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Transaction ID 67278120
Case No. 2020-0750-PAF

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KZ CAPITAL GENERAL TRADING LLC, a United Arab Emirates company,	)	
Plaintiff,	)	
v.	)	C.A. No. 2020-0750-PAF
SERGEY PETROSSOV, THOMAS J. RIDGE, CHRISTOPHE NAVARRE, and JETSMARTER, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER ADDRESSING
PARTIAL MOTION TO DISMISS

WHEREAS:[1]

A. Defendant JetSmarter ("JetSmarter" or the "Company") is a Delaware corporation with its principal place of business in Florida.[2] At all times relevant to this action, Defendant Sergey Petrossov was the Company's founder, Chief Executive Officer, and Chairman of the board of directors (the "Board").[3] Defendants Thomas Ridge and Christophe Navarre (together with Petrossov, the "Director Defendants," and together with Petrossov and JetSmarter, the

[1] The facts are drawn from the Verified Amended Class Action Complaint and documents integral thereto.

[2] Dkt. 28, Verified Amended Complaint ("Compl.") ¶ 6.

[3] *Id.* ¶ 13.

"Defendants") became directors on JetSmarter's Board in March 2016 and February 2017 respectively.[4] In May 2019, JetSmarter was acquired by and became a subsidiary of Vista Global Holding Limited ("Vista") in a transaction hereinafter referred to as the "Vista Transaction."[5]

B. KZ is a United Arab Emirates limited liability company with its principal place of business in Dubai, United Arab Emirates.[6] Nurali Aliyev is the principal of KZ.[7] KZ was a stockholder of JetSmarter until the Vista Transaction.

C. Petrossov founded JetSmarter on November 26, 2012.[8] The Company's operations are centered on the sale of annual memberships to individuals, which allows members to book flights on private jets that were affiliated with, but not owned by, JetSmarter.[9]

D. Despite actively selling memberships and achieving some name recognition by 2016, JetSmarter was consistently unprofitable and in need of capital.[10] In July 2014, the Company raised approximately $2 million in a Series A

[4] *Id.* ¶ 52.
[5] *Id.* ¶ 78.
[6] *Id.* ¶ 2.
[7] *Id.* ¶ 15.
[8] *Id.* ¶ 8.
[9] *Id.* ¶ 9.
[10] *Id.* ¶ 11.

financing round, which valued JetSmarter at $14 million.[11] JetSmarter raised an additional $20 million in an August 2015 Series B financing round, valuing the Company at $107 million.[12] And by December 2016, JetSmarter announced that it had raised $105 million in a Series C financing, valuing the Company at $1.5 billion.[13]

E. In 2016, JetSmarter's then-President, Gennady Barsky, had the task of raising capital through tapping into "his large network of connections."[14] Meanwhile, Petrossov managed the Company's day-to-day operations and financial affairs.[15]

F. In October 2016, at Petrossov's request, Barsky met with Nurali Aliyev, KZ's principal, to solicit an investment in JetSmarter's upcoming Series C preferred stock offering.[16] Barsky and Aliyev's negotiations were premised on KZ purchasing 1% of JetSmarter for $15 million, implying an overall value for JetSmarter of $1.5 billion.[17] On October 10, 2016, Barsky emailed to Aliyev information regarding JetSmarter, including an investor presentation that had been

[11] *Id.* ¶ 12.
[12] *Id.*
[13] *Id.*
[14] *Id.* ¶¶ 13–14.
[15] *Id.* ¶ 13.
[16] *Id.*
[17] *Id.* ¶ 16.

prepared either by or under the direction of Petrossov (the "2016 Presentation").[18] Petrossov encouraged Barsky also to send Aliyev JetSmarter-generated promotional materials designed to entice aircraft owners to enter into aircraft lease arrangements with JetSmarter.[19] Those promotional materials represented that JetSmarter would be expanding its operations into Almaty, Kazakhstan within the next year.[20] KZ alleges this specific representation was included in the materials to further pique Aliyev's interest in investing because Aliyev's family is from Kazakhstan.[21] The Complaint alleges that throughout 2016 Barsky had developed a "deep friendship" with Aliyev.[22]

G. KZ agreed to purchase $15 million of JetSmarter's Series C preferred stock for $760.58 per share. The terms of the transaction are reflected in a stock purchase agreement (or "SPA"), dated December 9, 2016.[23] KZ remitted the first $10 million through two, $5 million tranches at or not long after executing the SPA.[24]

[18] *Id.* ¶ 17; *see id.*, Ex. 1.

[19] Compl. ¶ 22.

[20] *Id.*

[21] *Id.* ¶¶ 22, 15.

[22] *Id.* ¶ 15.

[23] *Id.* ¶ 27; *see id.*, Ex. 2 ("SPA").

[24] Compl. ¶ 28.

On July 12, 2017, KZ delivered another $3 million to the Company.[25] KZ's Series C preferred investment under the SPA thus totaled $13 million.

H. In connection with the SPA, KZ and JetSmarter entered into two letter agreements. A "Board Observer Rights" agreement granted KZ the right to observe the Company's Board meetings and to receive all of the materials and information that would likewise be provided to Board members in connection with those meetings.[26] The second agreement, titled "Investment in shares of Series C Preferred Stock of JetSmarter, Inc." (the "IRA"),[27] included a "most favored nations" or "MFN Provision."[28] The MFN Provision required the Company to inform KZ of any agreements that JetSmarter had entered into with other Series C investors which provided those investors with rights beyond those enumerated in the SPA, IRA, or JetSmarter's certificate of incorporation.[29] The MFN Provision also required the Company to provide KZ with this information within 30 days of the "final Closing" of the Series C financing round.[30] KZ could then opt to "become part of" any of

[25] *Id.*

[26] *Id.* ¶ 29; *see* Compl., Ex. 3.

[27] Dkt. 28, Compl., Ex. 4 ("IRA").

[28] Compl. ¶ 29.

[29] IRA ¶ 5.

[30] *Id.*

those agreements so long as the other investors had invested no more than $20 million.[31]

I. KZ alleges four instances in which JetSmarter beached the MFN Provision of the IRA. First, another investor purchased $2 million of Series C preferred stock and was granted additional common stock as part of its agreement with the Company, effectively reducing the price that this investor paid per share relative to other investors.[32] In effect, this investor was allowed to buy stock that valued the Company at $600 million while other investors were making stock purchases that valued the Company at $1.5 billion.[33] Two other investors received free flight credits that were equivalent in value to their respective investments in the Company.[34] Additionally, Petrossov signed a handwritten personal guarantee to a fourth investor, promising that the investor would be able to fully redeem his $7 million investment.[35] The Complaint alleges that none of these particular investor agreements were ever disclosed to KZ.[36] KZ discovered the existence of these agreements when it began investigating JetSmarter after an April 2019 meeting

[31] *Id.*
[32] Compl. ¶ 33.
[33] *Id.*
[34] *Id.* ¶ 34.
[35] *Id.* ¶ 35.
[36] *Id.* ¶ 36.

between KZ representatives and Barsky, where Barsky is alleged to have disclosed the directors' "wrongdoing."[37]

J. Shortly after KZ transferred the first $10 million of its investment to the Company, JetSmarter announced Barsky's resignation as an officer of the Company on February 17, 2017.[38] Barsky, however, continued to raise an additional $12 million for JetSmarter after his resignation through August 2017.[39] During this time, the Company continued to compensate Barsky for his efforts.[40]

K. On July 25, 2017, Ediza Services Limited, a KZ affiliate, sold an aircraft to JS Partners, LLC ("JS Partners"), a company owned by Petrossov and Barsky (the "Aircraft Transaction").[41] JS Partners paid part of the purchase price for the aircraft in shares of JetSmarter Series B preferred stock, valued at $5 million.[42]

L. In 2017, following the funding of its Series C round, JetSmarter obtained additional financing from Clearlake Capital Group, L.P. ("Clearlake"). Under the terms of that financing, Clearlake and Leucadia National Corporation (collectively, "Clearlake"), provided JetSmarter with a $60 million bridge loan that

[37] *See id.* ¶¶ 80–82.
[38] *Id.* ¶ 41.
[39] *Id.* ¶ 42.
[40] *Id.*
[41] *Id.* ¶ 44.
[42] *Id.*

would convert into $180 million of a new Series C-1 preferred stock.[43] JetSmarter's arrangement with Clearlake valued the Company at approximately $400 million.[44]

M. JetSmarter's Fifth Amended and Restated Certificate of Corporation (the "Certificate") required the Company to obtain consent from holders of a majority of each series of JetSmarter preferred stock under a variety of circumstances.[45] Clearlake's investment, which involved an amendment to the Certificate, would require such consent, and JetSmarter sought to obtain it.[46] In July 2017, the Company disseminated an investor presentation (the "2017 Presentation") to JetSmarter's existing stockholders, encouraging them to approve Clearlake's investment.[47]

N. In early August 2017, Barsky spoke with KZ on multiple occasions, at Petrossov's behest, to obtain KZ's consent to the Clearlake Transaction, including the Certificate amendment.[48] During those conversations, Barsky informed KZ that JetSmarter would soon undergo an initial public offering "which was to be handled by Goldman Sachs."[49] On September 8, 2017, KZ executed a written consent and

[43] *Id.* ¶¶ 48–49.
[44] *Id.* ¶ 50.
[45] SPA, Ex. A, art. IV, D § 6.2(a), (d).
[46] Compl. ¶ 64.
[47] *Id.* ¶¶ 65, 70; *see id.*, Ex. 5.
[48] Compl. ¶ 71.
[49] *Id.*

waiver approving Clearlake's investment.[50] Neither party has provided the court with KZ's written consent or waiver. The Clearlake transaction closed shortly thereafter (the "Clearlake Transaction").[51]

O. As part of its marketing efforts to increase JetSmarter's membership base, the Company's sales team offered "special deals, multiyear agreements, and other incentives" to prospective members.[52] In June 2018, the Company began making unilateral changes to the terms of its agreements with existing members, which, unsurprisingly, triggered complaints from members.[53] In response, the Company directed members to the terms of their membership agreements stating that the Company "could change, suspend, or terminate any of [its] services or benefits at any time."[54] Lawsuits ensued.[55]

P. As early as 2016, JetSmarter's customers expressed displeasure with the Company's services, resulting in at least 12 lawsuits.[56] JetSmarter did not take kindly to the member lawsuits and complaints. It began suing individuals for libel

[50] *Id.* ¶ 72.
[51] *Id.*
[52] *Id.* ¶ 61.
[53] *Id.* ¶ 61–62.
[54] *Id.* ¶ 62.
[55] *Id.*
[56] *Id.* ¶ 60.

and slander.[57] Meanwhile, JetSmarter's employees reported being pressured to procure more investors and customers, along with delays in receiving their paychecks.[58]

Q. In January 2019, the television business channel, CNBC, aired a program resulting from an investigation into JetSmarter.[59] CNBC's investigative team interviewed "several JetSmarter members, more than 20 former employees, and a wide range of industry executives."[60] CNBC's reportage concluded that JetSmarter had engaged in "continuous changes in policy and pricing in an attempt to cover its operational losses."[61]

R. JetSmarter remained unprofitable, leading the Company to "the brink of bankruptcy."[62] In May 2019, with the Company having reached the end of the financial runway, the Board decided to sell JetSmarter to Vista at a "significantly reduced valuation."[63] KZ contributed $159,185.55 to this new venture "to protect whatever remaining interests it had."[64] KZ is no longer a JetSmarter stockholder.

[57] *Id.* ¶ 63.
[58] *Id.* ¶ 60.
[59] *Id.* ¶ 59.
[60] *Id.*
[61] *Id.*
[62] *Id.* ¶¶ 58, 78.
[63] *Id.* ¶ 78.
[64] *Id.* ¶ 79.

S. Plaintiff filed its original complaint on September 2, 2020, and an amended complaint on January 1, 2021.[65] The amended complaint (the "Complaint") contains four counts. Count I is a breach of contract claim alleging that JetSmarter breached the terms of the IRA's MFN Provision.[66] Count II alleges that the Director Defendants breached their fiduciary duties.[67] Specifically, the Complaint alleges that Petrossov "disseminat[ed] false and misleading information to KZ Capital" to invest in JetSmarter in 2016 and later to approve the Clearlake Transaction in 2017.[68] Plaintiff also asserts that Ridge and Navarre "lacked due care or good faith in making business decisions" by: (1) allowing Barsky to continue representing the Company following his official departure, (2) allowing the company to disseminate false and misleading information, and (3) approving the Clearlake Transaction.[69] The Complaint also alleges that Navarre "benefitted personally from the Clearlake deal" because he was allowed to invest $500,000 of his own money in the Company on the same terms as Clearlake.[70]

[65] *See* Dkt. 1, 28.
[66] Compl. ¶¶ 83–86.
[67] *See id.* ¶¶ 88–97.
[68] *Id.* ¶ 92.
[69] *Id.* ¶ 93.
[70] *Id.* ¶¶ 94, 56.

T. Count III alleges that Ridge and Navarre breached their "contractual fiduciary duties" to KZ.[71] This claim is derived from letter agreements that both directors signed upon joining the Board, which acknowledged they would owe fiduciary duties as directors.[72] Count IV alleges that JetSmarter and Petrossov engaged in negligent misrepresentation based on the alleged disclosure violations in Count II.[73]

U. Defendants have moved to dismiss Counts II through IV of the Complaint.[74] Following briefing on the motion, the court held oral argument on October 20, 2021.[75]

NOW, THEREFORE, the court having carefully considered Defendants' partial motion to dismiss, IT IS HEREBY ORDERED, this 31st day of January, 2022, as follows:

1. On a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6):

[71] *Id.* ¶ 104.

[72] *See id.* ¶¶ 99–101.

[73] *Id.* ¶¶ 108–10.

[74] *See* Dkt. 30.

[75] *See* Dkt. 39, Defendants' Opening Brief in Support of Their Partial Motion to Dismiss the Verified Amended Complaint ("Defs.' Op. Br."); Dkt. 46, Plaintiff's Answering Brief in Opposition to Partial Motion to Dismiss Verified Amended Complaint ("Pl.'s Ans. Br."); Dkt. 48, Defendants' Reply Brief in Further Support of Their Partial Motion to Dismiss the Verified Amended Complaint ("Defs.' Reply Br."); Transcript of October 20, 2021 Oral Argument (forthcoming on docket) ("Hrg.").

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and ([iv]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.

Savor, Inc. v. FMR Corp., 812 A.2d 894, 896–97 (Del. 2002) (internal citations and quotation marks omitted). Although the pleading standards are minimal, *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011), "a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff,'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

2. **Breach of Fiduciary Duty Claims.** Count II identifies two broad categories of conduct in which the Director Defendants are alleged to have breached their fiduciary duties. The first category relates to Plaintiff's investment in JetSmarter. The second relates to the Clearlake Transaction. Both involve disclosure.

3. For its disclosure claims, Plaintiff points to four instances in which the Director Defendants breached their fiduciary duties.[76] First, the Complaint alleges

[76] Pl.'s Ans. Br. 10–11.

that the 2016 Presentation that was sent to Aliyev misrepresented JetSmarter's membership numbers.[77] Second, Plaintiff points to various news articles on December 12, 2016, which included information provided by Petrossov, stating that the Company had raised $105 million in its Series C round and that Jet Edge, an Abu Dhabi-based private equity fund, had become an investor.[78] The Complaint alleges that, as of the date of those articles' publication, "the Company had written commitments for only $46.5 million, and not all of those funds had been received."[79] The Complaint further alleges that Jet Edge never became an investor in JetSmarter.[80] Third, the Complaint alleges that the 2017 Presentation contained three categories of misrepresentations or omissions, which will be described in greater detail below.[81] Fourth, the Complaint alleges that Barsky falsely assured KZ that "JetSmarter would soon be undergoing an IPO which was to be handled by Goldman Sachs,"[82] which never happened.

4. The Complaint alleges that Plaintiff suffered harm and is entitled to compensatory and consequential damages because its "economic and voting

[77] Compl. ¶¶ 17–25.
[78] *Id.* ¶ 38.
[79] *Id.* ¶ 40.
[80] *Id.*
[81] *Id.* ¶¶ 65–69.
[82] *Id.* ¶ 71.

interests" in the Company were diluted following the Clearlake Transaction.[83] Plaintiff argues that Count II is a direct, and not a derivative, claim because the breaches of fiduciary duty involved disclosure violations, economic and voting dilution, and the "transfer of control from a diverse group of investors to one controlling stockholder (*i.e.*, Clearlake)."[84] Plaintiff recognizes that it lacks standing to assert any derivative claims.[85]

5. To maintain a claim for breach of fiduciary duty, Plaintiff must first allege well-pleaded facts to support a reasonable inference that a fiduciary relationship existed between KZ and the Director Defendants at the time of the alleged breach. *Sanders v. Devine*, 1997 WL 599539, at *5 (Del. Ch. Sept. 24, 1997) ("In order to prevail on a breach of fiduciary duty claim, plaintiff . . . must first establish that at the time the [disclosure document] was issued he was a person to whom a fiduciary duty was owed."). Plaintiff cannot maintain any claims for breach of fiduciary duty before any such duty was owed. *See Leung v. Schuler*, 2000 WL 264328, at *6 (Del. Ch. Feb. 29, 2000) ("It is well established in Delaware that to successfully state a claim for breach of the fiduciary duty of disclosure, the plaintiff must have been owed a fiduciary duty at the time of the alleged breach."). Plaintiff

[83] *Id.* ¶ 97.

[84] Pl.'s Ans. Br. 15; *see also* Compl. ¶ 97.

[85] *See* Pl.'s Ans. Br. 16; Hrg. 23:23–24:6.

concedes that the Director Defendants did not owe KZ fiduciary duties at the time of Plaintiff's initial investment in December 2016.[86] Accordingly, Plaintiff fails to state a claim to the extent that its fiduciary duty claim relates to disclosures made to KZ in 2016 concerning the SPA and KZ's decision to invest in the Company.

6. Plaintiff contends that the Director Defendants owed KZ fiduciary duties at the time that it remitted the last $3 million of its initial $13 million investment under the SPA in July 2017. According to Plaintiff, the $3 million was a separate investment that it was induced to make following the initial $10 million investment. Plaintiff offers no legal support for this argument. Plaintiff had already committed $15 million at the time that the SPA was executed in December 2016.[87] The $3 million payment was governed by the terms of the SPA, not a later agreement.[88] I am not persuaded, based on the allegations of the Complaint and the lack of legal support for this argument, that disclosures made in connection with the SPA before KZ became a stockholder gives rise to a claim for breach of fiduciary duty merely because KZ chose to deliver the final payment after it became a stockholder. *See Sanders*, 1997 WL 599539, at *5 ("[A]s a matter of law, there can

[86] Pl.'s Ans. Br. 2–3.

[87] SPA § 1.2; *id.*, Schedule I. Defendants have not argued on this motion that any disclosure claims relating to Plaintiff's investment pursuant to the SPA are foreclosed under the terms of the SPA.

[88] *See* Compl. ¶ 28 ("KZ Capital initially funded $10 million . . . . KZ Capital later delivered an additional $3,000,000 on July 12, 2017, for a total $13 million in Series C.").

be no liability under any fiduciary duty theories for the disclosures made in connection with the offering."); *see also Perdana Cap. (Labuan) Inc. v. Chowdry*, 868 F. Supp. 2d 851, 860 (N.D. Cal. 2012) (applying Delaware law and stating: "To the extent the [complaint] suggests that [plaintiff] also made investments in reliance on [defendant's] clean track record, however, those contributions were required once [plaintiff] entered into the partnership agreement. [Plaintiff] altered its position when it entered into the agreement in the first instance, not by performing on the contract, as was required."). Therefore, the $3 million portion of KZ's investment does not give rise to a claim for breach of the duty of disclosure.

7. Plaintiff also argues that the $5 million worth of Series B preferred stock that it received in the Aircraft Transaction was an investment in the Company after KZ had become a stockholder and, thus, gives rise to a disclosure claim against the Director Defendants in their capacities as such.[89] That argument is flawed. The parties to the Aircraft Transaction—JS Partners and an *affiliate* of KZ—were neither parties to the SPA nor parties to this action. Furthermore, the Complaint describes the Aircraft Transaction as being for the sale of an aircraft, not as a purchase of JetSmarter stock from the Company.[90] The fact that parties to a private contract agreed to use JetSmarter stock as part of the consideration does not support a

[89] Pl.'s Ans. Br. 3; Hrg. 25:8–19.

[90] *See* Compl. ¶ 44.

disclosure claim against JetSmarter's directors. KZ offers no legal authority to support this theory. Nor does Plaintiff allege that JetSmarter or any of its directors provided information to KZ or its affiliate in connection with that transaction. Therefore, the Complaint has failed to allege that the Aircraft Transaction gives rise to a fiduciary duty claim by or against any of the parties to this action.

8. What remains of the breach of fiduciary duty claim concerns the Clearlake Transaction—specifically, KZ's consent to that transaction and the amendment of the Certificate.[91] Defendants argue this claim is derivative and must be dismissed. In that regard, Plaintiff concedes that it no longer owns JetSmarter stock and, therefore, lacks standing to maintain any derivative claims.

9. In determining whether a claim is derivative or direct, a court must ask two questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

10. Plaintiff alleges that it suffered economic and voting power dilution in the Clearlake Transaction and, therefore, it is a dual-natured claim under *Gentile v. Rossette*, which can be asserted either directly or derivatively. 906 A.2d 91, 99–100

[91] *Cf. id.* ¶ 92 (alleging disclosure violations relating to either Plaintiff's initial investment or the Clearlake Transaction).

(Del. 2006). Yet as the Delaware Supreme Court recently made clear after KZ filed its answering brief, claims alleging equity dilution or overpayment, "absent more, are exclusively derivative." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1267 (Del. 2021). Those claims may become direct, however, when a plaintiff also alleges that the transaction resulted in a change of control from a "diversified group of public equity holders to a controlling interest," *i.e.*, a *Revlon* claim. *Id.* at 1266.[92]

11. Recognizing the derivative nature of its claim, Plaintiff contends that the Complaint alleges a direct claim under *Revlon*. According to Plaintiff, the Clearlake Transaction resulted in Clearlake being "effectively sold exclusive control" over the Company,[93] in addition to the existing stockholders having been diluted.

12. *Revlon* duties can be triggered in three ways:

> (1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control.

Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (internal quotations and citations omitted). "*Revlon* does not apply where the plaintiffs cannot

[92] *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986).

[93] Compl. ¶ 75.

allege that a sale or change of control has taken place or necessarily will take place such that the public shareholders of a corporation have been or will be deprived of a control premium." *In re Paxson Commc'n Corp. S'holders Litig.*, at *7 (Del. Ch. July 12, 2001).

13. The Complaint is extremely thin on facts to support a claim that the Clearlake Transaction was a sale of control giving rise to a direct claim under *Revlon*. There is no allegation as to the percentage ownership of the Company that Clearlake acquired following the transaction. The Complaint alleges that "Clearlake was effectively sold exclusive control over JetSmarter without paying a control premium."[94] Plaintiff also alleges that prior to the consummation of the Clearlake Transaction, "the voting control of JetSmarter was held among a diversified group of investors, including KZ."[95] In their briefing, Defendants did not contest Plaintiff's assertion that the Clearlake Transaction gave control to Clearlake. At oral argument, in response to a question from the court, Defendants' counsel acknowledged that it

[94] *Id.*

[95] *Id.* ¶ 74. The Complaint also points to rights that Clearlake appears to have obtained pursuant to the terms of the amended Certificate for its C-1 preferred stock, such as veto rights over certain transactions. The amended Certificate is not in the record. Nevertheless, the rights alleged in the Complaint, of themselves, do not establish that Clearlake obtained control of the Company. To establish control, the complaint must sufficiently allege that: "(1) the alleged controller owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but exercises control over the business affairs of the corporation." *In re Vaxart, Inc. S'holder Litig.*, 2021 WL 5858696, at *15 (Del. Ch. Nov. 30, 2021) (internal quotations omitted).

was her understanding that upon converting its debt from the Clearlake Transaction, Clearlake "did have a controlling interest in the company."[96]

14. Given the plaintiff-friendly pleading standard under *Central Mortgage*, I conclude, albeit with great hesitancy, that it is reasonably conceivable that the Complaint alleges the Clearlake Transaction is subject to enhanced scrutiny under *Revlon*. In this context, the directors must establish both the reasonableness of their decision-making process and the reasonableness of their action in light of the existing circumstances. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994); *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 249–50 (Del. Ch. 2021).

15. At oral argument, Defendants' counsel contended that Plaintiff could not establish the merits of its claim under *Revlon*. The court is sympathetic to Defendants' position, particularly given the paucity of facts in the Complaint on this theory and that Defendants' apparent concession that the Clearlake Transaction resulted in a transfer of control arose only in response to a question from the court at oral argument. On the other hand, *Brookfield* was decided after Plaintiff filed its amended Complaint. In addition, Defendants' briefing did not focus on the merits

[96] Hrg. 13:24–14:1.

of a *Revlon* claim.[97] Given that the pending motion is not case dispositive, I deny the motion to dismiss Count II as to KZ's *Revlon* theory, although I find it to be particularly weak. Any disclosure claims pertaining to the Clearlake Transaction will be considered as part of that claim. *See I.A.T.S.E. Local No. One Pension Fund v. Gen. Elec. Co.*, 2016 WL 7100493, at *6 (Del. Ch. Dec. 6, 2016) (granting in part and denying in part a motion dismiss and stating that disclosure allegations would be considered as part of entire fairness review of the fiduciary duty claims).[98]

16. **Contractual Fiduciary Duty Claim.** Count III recasts Plaintiff's common law fiduciary duty claims against Ridge and Navarre as breaches of contractually imposed fiduciary duties. For this theory, Plaintiff relies on letter agreements that Ridge and Navarre signed in connection with their appointments to the JetSmarter Board (the "Letter Agreements"). These Letter Agreements generally included terms governing tenure, compensation and benefits, indemnification, and

[97] Defendants' reply brief seeks to discredit the claim, arguing that the mere retention of an investment banker and the failure to pursue business combinations do not state a claim under *Revlon*. Defs.' Reply Br. 13–14. But that is not the nature of Plaintiff's claim.

[98] Plaintiff's general allegations that Ridge and Navarre did not do their jobs or failed to act with appropriate diligence, *see, e.g.*, Compl. ¶ 93 (alleging Ridge and Navarre "lacked due care or good faith in making business decisions"), are classic derivative claims that must be dismissed for Plaintiff's lack of standing. *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.02, at 11-8 (2d ed. 2020) ("[G]eneral allegations of mismanagement that result in depression of the stockholders' pro rata investment in the corporation, or so-called 'equity dilution,' have been construed as constituting a direct injury to the corporation rather than to the shareholders in their individual capacity, and thus may properly be asserted only by or on behalf of the corporation.").

time to be devoted to board duties. Plaintiff points to language in the Letter Agreements that reads:

> Fiduciary Duties; No Conflicts. As a member of the Board, you will have fiduciary duties to the Company and its stockholders. . . .[99]

KZ was not a party to the Letter Agreements. Rather, Petrossov countersigned those agreements as JetSmarter's CEO.[100] Nevertheless, according to Plaintiff, the Letter Agreements "create contractual rights for the benefit of shareholders," and therefore, Plaintiff "is entitled to enforce those rights through a direct claim."[101]

17. Count III is a transparent attempt to evade Rule 23.1 and the requirement of derivative standing by citing a contract—to which Plaintiff is not a party—that does nothing more than acknowledge Ridge and Navarre's common law fiduciary duties as directors of a Delaware corporation. "Delaware fiduciary duties are based in common law and have been carefully crafted to define the responsibilities of directors and managers, as fiduciaries, to the corporation." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 114 n.6 (Del. Ch. 2009). Although fiduciary duties may arise from contract, such as in the alternative entity

[99] Dkt. 31, Ex. 7 § 6 (Ridge's Letter Agreement); *see also* Dkt. 32, Ex. 8 § 6 (Navarre's Letter Agreement).

[100] Dkt. 31, Ex. 7 at 6; Dkt. 32, Ex. 8 at 6.

[101] Pl.'s Ans. Br. 21; *see* Hrg. 37:19–21 (Plaintiff's counsel: "the general law on fiduciary duties was incorporated into the contract, and it became a contractual obligation of the defendants").

context, that is not what is alleged here. *See Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *14 (Del. Ch. July 6, 2018) ("A 'contractual fiduciary duty' is a fiduciary duty (1) the scope of which is established by contract; *or* (2) compliance with which is measured by a contractual standard."); *Allen v. El Paso Pipeline GP Co., L.L.C.*, 2014 WL 2819005, at *19 (Del. Ch. June 20, 2014) ("Because the alternative entity statutes permit the entity's governing agreement to modify, alter, or expand fiduciary duties, there are situations involving alternative entities where a party could owe fiduciary duties, the scope of the fiduciary duty would be established by contract, and a third party could aid and abet a breach of the contractually measured fiduciary duty."); *see generally* 3 Bradley W. Voss, *Voss on Delaware Contract Law* § 12.10 (2021) (discussing contractual fiduciary duties and cases).

18. JetSmarter is not a limited partnership or limited liability company. Plaintiff offers no authority for the broad proposition that a director of a Delaware corporation's mere signing of a contract which acknowledges no more than her common law fiduciary duties is subject to a separate contract-based fiduciary duty claim, and that all fiduciary duty claims, either direct or derivative, can now be asserted by stockholders that are not parties to the contract.[102] Indeed, such a theory

[102] To be sure, the Letter Agreements do not purport to describe the scope of any fiduciary duties acknowledged therein.

would run counter to Delaware case law holding that fiduciary duty claims grounded in contract are superfluous and subject to dismissal. *See Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010) ("It is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous.").

19. Plaintiff argues that *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015), lends support to its position. In that case, the Delaware Supreme Court, answering a certified question by the U.S. Court of Appeals for the Second Circuit, held that a "suit by a party to a *commercial* contract to enforce its own contractual rights is not a derivative action under Delaware law." *Id.* at 182 (emphasis added). [103]

[103] The full text of that questions reads:

> Where the plaintiff has secured a contractual commitment of its contracting counterparty, the defendant, to render a benefit to a third party, and the counterparty breaches that commitment, may the promisee-plaintiff bring a direct suit against the promisor for damages suffered by the plaintiff resulting from the promisor's breach, notwithstanding that (i) the third-party beneficiary of the contract is a corporation in which the plaintiff-promisee owns stock; and (ii) the plaintiff-promisee's loss derives indirectly from the loss suffered by the third-party beneficiary corporation; or must the court grant the motion of the promisor-defendant to dismiss the suit on the theory that the plaintiff may enforce the contract only through a derivative action brought in the name of the third-party beneficiary corporation?

NAF Hldgs., 118 A.3d at 176.

20. Without any analysis of *NAF*, Plaintiff asserts that the opinion allows KZ to assert the entirety of its common law fiduciary duty claims directly because of the existence of the Letter Agreements, which according to Plaintiff, give it, as a stockholder, rights as a third-party beneficiary.[104] Here, however, the Complaint does not allege facts analogous to the situation in *NAF*. KZ was not a party to the Letter Agreements, unlike the plaintiff in *NAF*. Rather, Petrossov countersigned those agreements as JetSmarter's CEO.[105] Furthermore, *NAF* does not transform the derivative portions of Plaintiff's claim for breach of fiduciary duty into a direct claim. As the Delaware Supreme Court later clarified in *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016), *NAF* "does not support the proposition that *any* claim sounding in contract is direct by default, irrespective of *Tooley*." *Id.* at 1259 (emphasis in original); *see Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1139 (Del. 2016) (noting that "a *Tooley* analysis was not needed to determine whether the *commercial* contract claim in *NAF Holdings* was direct or derivative" (emphasis added)). In *El Paso*, the court held that the *Tooley* analysis applied to dual-natured claims premised on breach of the limited partnership agreement, and determined the claims were derivative. Plaintiff does not address *El Paso*, and its theory is contrary to Delaware law. Plaintiff does not otherwise argue

[104] Pl.'s Ans. Br. 21; Compl ¶ 102.

[105] Dkt. 31, Ex. 7 at 6; Dkt. 32, Ex. 8 at 6.

that the damages resulting from the alleged breach were unique to KZ. Thus, Plaintiff cannot assert a direct claim under its aberrant theory of contractual breach of fiduciary duty.[106]

Therefore, Count III is dismissed for failure to state a claim.

21. **Negligent Misrepresentation.** In Count IV, brought solely against the Company and Petrossov, Plaintiff repackages its disclosure claims from Count II under a negligent misrepresentation theory.

22. "A claim for negligent misrepresentation is often referred to interchangeably as equitable fraud." *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch. Jan. 30, 2015). Negligent misrepresentation, or equitable fraud, requires the same elements as a claim for common law fraud, except that the complaint need not allege that the misrepresentation or omission was made knowingly or recklessly. *Id.* "A claim for negligent misrepresentation requires: (1) a particular duty to provide accurate information, based on the plaintiff's pecuniary interest in that information; (2) the supplying of false information; (3) failure to exercise reasonable care in obtaining or communicating information; and (4) a pecuniary loss caused by justifiable reliance on the false

[106] This Order does not attempt to address other flaws in Plaintiff's theory, which the parties did not brief.

information." *Metro. Life Ins. Co. v. Tremont Grp. Hldgs., Inc.*, 2012 WL 6632681, at *17 (Del. Ch. Dec. 20, 2012).

23. The threshold issue for a claim of negligent misrepresentation is whether the defendant owed the plaintiff a duty to provide accurate information. Accordingly, the plaintiff must allege that there is either (1) "a special relationship between the parties over which equity takes jurisdiction (like a fiduciary relationship)" or (2) "justification for a remedy that only equity can afford." *Envo, Inc. v. Walters*, 2009 WL 5173807, at *6 (Del. Ch. Dec. 30, 2009), *aff'd*, 2013 WL 1283533 (Del. Mar. 28, 2013). Plaintiff seeks only money damages. Thus, it must allege a special relationship to maintain this claim.

24. The Complaint is devoid of any facts suggesting that Plaintiff had a special relationship, fiduciary or otherwise, with the Company or Petrossov prior to the execution of the SPA in December 2016. The parties to the SPA were "[s]ophisticated contractual parties who bargain[ed] at arm's length." *LVI Grp. Invs., LLC v. NCM Grp. Hldgs., LLC*, 2018 WL 1559936, at *18 (Del. Ch. Mar. 28, 2018) (internal quotations omitted). Such parties are generally not afforded the "kind of equitable protection that the negligent misrepresentation . . . doctrine envisions." *Id.* (internal quotations omitted). Plaintiff's allegation that Aliyev and Barsky had "met and developed a deep friendship" while Barsky was soliciting KZ's

investment does not suffice to allege a "special relationship."[107] It is well-settled that alleging mere friendship, without more, cannot satisfy a plaintiff's pleading burden to allege a special relationship necessary to state a negligent misrepresentation claim. *See Clark v. Davenport*, 2019 WL 3230928, at *15 (Del. Ch. July 18, 2019) (noting that allegations of "trust" and "friendship" were not sufficient to establish a special relationship, such as a fiduciary relationship, necessary for a negligent misrepresentation claim). Thus, any harm emanating from Plaintiff's initial $13 million investment, *i.e.*, the SPA, must be dismissed.[108] As in Count II, Plaintiff cannot assert that the Aircraft Transaction states a claim because none of the parties to that transaction is a party to this action, and neither Petrossov

[107] Compl. ¶ 15.

[108] Plaintiff points to *Sanders*, 1997 WL 599539, for the seeming proposition that either a "special relationship" is not a required element of a negligent misrepresentation claim or that satisfying that element is not limited to establishing that the plaintiff was a stockholder at the time of the misrepresentation. Pl.'s Ans. Br. 21–22. In *Sanders*, when addressing claims for fraudulent inducement and negligent misrepresentation relating to disclosures made in connection with a stock purchase, the court stated:

> There is no dispute that the defendants, or at least those participating in the offering of the Shares, owed plaintiff a duty to exercise reasonable care to see that the statements made in connection therewith were not materially misleading and, of course, owed a duty not to engage in intentional misrepresentations.

Sanders, 1997 WL 599539, at *6. In making this statement, the *Sanders* Court was merely recounting that the defendants had not challenged the plaintiff's standing to bring a negligent misrepresentation claim; this was not a holding of the court. Whether plaintiff had established a "special relationship" was not contested, and in any event, the court did not need to reach it because the plaintiff could not have reasonably relied on the disclosures. *Id.* KZ cites no case, and the court has not located one, supporting Plaintiff's interpretation of *Sanders*.

nor the Company is alleged to have made any representations in connection with that transaction.

25. Like Count II, the scope of Count IV has been narrowed. All of the alleged misrepresentations made in connection with KZ's investments in the Company fail to state a claim because at the time of those alleged misrepresentations there was no special relationship. As to the alleged misrepresentations relating to the Clearlake Transaction, which were made when KZ was a stockholder in the Company, they are subsumed in the *Revlon* claim. Because the negligent misrepresentation claim as to those disclosures is based upon a fiduciary relationship and constitutes part of the fiduciary duty claim, it is superfluous and must be dismissed. "When the special relationship involves allegations of fiduciary breach, then the claim for equitable fraud is subsumed in the claim for breach of fiduciary duty." *Clark*, 2019 WL 3230928, at *14. The latter claim "confronts directly the implications of the fiduciary relationship, rendering the constructive [or equitable] fraud count redundant and superfluous." *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013); *accord Clark*, 2019 WL 3230928, at *14 (dismissing as superfluous a negligent misrepresentation claim based upon a fiduciary relationship

where complaint also alleged fiduciary duty claim upon the same alleged misrepresentations).[109]

26. For the forgoing reasons, Defendants' partial motion to dismiss Count II is granted in part and denied in part. The partial motion to dismiss as to Counts III and IV of the Complaint is granted.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor

[109] Defendants argue that certain of Plaintiff's claims are barred on grounds of laches because they were not asserted within the analogous three-year statute of limitations. Defs.' Op. Br. 11–15. Defendants do not assert laches as to claims arising out of the Clearlake Transaction, which closed less than three years before Plaintiff filed its original complaint. Because this Order dismisses Counts II through IV on the merits, except for the portion of Count II pertaining to the Clearlake Transaction, the court need not reach the laches argument.