. 08-5900, 2010 WL 890038, at \*2–3 (D. Minn. Jan. 5, 2010) (cited in Dkt. # 69, at pp. 10–11). Because “[t]he putative class members performed most of their work at client sites and, therefore, traveled away from the home office approximately 80% of the time that they worked for [defendant]” the *Cruz* court concluded that “[p]laintiffs have not provided a basis upon which the Court would apply Minnesota law to all putative class members.” *Id.* at \*10. It was *in that particular factual and legal context* that that the *Cruz* court noted the “material conflicts among many of the unjust enrichment laws of the various states in which putative class members reside.” *Id.* at \*6.

In contrast, Minnesota is the unmistakable center of gravity for the misconduct upon which Plaintiffs' conversion and unjust enrichment claims are predicated. The wrongful taking of shareholder equity and the resulting unjust enrichment were the product of actions that took place in Minnesota, and no individual shareholder's state of domicile will have any bearing on the applicable law.

Defendants' citation of *Jim Moore Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co., Inc.* is equally inapt and unavailing. No. 02-80381-Civ., 2003 WL 21146714 S.D. Fla. May 6, 2003) (cited in Dkt. # 69, at pp. 11–12). In *Jim Moore*, the plaintiffs sought certification of a subclass of insurance agents located Florida, Louisiana, Texas, and California who had entered into contracts to sell flood insurance policies. *Id.* at \*3. The plaintiffs invoked the law of conversion of *several* states and the court determined that conflicts among the law existed. *Id.* at \*10–11. Not surprisingly, the *Jim Moore* court concluded that class certification was inappropriate given the variations in the “law of the several governing jurisdictions, as well as the sheer volume of individual factual variations that would arise at trial.” *Id.* at \*13.

No such problem is presented here, as Plaintiffs' conversion claim does not invoke different states' laws, but instead is based on the Defendants' misappropriation of shareholder equity through actions occurring in Minnesota. In sum, Defendants have presented no legal precedent that justifies the denial of class certification as to Plaintiffs' claims for conversion and unjust enrichment.

**V. BECAUSE DISCOVERY IS ONGOING AND LIABILITY HAS YET TO BE DECIDED, THE COURT SHOULD NOT PREMATURELY LIMIT THE REMEDIES AVAILABLE TO FASHION APPROPRIATE RELIEF.**

Rescission is an appropriate potential remedy for the Class because the numerous procedural and structural defects of the merger/recapitalization are grounds for voiding the transaction. This remedy should not be forfeited now, despite the inconvenience it may cause Defendants. *See Nagy v. Bistricer*, 770 A.2d 43, 63–64 (Del. Ch. 2000) (“Although the defendants would have me rule out the option of rescission now, they have provided me with no reasoned basis to conclude that such a remedy is impractical or unwarranted. Indeed, the record suggests that the Merger was simply an easily undone card shuffle involving two decks of cards controlled by Defendants, the sole purpose of which might well have been to put pressure on [plaintiff] to depart by way of an expensive appraisal proceeding.”)).

While discovery is ongoing and continues to produce important facts about the merger/recapitalization, Plaintiffs’ First Amended Complaint and subsequent filings provide a detailed account of the wrongdoing that occurred throughout the transaction. (*See generally* Dkt. # 58 and Dkt. # 82.) For the sake of brevity, Plaintiffs will not repeat the lengthy record of fiduciary duty breaches described in the First Amended Complaint, but rather will summarize a few of the specific grounds that can support a rescission remedy.

A. The Vote Defeating the “Merger”/Recapitalization Was Ignored by Defendants.

In the weeks prior to the merger/recapitalization, RTI shareholders received three documents all unambiguously stating that the closing of the transaction was conditioned on “[t]he aggregate amount of Dissenting Shares (i) with respect to Common Stock shall be less than 10% of the shares of Common Stock entitled to vote on the Merger.” (*See* Proxy at p. 21 and Ex. E.) In a June 9, 2009 letter to RTI shareholders—just three days prior to the vote—Defendant Kiesel attached a letter from RTI’s counsel wherein it was represented that the 10% requirement was a condition that had not been waived.

(Affidavit of Larina A. Brown in Opposition to Defendants’ Motion to Dismiss, filed Oct. 21, 2009 (Dkt. # 23), Ex. B.) When nearly 40% of the common shares voted against the merger, the condition was waived several days later. (*See* Dkt. # 58, at ¶ 49 and Dkt. #82, p. 27.)

B. Defendants Violated Delaware Law Governing Required Disclosures by Distributing an Obsolete Version of the Delaware Appraisal Statute.

Months later, in February 2010, RTI finally informed shareholders that they had not provided the current Delaware statute governing appraisal rights. (*See* Affidavit of Larina A. Alton in Support of Motion to Amend/Correct for Punitive Damages (Dkt. # 83), Ex. 53.) To remedy this material failure, RTI has now promised to provide (“in the near future”) an opportunity for shareholders change their decision regarding appraisal rights. (*Id.*) *See also Nebel v. Sw. Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at \*6 (Del. Ch. July 5, 1995) (“any argument that [a technical violation of the appraisal statute] is ‘immaterial’ is foreclosed by the mandatory nature of the statutory

requirement.... Where the legislature so commands but the command is not observed, the corporation cannot be heard to argue that its violation of the statute is not material.”) Simply put, RTI itself recognizes the significant defect in the “merger”/recapitalization process and now, months later, is still trying to “fix” the deeply flawed transaction. The Court should not deny itself the same opportunity to “fix” the transaction at the appropriate time.

C. Defendants’ Misconduct Left Shareholders With No Practical Choice in Voting or Securing Their Rights as RTI Shareholders.

By deliberately distributing misleading Proxy materials, conducting a misleading shareholder meeting, requiring a complete Release of claims and processing shareholder votes in an inconsistent manner, Defendants knowingly placed all proposed Class members in an untenable position with respect to the merger/recapitalization. (See Dkt. # 58, ¶¶ 47–49 and Dkt. # 82, pp. 22–28.) Accordingly, the Court should retain rescission as one means of fashioning a suitable remedy. See *Nagy v. Bistricher*, 770 A.2d 43, 63–64 (Del. Ch. 2000) (refusing to dismiss rescission claim where “[t]he behavior of the defendants left Nagy with no practical choice ... Nagy's choice to seek appraisal could be seen as a rational decision to turn down a deal about which he knew nothing. But the fact that Nagy made a rational choice in a ridiculous situation does not render [defendants’] conduct less inconsistent with their fiduciary duties.”).

D. The Court Could Find that Defendants’ Inconsistent and Misleading Proxy Communications, Defective Notice of Appraisal Rights and Ex Post Waiving of a Closing Condition Render the Merger/Recapitalization a Legal Nullity.

Plaintiffs’ Third Amended Complaint and Motion to Amend for Punitive Damages together provide a detailed and documented account that begins to describe Defendants’ wrongdoing and the effects of such wrongdoing on the putative Class. As facts have continued to emerge regarding the merger/recapitalization of RTI, the documented scope and duration of Defendants’ misconduct has only broadened, and Defendants have offered no legal basis for this Court to limit its own ability to tailor appropriate class-wide relief. *See Nagy v. Bistricher*, 770 A.2d 43, 63–64 (Del. Ch. 2000) (“[Defendants’] argument that rescissory damages may not be appropriate lacks force. [Defendants] have the burden to show that the Merger is entirely fair and have already fallen short of that standard. They had the economic motive to advantage themselves at the expense of [plaintiff] and structured the Merger in a highly unusual and eyebrow-raising way. Rescissory damages therefore cannot be ruled out as a fitting remedy.”); *see also Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009) (“[T]he Court of Chancery has broad discretion to craft an appropriate remedy for a fiduciary violation.”); *Hanby v. Wereschak*, 207 A.2d 369, 370 (Del. 1965) (“[T]he Court of Chancery [has] the inherent powers of equity to adapt its relief to the particular rights and liabilities of each party.”).

**CONCLUSION**

Because there is neither a legal nor factual basis for Defendants’ objections to class certification of any of the claims brought by the proposed Class, Plaintiffs

respectfully request that the Court grant class certification as to all Class members' claims.

Dated: May 17, 2010

**ANTHONY OSTLUND BAER  
& LOUWAGIE, P.A.**

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