

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Civil File No. 09-cv-02076 (MJD/JJG)

Plaintiffs,

vs.

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND IN
SUPPORT OF PLAINTIFFS'
RULE 56(f) REQUEST FOR
CONTINUANCE**

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

Defendants.

[FILED UNDER SEAL]

INTRODUCTION

Plaintiffs Mike Tate, Joseph Schuster, Lyle Evanson and John Ayers ("Plaintiffs") file this Memorandum in Opposition to Defendant Restaurant Technologies, Inc.'s ("RTI") Motion for Partial Summary Judgment. RTI's motion seeks dismissal of Count IX of the First Amended Complaint which calls for a declaration that the recapitalization which took place in June of 2009 is void.

RTI's premature motion is not premised upon the argument that the recapitalization process engineered by the Individual Defendants was legal, much less equitable. RTI does not present *any* facts attempting to justify the propriety of the recapitalization which was employed to strip the putative Class of its ownership in RTI and the rights which accompany such ownership. Apparently indifferent to the legal

significance of the pervasive self-dealing and misrepresentations that occurred, RTI simply argues that the prospect of declaratory relief poses an “unnecessary risk” which is “interfering” with sales plans. (See Defendant RTI’s Memorandum in Support of Summary Judgment (“Def. Mem.”) (Dkt. # 74 at 2).) RTI’s motion is based solely on the notion that it may be difficult to unwind the recapitalization which was employed to enrich RTI’s major shareholder, Defendant Parthenon Capital (“Parthenon”), at the expense of the putative Class.¹

As set forth below, material facts support the assertion that the 2009 recapitalization was tainted by self-dealing and misrepresentations resulting in the improper conversion of RTI’s equity. Plaintiffs request that the Court not reward such wrongful conduct by prematurely limiting Plaintiffs’ remedies and thereby tacitly acknowledging the false claim of ownership by Defendants. It is counterintuitive to suggest that the Court should limit the form of equitable relief it can grant before it has considered (or even been thoroughly presented with) Plaintiffs’ claims on their merits. Plaintiffs are entitled to the full scope of potential equitable relief implicated by the claims of their Amended Complaint. Defendants motion should be denied.

¹ RTI’s request to dismiss one of Plaintiffs’ claims is solely premised on the hope that a sale will actually occur. RTI does not advise what happens if the Court follows its lead, dismisses the rescission claim and then no sale occurs ... do the claims get reinstated?

BACKGROUND

A. PROCEDURAL BACKGROUND.

1. Pleading Status.

The Complaint was originally filed in State Court in July 2009 shortly after Plaintiffs learned that the recapitalization closed. The Defendants removed the case to federal court. (Dkt. # 1.) A motion to dismiss was filed, briefed, heard and ruled upon. (Dkt. # 54.) A motion for class certification is pending and is scheduled to be heard before this Court on June 24, 2010.² (Dkt. # 63.) A motion to permit the assertion of punitive damages is also pending and is scheduled to be heard by Judge Graham on June 23, 2010. (Dkt. # 82.)

2. Discovery Status.³

The parties have been operating under a Pretrial Order (Dkt. # 21) setting forth a factual discovery cutoff of July 1, 2010, a subsequent exchange of expert reports, a dispositive motion deadline of October 1, 2010 and a trial ready date of February 1, 2011. By agreement of the parties, the Court recently moved back a few of the deadlines. (Dkt. # 97.) However, while certain discovery remains to be completed, consistent with the Pretrial Order, a considerable amount of discovery has occurred as set forth below.

² Defendants do not oppose class certification. Rather, Defendants attempt to accomplish within that motion practice what they are also trying to accomplish in the instant motion by arguing that declaratory relief is unavailable as a class-wide remedy. (Dkt. # 69.)

³ A portion of Plaintiffs' argument involves Rule 56(f). Accordingly, an overview of the discovery activities which have occurred and which are yet to take place is necessary.

a. Third-Party Document Discovery

The following document subpoenas were issued to third parties and responded to:

<u>Third-Parties</u>	<u>Document Production Date</u>
Chartwell Financial	11/05/09
Cargill	11/05/09
McDonald's	11/10/09, 11/20/09, 12/02/09
Burger King	10/30/09, 12/08/09
Jack in the Box	12/02/09, 12/08/09
Wells Fargo	11/20/09
Golden State Foods	04/10/10
Yucaipa	02/19/10, 02/22/10
Piper Jaffray	12/21/09
Robert W. Baird	01/25/10, 01/28/10
Gemini Investors	11/20/09, 12/02/09
St. Paul Commodities	11/20/09
William Blair & Co.	05/27/10

In addition, the following third-party document subpoenas are currently outstanding:

	<u>Status</u>
Sankaty Advisors LLC	- Objection to any production
KPMG Peat Marwick	- Subpoena recently issued/no response to date
Wells Fargo	- Request to review original proxy documents being processed ⁴

b. Production of Party Documents

The production of documents by the Defendants has not proceeded in nearly as an efficient fashion as third-party production. Prior to the commencement of the litigation,

⁴ For more details regarding the status of these productions, *see* Affidavit of Robert C. Moilanen (hereinafter "Moilanen Aff.") submitted in support of Rule 56(f) argument. While Plaintiffs firmly believe that the affidavits submitted by Defendants are immaterial to the relief which they request, the Moilanen Aff. is provided to explain why information is unavailable to contest the immaterial assertions made within the affidavits.

Defendant RTI produced certain documents in response to a books and records request.

In response to that request, RTI initially “rolled out” documents slowly as set forth below:

- 5/15/09: 431-page proxy materials concerning recapitalization received by shareholders. The proxy materials included a merger agreement which stated that a condition of the recapitalization/merger was the no more than 10% of common shareholders vote against it (Dkt. # 11, Ex. 1 at p. 21);**
- 5/22/09: Books and records request delivered to RTI (Affidavit of Nathan P. Brennan (hereinafter “Brennan Aff.”) at Ex. 1);**
- 6/1/09: 412 pages of documents produced by RTI in response to the books and records request;
- 6/2/09: 1,426 additional pages of documents produced by RTI in response to the books and records request;
- 6/3/09: **The date of a shareholder informational meeting concerning the recapitalization - 540 pages of additional documents produced by RTI in response to the books and records request;**
- 6/4/09: **The date of a shareholder letter stating “We do not believe the proposal is fair to the common shareholders but, as discussed below, have not been given adequate time or information to fully assess the proposal.” (Brennan Aff. at Ex. 2) - 238 pages of additional documents produced by RTI in response to the books and records request;**
- 6/5/09: 185 pages of additional documents produced by RTI in response to the books and records request;
- 6/8/09: 96 pages of additional documents produced by RTI in response to the books and records request;
- 6/10/09: 1,079 pages of additional documents produced by RTI in response to the books and records request;

- 6/12/09: The date of the vote on the recapitalization in which over 34% of RTI common shareholders voted against the recapitalization (Brennan Aff. at Ex. 3);**
- 6/16/09: The date the RTI Board of Directors waived the 10% opposition voting condition (Brennan Aff. at Ex. 4);**
- 6/24/09: The date the recapitalization transaction closed;**
- 7/17/09: Complaint filed and served in state court along with document requests to Defendants.**

Plaintiffs served document requests on RTI with the initial filing and service of the Complaint in July 2009. Plaintiffs also subpoenaed the RTI attorneys who handled the recapitalization transaction. Defendants' removal of the action to federal court (which required that a Rule 26 conference must occur prior to the commencement of discovery) and RTI's motion to dismiss delayed the production of records from RTI and its attorneys. Thereafter, Defendants engaged in a "rolling" production process which hindered Plaintiffs' ability to join issues and engage in deposition discovery.⁵ Production of documents from RTI and its counsel occurred on the following dates:

- 11/4/2009: RTI produces 2,055 pages of documents;
- 11/20/2009: RTI produces 26,132 pages of documents;
- 12/14/2009: RTI produces 34,703 pages of documents;
- 12/28/2009: RTI produces 3,101 pages of documents;
- 1/15/2010: RTI produces 3,535 pages of documents;

⁵ Plaintiffs had no initial objection to a "rolling" production, but did not appreciate the fact that Defendants would roll out documents over a period of six months. As many as 17,000 pages of documents were "rolled out" within the last two weeks, nearly nine months after the document requests were initially served. *See Moilanen Aff.* at ¶ 10.

- 1/20/2010: RTI produces data room disk;
- 1/26/2010: RTI produces 91,738 pages of documents;
- 2/9/2010: RTI produces an additional 2,385 pages of documents;
- 2/19/2010: RTI produces an additional 17,255 pages of documents;
- 3/5/2010: RTI produces an additional 45 pages of documents;
- 4/21/2010: RTI produces an additional 258 pages of documents;
- 5/4/2010: RTI produces an additional 23 pages of documents;
- 5/11/2010: RTI produces an additional 2,456 pages of documents;
- 5/24/2010: RTI produces an additional 14,700 pages of documents.⁶

While Defendants have now confirmed that all responsive documents have been produced, on May 28, 2010 and June 3, 2010, after the close of business, Plaintiffs received certain revised privilege and redaction logs showing that hundreds of documents are still being withheld. (*See Moilanen Aff. at Ex. D.*) Plaintiffs anticipate addressing this issue with the Magistrate Judge in the coming weeks, but are still making an effort to meet and confer.

c. Deposition Discovery

Limited deposition discovery has occurred thus far. The depositions which have occurred include:

John Ruelle – Former RTI CFO
Jack Grunewald – RTI Board member
Kenneth Larson – RTI Board member
Molly Simmons – Gemini investor

⁶ In addition, Defendant Parthenon Capital produced approximately 75,000 pages of documents on March 5, 2010 in response to a subpoena served in November 2009.

Shane Grutsch – St. Paul Commodities
Thomas Corvelli – McDonald’s Corp.
Wilford Becker – Chartwell Financial
Jack Ayers – Plaintiff/Class Representative
Joseph Shuster – Plaintiff/Class Representative
Lyle Levinson – Plaintiff/Class Representative
Michael Tate – Plaintiff/Class Representative
David Wolf – RTI controller
Peter Kies – Robert W. Baird
Kelley Drake – William Blair & Co.⁷

Pursuant to agreement of the parties, the following depositions are currently scheduled:⁸

<u>Deponent</u>	<u>Date</u>
Lisa Merryfield	(TBD)
Eric Larson	June 7, 2010
J.T. Haines	June 8, 2010
Timothy Hearn	June 9, 2010
Defendant Robert Weil	June 11, 2010
Gordon Griffin	June 15, 2010
Defendant Zachary Sadek	June 16, 2010
Defendant John Rutherford	June 18, 2010
Defendant Jonathan O. Grad	(TBD)
Bill Sanderson	(TBD)
Defendant Jeffrey Kiesel	June 25, 2010

⁷ The depositions of Mr. Kies and Mr. Drake occurred on June 2 and 3, 2010, respectively, and final transcripts are not yet available.

⁸ In addition, in light of the belated production of 17,000 pages of documents within the last two weeks, Mr. Grunewald and Mr. Larson may have to be recalled. Further, Defendants have recently expressed an interest in taking several additional depositions.

Deponent

Date

James Athanasoulas

June 28, 2010

Defendant Philip A. Clough

June 30, 2010

FACTUAL BACKGROUND

The following section provides a few of the material facts pertaining to the 2009 recapitalization of RTI and the reasons Plaintiffs are seeking declaratory relief as one of the available remedies for Defendants' wrongdoing.⁹

After a proposed [REDACTED] sale of RTI fell through in late 2008, the controlling shareholder of RTI (Defendant Parthenon) decided to engage in a recapitalization process.¹⁰ In October 2008, Defendant Jon Grad, a Parthenon principal and member of the RTI board, wrote an internal Parthenon email stating:

... you guys know enough to assume that if we went down a path in which we put a large slug of additional equity (say \$25M) into RTI but did in which that was technically a change of control transaction, but in which we still ended up as control shareholders, that they would be okay rolling over? I ask because it's likely that the best way to solve our shareholder issues is to do a merger proceeded by a shareholder meeting and vote in which shareholders would vote to cram themselves down.

⁹ A more complete account of Defendants' improper conduct is set forth in Plaintiffs' Memorandum in Support of Assertion of Punitive Damages (Dkt. # 82.) and the accompanying Affidavit of Larina A. Alton (Dkt. # 83.).

¹⁰ Parthenon and ABS appointed a majority of the RTI Board and ran the RTI Board for their own interest during this time period. Parthenon and ABS were holders primarily of preferred stock in RTI.

(Brennan Aff. at Ex. 5.)¹¹ Shortly after Grad's email was circulated, Parthenon put several million dollars into RTI at a 30% accretion rate with 100% conversion rights in a recapitalized RTI (Series B-2 stock). No alternative financing was seriously considered at the time and no fairness opinion was obtained at the time.

The RTI Board sought and obtained legal advice from Dorsey & Whitney on their fiduciary obligations when the interests of various classes of capital stock diverge. Specifically, it appears that Parthenon was looking to obtain legal advice permitting them to avoid meeting their fiduciary obligations to common shareholders. (Brennan Aff. at Ex. 7 (RTI 206214).) However, the advice they received included the following:

Generally, (assuming a party is not on both sides of a transaction) the business judgment rule protection applies to such decisions . . . if a board's duty with regard to diverging interest between shareholders is to act without self interest and the BJR applies, this does not then, I presume preclude decisions that are ultimately favorable to the preferred and not the common. Simply put, the board owes a fiduciary duty to all stakeholders.

Regarding the Equity-Linked case and the Chancellor Allen quote that it is generally the board's duty to *prefer the interest of the common stock* (as it sees them) to the interest created by the special rights of the preferred where there is a conflict – *it does appear to be good law.*

(Emphasis added) (Brennan Aff. at Ex. 8.)

¹¹ The candor of Defendant Grad's email is surprising in light of the fact that he had earlier advised his colleagues at Parthenon that they should "discuss matters live versus email given legal situation." (Brennan Aff. Ex. 6.)

Parthenon then began negotiations with RTI's lenders — Sankaty Advisors — and, in complete disregard of the legal advice they received, conducted self-serving negotiations which included the following terms:

- RTI's agreement to conduct a recapitalization and force common shareholders to sign releases in order to maintain any equity interest in recapitalized RTI.¹²
- Having RTI pay \$400,000 of closing costs to Parthenon at the time of the recapitalization.
- Having RTI agree to enter into a Management Services Agreement with a Parthenon subsidiary (PCap) in which RTI would pay PCap \$450,000 annually.
- Agreeing that Parthenon would receive 1% of any subsequent sale price when RTI was eventually sold.
- Employing, for purposes of the merger, a \$140 million enterprise value that would wipe out existing shareholder value while quietly supplying the lenders with warrants to purchase equity in recapitalized RTI.
- Agreeing that, when a recapitalization occurred, the Series B-1 preferred stock, like the Series B-2 preferred stock, would be converted at 100% of value including liquidation preferences.¹³ In order to do that, the recapitalization would have to be misnomered a "merger" even though no change of control occurred.¹⁴

¹² Forcing RTI common shareholders to sign releases appears to have originated with Parthenon and its counsel. (Alton Aff., Ex. 9, Req. Nos. 200-201.) However, counsel at Dorsey & Whitney approved the use of releases which were designed to require shareholders to release all claims if they attempted to maintain their ownership in RTI. (Brennan Aff. at Ex. 9.)

¹³ While Parthenon held 43% percent of the Series B-1 offering, Sankaty also owned certain Series B-1 preferred stock making the agreement that the B-1 stock would get 100% of accreted value in the recapitalization not surprising since the negotiations carving up RTI's equity were conducted between Parthenon and Sankaty.

¹⁴ In his recent deposition, RTI controller David Wolf admitted that no real change of control occurred when he testified to the relatively simple shifting of RTI's cash and equity among existing preferred shareholders, Parthenon and RTI's lenders. (Brennan

