

UNITED STATES DISTRICT COURT
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,

**DEFENDANTS' MEMORANDUM
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

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,

Defendants.

INTRODUCTION

Defendants do not oppose certification of the proposed class except with respect to Plaintiffs' claim for declaratory judgment (Count IX), conversion (Count IV) and unjust enrichment (Count VII). None of these claims is appropriate for class certification.

In their claim for declaratory judgment, Plaintiffs seek a rescission of the recapitalization merger of Restaurant Technologies, Inc. ("RTI" or the "Company") which took place on June 24, 2009. If successful, the consequences of a rescission would extend beyond the class members, for a rescission of the Recapitalization Merger would involve all shareholders of RTI as well as other third parties. Because all persons affected by the outcome of the litigation are not

before the Court as members of the class, it would be improper to maintain Count IX as a class claim.

Class certification on Plaintiffs' unjust enrichment and conversions claims against defendant Parthenon Capital LLC ("Parthenon")¹ should also be denied as Plaintiffs cannot meet the requirements of Rule 23. Plaintiffs provide no analysis of which state's law applies to their unjust enrichment or conversion claims. They do not provide the Court with the information necessary to conduct an appropriate conflict-of-laws and choice-of-laws analysis. The potential application of laws of numerous states makes class certification on these claims inappropriate.

As a result, although the Court should certify a claim as to the majority of Plaintiffs' claims, it should decline certification as to Plaintiffs' declaratory judgment claim seeking equitable relief as well as the conversion and unjust enrichment claims against Parthenon.

BACKGROUND AND FACTS

In reviewing Plaintiffs' motion for class certification, this Court may look beyond the pleadings. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("[I]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."). Although a court may not decide the merits of the case, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (citation and internal quotation marks omitted). To that end,

¹ Counts IV and VII are alleged only against Defendant Parthenon.

Defendants provide some additional background, to give the proper context to this Court's consideration of Plaintiffs' motion for class certification.²

I. RTI's Shareholders Prior to the Recapitalization Merger

Like many growing companies in need of capital, RTI turned to offerings of equity securities to raise the funds it needed. Prior to the Recapitalization Merger, in addition to common stock, RTI issued six rounds of preferred stock: Series A-1, Series A-2, Series A-3, Series A-4, Series B-1 and Series B-2. (Declaration of Michelle S. Grant ("Grant Decl.") Ex. 2 (May 13, 2009 Proxy Statement Offering Memorandum ("Proxy") at i.)

II. The 2009 Recapitalization Merger

In 2008, after RTI found itself still in need of additional operating capital and struggling to meet covenants in its lending agreement, RTI's Board of Directors determined that a sale of the Company to a third party would be in the best interests of all shareholders. (Proxy at ii.) RTI sought to consummate a sale of the Company with the highest bidder, but due to the unfolding credit crisis in late 2008 that bidder was not able to obtain financing. (*Id.*) At such time, the bids submitted by other third parties had either been withdrawn or expired. (*Id.*) As a result, and because the Company appeared likely to miss the fourth quarter forecasts on which the bidders had relied in making offers, RTI terminated the auction process. (*Id.*)

² Additional background can be found in Defendants' Memorandum in Support of Motion to Dismiss (Doc. No. 10).

When no buyer emerged and the Company continued to miss forecasts by wide margins, the Board considered its options, including bankruptcy. (*Id.* at i.) RTI's financial position had deteriorated significantly over the last quarter of 2008 and into 2009. (*Id.*) By December 31, 2008, this deterioration caused RTI to violate certain financial covenants under its Note Purchase Agreement with its lenders. (*Id.*)

If the default was not waived by RTI's lenders, the lenders could have exercised 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—\$15 million. (*Id.*) RTI needed participation by its two largest investors—Parthenon Capital LLC and ABS Capital Partners—to raise this amount of cash, which participation was contingent upon RTI achieving a recapitalization of the Company's equity structure. (*Id.*)

In March 2009, RTI's Board formed a special committee consisting of three directors not affiliated with Parthenon or ABS. After careful study, including obtaining a valuation of the Company from an independent investment banking firm, the special committee recommended proceeding with 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 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”). (*Id.* at i-ii.)

The Recapitalization Merger was approved by the required number of the Company’s shares and closed on June 24, 2009. (A true copy of the Agreement and Plan of Merger by which the transaction was accomplished is attached as Exhibit 3 to the Grant Decl.) 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. (Proxy at 20-21.) Both conditions were satisfied.

III. The Present Litigation

Plaintiffs originally filed this action on behalf of all persons who held RTI common stock prior to the Recapitalization Merger. On March 23, 2010, Plaintiffs filed an Amended Complaint, which added holders of Series A preferred stock and option holders to the putative class. (Am. Compl. ¶ 15.) The Amended

Complaint also added Parthenon Capital LLC as a defendant along with another current director. (*Id.* ¶¶ 10 & 12.)³

Plaintiffs seek certification of a class of :

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 13, 2010 (the “Class”). Excluded from the class are the individual Defendants and members of their immediate family; Defendant RTI and its current officers and directors, legal representatives and financial representatives; Defendant Parthenon Capital LLC, ABS Capital Partners and their affiliates, subsidiaries and individuals affiliated with those entities.

Many of the current officers and directors, legal representatives and financial representatives that are excluded are not defendants. (*See* Brennan Aff. Ex. B.)

Also excluded are all Series B preferred stock holders. (Am. Compl. ¶ 16.)

ARGUMENT

I. Class Certification Standard

Plaintiffs bear the burden of proving that the elements of Rule 23 have been met before this Court can certify the class action. *In re GenesisIntermedia, Inc. Sec. Litig.*, 232 F.R.D. 321, 328 (D. Minn. 2005). Plaintiffs must satisfy all elements of Rule 23(a) and one of the three subsections of Rule 23(b). *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005). “The Court cannot rely on conclusory allegations which parrot the provisions of Rule 23 to support

³ The deadline for Parthenon to answer or move to dismiss the Amended Complaint is May 24, 2010. Parthenon intends to move to dismiss at least some of Plaintiffs’ claims against it. Accordingly, Parthenon believes that any decision on class certification on claims against Parthenon should not be made until the Court decides the motion to dismiss.

certification. Instead, the Court must consider all of the facts and legal issues presented by the plaintiffs' claims." *R.W. Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 56 (S.D. Fla. 1990) (internal citation omitted). "This is particularly true with respect to questions of predominance and superiority which necessitate a 'close look' at, inter alia, 'the difficulties likely to be encountered in the management of a case.'" *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 28-29 (D.N.H. 1998) (quoting *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-17 (1997)).

Rule 23(a) requires that: (1) the putative class be so numerous that joinder of all members is impractical, (2) questions of law or fact are common to the class, (3) the class representatives' claims or defenses are typical of the claims or defenses of the class, and, (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

In this case, Plaintiffs only argue that they can satisfy subsection 23(b)(3). Rule 23(b)(3) requires that the questions of law or fact that are common to the putative class predominate over the questions affecting individual class members, and that a class action is the superior method for fair and efficient adjudication of the dispute. "[B]ecause of the important due process concerns of both plaintiffs and defendants inherent in the certification decision, the Supreme Court requires district courts to conduct a rigorous analysis of Rule 23 prerequisites."

GenesisIntermedia, 232 F.R.D. at 334 (citations and internal quotation marks omitted).

II. Class Certification on Plaintiffs' Rescission Claim Violates Due Process

A fundamental aspect of constitutional law is the providing of due process to an individual who could have an interest affected by the outcome of a litigation. A court, therefore, must assure that those affected individuals are provided with notice of the action and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). For class actions, an individual's interest may be affected even if that person is not a formal party to the action. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). Rule 23 brings these individuals before a court as a class, and, thus, guarantees that their interests will not be affected without due process of law. If an individual has an interest affected by the possible outcome of a class action, and is neither a party to the action nor a member of a class, a court cannot let the class action proceed. *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 456 (S.D. Fla. 1988).

In *Hastings-Murtagh*, the plaintiff sought to represent a class of all of Eastern Airlines employee-shareholders in an effort to rescind the merger of Eastern Airlines and Texas Air. *Id.* at 452. The proposed class consisted of only a partial number of all stockholders. *Id.* at 456. The court noted that if the requested relief of rescission was granted, employee and nonemployee stockholders would in effect be bound, for the court's order of rescission would require *all* stockholders who tendered their stock to return the consideration received in the exchange and become stockholders once again. *Id.* at 456-57. Other nonemployee shareholders who did not tender would also have their

financial stakes in the merged company affected if rescission was ordered. *Id.* at 457. Because the putative class did not include all individuals who would have an interest affected by the litigation, the court denied class certification for each of plaintiffs' claims where rescission was demanded. *Id.* at 457. The court allowed a damages class to proceed. *Id.* at 458-60.

Likewise, here Plaintiffs' requested relief for rescission of the Recapitalization Merger in Count IX would affect a number of individuals that are not part of the putative class. A rescission would affect the rights of the holders of Series B-1 and Series B-2 preferred stock (who now hold Class Z preferred stock), whom the Plaintiffs do not seek to represent. It would also affect the non-defendant common shareholders, Series A preferred shareholders, and option holders who Plaintiffs have excluded from the class. A rescission would require each of them to return the consideration received (whether it be cash or shares in New RTI). In addition, the current shareholders of RTI would have their financial stakes in RTI affected if rescission is ordered.

A rescission of the Recapitalization Merger would also affect the rights of RTI's lenders who are not parties to this action. As part of the Recapitalization Merger, RTI's lenders agreed to waive the Company's defaults under the Note Purchase Agreement rather than pursuing remedies which almost certainly would have led to the bankruptcy of the Company.

As such, these parties will not be afforded the due process required if Plaintiffs' are allowed to pursue their claim for rescission. Accordingly, class certification of Count IX should be denied.

III. Plaintiffs Cannot Satisfy the Requirements of Rule 23(a) or Rule 23(b) with Respect to Their Conversion or Unjust Enrichment Claims

In Count IV, Plaintiffs allege that Parthenon "improperly upstream[ed] equity from Series A preferred shareholders and RTI common shareholders." (Am. Compl. ¶ 68.) In Count VII, Plaintiffs allege that "Parthenon received certain valuable rights and interests from Plaintiffs, including a greater percentage of the total ownership, control, management and value of RTI" to which it was not entitled. (Am. Compl. ¶¶ 85-86.)

Plaintiffs provide no indication of what law they believe should apply to their conversion or unjust enrichment claims. The putative class members are located in at least twenty-one states. (*See* Grant Decl. ¶2.) The conversion and unjust enrichment claims are alleged only against defendant Parthenon, which is a limited liability company with offices located in Massachusetts and California. (Am. Compl. ¶ 12.) The other defendants are domiciled in Massachusetts, Delaware, Maryland, California, and Minnesota. Before the Court can apply any one state law to all class members, it must "conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member." *St. Jude*, 425 F.3d at 1120. As this Court has recognized, there are substantive differences in the unjust enrichment laws of various states. *See Cruz v. Lawson Software, Inc.*, No. 08-

5900 (MJD/JSM), 2010 WL 890038, at *6 (D. Minn. Jan. 5, 2010) (discussing differences between Minnesota, California, Mississippi, and Kansas law and noting that “there are material conflicts among many of the unjust enrichment laws of the various states in which putative class members reside”). The same is true for conversion. *See, e.g., Jim Moore Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 02-80381-Civ., 2003 WL 21146714, at *11 (S.D. Fla. May 6, 2003) (discussing differences under various state laws).

Plaintiffs have failed to perform the conflicts-of-law and choice-of-law analyses required by the Eighth Circuit’s opinion in *St. Jude*. Accordingly, Plaintiffs have failed to show that class-wide questions of law predominate or whether class-wide treatment is superior to other means of resolving their conversion and unjust enrichment claim. *See, e.g., Good v. Ameriprise Fin., Inc.*, 248 F.R.D. 560, 572-73 (D. Minn. 2008) (“plaintiffs have not conducted any choice-of-law analysis, and they do not even attempt to explain why it would comport with due process and the Full Faith and Credit clause to apply Minnesota law to a nationwide class”). Without knowing what law applies, it is impossible to say that there are questions of law common to the class. *Id.* at 573. Moreover, the potential application of the laws of at least twenty-one states would create a morass of individual legal and factual determinations that would defeat the predominance requirement. *See Cruz*, 2010 WL 890038, at *10; *Spencer v. The Hartford Fin. Servs. Group, Inc.*, 256 F.R.D. 284, 305 (D. Conn. 2009) (“The court determines that the legal variations in unjust enrichment claim defeat a

finding of predominance”); *Thompson v. Bayer Corp.*, No. 4:07CV0017 (JMM), 2009 WL 362982, at *8 (E.D. Ark. Feb. 12, 2009) (“After considering the variations in unjust enrichment laws, the Court finds that Plaintiff has failed to satisfy the superiority and predominance requirements of Rule 23(b)(3).”) (citations omitted); *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 583 (N.D. Ill. 2008) (“class actions are improper unless all litigants are governed by the same legal rules – otherwise the class representative cannot meet his burden of satisfying the commonality, superiority, and predominance requirements”); *Jim Moore*, 2003 WL 21146714, at *11 (denying class certification on plaintiffs’ conversion claim due to differences in state laws). Accordingly, class certification on Plaintiffs’ conversion and unjust enrichment claims is inappropriate.

CONCLUSION

For all the reasons set forth above, Defendants respectfully request that Plaintiffs’ motion for class certification be denied as to Counts IV, VII, and IX.

Dated: May 3, 2010

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