

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ANIL C. SINGH  
Justice

PART 45

Index Number : 151483/2016  
JUMA TECHNOLOGY CORP  
vs.  
ANTHONY M. SERVIDIO ET AL  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the accompanying decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/24/17

*ACS*, J.S.C.  
**ANIL C. SINGH**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
JUMA TECHNOLOGY CORP., MARGERY C. RUBIN  
as Trustee of RUBIN FAMILY IRREVOCABLE STOCK  
TRUST, and ROBERT M. RUBIN,

Plaintiffs,

-against-

DECISION AND  
ORDER

Index No.  
151483/2016  
Mot. Seq. 001, 002, 003

CAROL SERVIDIO, SOLELY IN HER CAPACITY  
AS EXECUTRIX OF THE ESTATE OF ANTHONY  
M. SERVIDIO, JOSEPH FUCCILLO, ROBERT  
THOMSON, VISION OPPORTUNITY MASTER FUND,  
LTD., VISION CAPITAL, ADVANTAGE FUND, LP,  
VISION CAPITAL ADVISORS, LLC and NECTAR  
HOLDINGS, INC,

Defendants.  
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**HON. ANIL C. SINGH, J.:**

Juma Technology Corp (“Juma”), Margery C. Rubin as Trustee of Rubin Family Irrevocable Stock Trust (the “Trust”) and Robert M. Rubin (“Rubin”) (collectively, “Plaintiffs”) bring this action sounding in breach of fiduciary duty and seeks an accounting. Defendants Carol Servidio, solely in her capacity as the Executrix of the estate of Anthony M. Servidio (“Servidio”), Joseph Fuccillo (“Fuccillo”), Robert Thomson (“Thomson”), Vision Opportunity Master Fund, Ltd (“Master Fund”), Vision Capital Advantage Fund, LP (“Advantage Fund”, together with the Master Fund referred to as the “Vision Funds”), Vision Capital Advisor,

LLC (“Vision Advisor”, together with the Master Fund and Advantage Fund referred to as “Vision Defendants”) and Nectar Holdings, Inc. (“Nectar”) (collectively, “Defendants”) move to dismiss the Amended Complaint (“Complaint”). Plaintiffs oppose.

The Complaint alleges that the Vision Defendants are controlling shareholders of Juma while the Trust and Rubin are minority shareholders. It is also alleged that Servidio and Thomson are directors of Juma and Fuccillo is an officer and director of Juma.

The gravamen of the Complaint is that the Defendants breached their fiduciary duties to Juma by using their respective positions and affiliations with Juma to exercise complete control and domination over Juma to strip Juma of all its assets. Juma’s assets were allegedly converted for Defendants’ own use and benefit and/or for the use and benefit of other entities under Defendants’ exclusive control.

The Complaint further alleges that commencing in or about August 2007, Juma, together with an affiliate, Nectar Services Corp (“NSC”), entered into a series of financing arrangements with the Master Fund and Advantage Fund, pursuant to which Juma and NSC executed and delivered to the Funds a series of convertible promissory notes.

Commencing in November 2017 and after, Plaintiffs allege that the Vision Defendants exercised complete control and domination of Juma’s affairs, including

decisions made by the board. Plaintiffs allege that the Vision Defendants insisted that all decisions concerning Juma's affairs be approved by their representative, Thomson and that Fuccillo, Servidio and others were directed to report directly to Thomson.

Plaintiffs contend that following the issuance of injunctive relief in a separate action on October 20, 2012, a special meeting of the board of directors of Juma was convened for the purpose of approving a strict foreclosure of all the assets and property of Juma and NSC. During the special meeting, Servidio, Fuccillo and Thomson allegedly refused to consider other legal options. On October 2012, the strict foreclosure was completed resulting in the alleged transfer of Juma's assets to defendant Nectar.

It is also alleged that the individual defendants resigned following the strict foreclosure. On December 20, 2012, the separate action was allegedly settled on terms detrimental to the rights of Juma, and for the sole benefit of the Vision Defendants.

The Complaint states four causes of action. The first cause of action is for breach of fiduciary duty against Servidio, Fuccillo, Thomson and the Vision Defendants in allowing the Vision Defendants to transfer Juma's assets to the Vision Defendants. The second cause of action is against the Vision Defendants and Nectar for an accounting and disgorgement of profits. The third cause of action is against

the Vision Defenadants for mismanagement of Juma's business and affairs, waste of its assets property and goodwill and loss of customer confidences. The fourth cause of action is for breach of fiduciary duties against the Vision Defendants for using their position as lender to exercise control over Juma, thereby acting as equity shareholders rather than a lender.

Defendants seek dismissal of the claims pursuant to CPLR 3211 (a)(1), (2), (3), (5), (7), (8)<sup>1</sup>.

### Discussion

#### Juma's standing to sue

Juma does not have standing to sue.

The relevant part of 8 Del. C. §510 states that,

If any corporation, . . . , neglects or refuses for 1 year to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under this chapter, or shall neglect or refuse to file a complete annual franchise tax report, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the Secretary of State, for good cause shown, shall have given further time for payment of the tax or taxes or the completion of an annual franchise tax report, in which case a certificate thereof shall be filed in the office of the Secretary of State stating the reason therefor.

Hence, under Delaware law, a corporation's failure to pay taxes for one year will void its corporate charter and render inoperative all powers conferred upon it by law.

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<sup>1</sup> The Vision Defendants and Thomson seek dismissal to all these sections. Fuccillo and Servidio bring their motion to dismiss pursuant to (5), (7) and (8).

The Supreme Court of Delaware has held that pursuant to §510, a corporation “has thereby ceased to exist and has lost any standing to appeal and be heard, even if represented by counsel.” Transpolymer Industries, Inc. v. Chapel Main Corp., 1990 WL 168276, at \*1 (Del.,1990)<sup>2</sup>.

A Delaware court similarly held in James v. United Medical LLC, 2017 WL 1224513, at \*4 (Del. Super., 2017) that a corporate plaintiff had no standing to bring a case pursuant to 8 Del. C. § 510 as the record in the case established that the corporate plaintiff was “void” and therefore, “any statutory period allowing [the corporate plaintiff] to bring a suit has expired, and there is no allegation that [the corporate plaintiff] received an extension of that period.”

The case law relating to the issue is otherwise sparse. First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co., 2005 WL 2173993, at \*7 (Del.Ch.,2005) attempts to distinguish Transpolymer. In First State, the court held that references in Transpolymer to “a void corporation lacking standing could be considered dicta.” However, the court also held that “Transpolymer does not require a departure from the traditional rule that a dissolved Delaware corporation has the power to close its affairs but not to carry on the business for which it was established.” The court went

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<sup>2</sup> Some of the cases distinguishing Transpolymer refer to it as an unpublished opinion. However, Delaware Supreme Court Rules 14(b)(vi) & 17(a, commentary) permit citation of the Court's unpublished orders as precedent in other unrelated cases.

on hold that the suit brought fell “within the ambit of winding up its corporate affairs” and therefore the corporate plaintiff had standing.

Here, Juma is listed by Delaware’s Secretary of State as “Void” as of March 1, 2014, with taxes in arrears of \$400,231. (NYSCEF No. 57). Juma does not dispute this fact. Moreover, nor does Juma argue that it is bringing this suit as an attempt to wind down its corporate affairs.

Instead, Juma argues that it has standing to sue pursuant to 8 Del. C. §278 which states that,

All corporations, **whether they expire by their own limitation or are otherwise dissolved**, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, **but not for the purpose of continuing the business for which the corporation was organized**. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

(emphasis added). However, Juma’s assertion that it was dissolved and should be given 3 years to prosecute this case pursuant to §278 is unavailing. §278 applies to corporations that “expire by their own limitation or are otherwise dissolved” and not

to corporations that are void. Moreover, the Delaware Code provides for a procedure for dissolution and the Complaint does not allege that Juma followed the procedure.

Accordingly, pursuant to 8 Del. C. §510 and the supporting case law, Juma does not have standing to bring this suit. The dismissal is without prejudice to Juma.

### **Claims brought by the Trust and Rubin**

The claims asserted against the Defendants have also been brought by Rubin and the Trust. Since the claims asserted in the Complaint belong to the corporation, they may only be asserted by Rubin and the Trust derivatively.

The Court of Appeals has held that “allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually”. Abrams v. Donati, 783, 66 N.Y.2d 951, 953 (1985). “For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation”. Id. “A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed.” Id. The court further held that “[e]xceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged.” Id. See also, Serino v. Lipper, 123 A.D.3d 34, 39–40 (1st Dept 2014); Yudell v. Gilbert, 99 A.D.3d 108,




113-15 (1st Dept 2012); Lamberti v. 30 Real Estate Corp., 8 A.D.3d 211, 212 (1st Dept 2004).

Here, the Complaint states that fiduciary duties owed to Juma were breached. The allegations in the Complaint plead a wrong to the corporation only. Rubin and the Trust has not alleged breach of a duty independently owed to them. Therefore, the Complaint brought by Rubin and the Trust are also dismissed without prejudice. Accordingly, it is hereby

**ORDERED** that defendants Carol Servidio, solely in her capacity as the Executrix of the estate of Anthony M. Servidio, Joseph Fuccillo's, Vision Opportunity Master Fund, Ltd's, Vision Capital Advantage Fund, LP's, Vision Capital Advisor LLC's, Robert Thomson's and Nectar Holdings Inc.'s motions to dismiss Plaintiffs' Amended Complaint is granted without prejudice.

Date: May 24, 2017  
New York, New York

  
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Anil C. Singh