IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

XU HONG BIN and KOTEX DEVELOPMENT CORP.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 4637-CC
v.	)	
	)	
HECKMANN CORPORATION, RICHARD J. HECKMANN, DONALD G. EZZELL, BRIAN R. ANDERSON, DAN QUAYLE, ALFRED E. OSBORNE, JR. LOU L. HOLTZ, ANDREW D. SEIDEL, and EDWARD A. BARKETT,	)	
Defendants.		

MEMORANDUM OPINION

Date Submitted: September 17, 2009
Date Decided: October 26, 2009

Kenneth J. Nachbar, of MORRIS, NICHOLS, ARSHT & TUNNELL, LLP, Wilmington, Delaware; OF COUNSEL: Israel Dahan, of CADWALADER, WICKERSHAM & TAFT, LLP, New York, New York, Attorneys for Plaintiffs.

Thomas J. Allingham II, Stephen D. Dargitz, and Joseph O. Larkin, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

Presently before the Court is plaintiffs' motion to dismiss the three counterclaims asserted by defendants. Plaintiffs argue that the first of these counterclaims, alleging breach of fiduciary duty, is barred by a mutual release provision contained in an enforceable contract between the parties. Because there are disputed issues of fact that must be resolved to determine if the contract is valid and enforceable, plaintiffs' motion to dismiss defendants' counterclaim for breach of fiduciary duty is denied. As to the second and third counterclaims, for breach of contract and conversion, respectively, I find that defendants have failed to state a claim and accordingly grant plaintiffs' motion to dismiss these counterclaims.

Also before the court is plaintiffs' motion for partial judgment on the pleadings. Plaintiffs seek partial judgment as to Count IV of their complaint, which asks the Court to order specific performance of the contract containing the mutual release. Because it is not yet determined that the contract is valid and enforceable, a request for specific performance of the contract is premature. Accordingly, plaintiffs' motion for partial judgment on the pleadings is denied.

I. BACKGROUND[1]

A. The Parties

Plaintiff Xu Hong Bin is a citizen of the People's Republic of China. Xu founded China Water, a bottled water producer and distributor in China. Plaintiff Kotex Limited ("Kotex") is a British Virgin Islands corporation that, at the time of the merger described below, was co-owned and co-directed by Xu and Ms. Leung Lei Shan. Xu and Leung were Kotex's only shareholders and directors at that time.

Defendant Heckmann Corporation ("Heckmann") is a Delaware corporation that was formed as a holding company to make strategic investments in existing businesses. China Water was Heckmann's first acquisition. Various Heckmann directors and officers are also defendants in this action but a detailed description of each is unnecessary to resolve Xu's motions.

B. The Merger

On May 19, 2008, Heckmann entered into an Agreement and Plan of Merger and Reorganization (the "Merger Agreement") with China Water, under which China Water would merge into a wholly owned subsidiary of Heckmann (the

[1] The facts set forth herein are taken from defendants' counterclaim unless otherwise indicated and are accepted as true for purposes of plaintiffs' motions to dismiss the counterclaims and for partial judgment on the pleadings.

"Merger"). In connection with the Merger Agreement, Xu also entered into a Majority Stockholder Consent Agreement (the "Consent Agreement") pursuant to which Xu agreed to exchange his China Water shares for cash and restricted Heckmann shares and place 90% of the restricted shares in escrow to secure representations and warranties he made in connection with the Merger. Terms of the Merger Agreement and the Consent Agreement were later amended to adjust for the worldwide financial crisis. Ancillary agreements transferring exchangeable China Water shares among the controlling group of selling insiders also were added. The Merger, however, ultimately closed on October 30, 2008. Shortly before the Merger, at Xu's request, the parties amended the Consent Agreement to provide that certain of Xu's shares would be transferred to Kotex.

When the Merger closed, Xu continued as President of China Water and became a Heckmann director. As consideration for the Merger, Xu received $15 million cash, the right to share in an additional contingent payment of $15 million in cash or stock, and 18,369,000 restricted Heckmann shares. At the direction of Xu and Leung, 16,532,100 of the restricted Heckmann shares were issued to Kotex and placed in escrow until March 31, 2010. The remaining 1,836,900 restricted Heckmann shares were issued to Xu individually and not subject to escrow, but the trading restrictions would not lapse until the two-year anniversary of the Merger's closing.

C. Post-Merger Conflict and the Escrow Resolution and Transition Agreement

After the Merger, Heckmann allegedly discovered that China Water's receivables were not being collected and that sales figures were plummeting. In January 2009, extremely disappointing preliminary year-end operating results for China Water became available. Heckmann representatives sought an explanation from Xu regarding China Water's poor performance, but felt that the answers Xu gave were "inadequate."

At some point thereafter negotiations between Heckmann and Xu began over an agreement, entitled the Escrow Resolution and Transition Agreement ("ERTA"), which was ultimately signed on March 13, 2009. The ERTA required Xu to resign as President of China Water and as a Heckmann director. Heckmann agreed in the ERTA to pay Xu $6 million to reimburse him for manufacturing equipment purchases he purported to have made personally on China Water's behalf.

Xu also agreed in the ERTA to sell 13,032,100 of Kotex's escrowed Heckmann shares back to Heckmann for $14 million, or $1.07 per share – a steep discount to Heckmann's then-current trading price of $4.62 per share. The ERTA also provided that Heckmann would (i) release from escrow Kotex's remaining 3,500,000 Heckmann shares, and (ii) remove all restrictions on the remaining Heckmann shares held by Xu and Kotex on May 1, 2009. These measures would

have allowed Xu and Kotex to begin liquidating the balance of their shares on May 1.

Xu signed the ERTA on his own behalf and as a Kotex director. Kotex was a necessary party to the ERTA because it held a significant percentage of the restricted Heckmann shares.

On March 22, 2009, Heckmann received a message from Ms. Gloria Chan, a Hong Kong lawyer representing Leung. Chan informed Heckmann that the ERTA was not valid because it had not been approved by Leung. On March 24, Heckmann's General Counsel asked Chan to confer with Xu's counsel, Cadwalader, Wickersham & Taft, LLP ("Cadwalader") about the matter. On March 25, Chan again denied that Cadwalader had the authority to represent Leung or Kotex when the ERTA was signed and emphasized that Heckmann was to issue shares only to Kotex. Chan also demanded the return of any consideration paid to Xu or his counsel. Chan threatened legal action against Heckmann if these steps were not taken. On March 26, Chan again reiterated to Heckmann that Leung had not authorized the ERTA.

Leung also sent personal e-mails to Heckmann's CEO, Richard Heckmann, denying that Xu had authority to act on Kotex's behalf. Leung warned that she had not signed the ERTA or received any of the $14 million transferred to Xu to

repurchase Heckmann stock and directed that Xu should not be given shares of unrestricted Heckmann stock.

On April 6, 2009, after two weeks of protests, Heckmann received a letter, purportedly written by Chan, stating that Leung's "previous doubt on the validity of the [ERTA] concluded by Cadwalader on behalf of Kotex is now removed. You are now requested to perform your obligations under those agreement(s)/contract(s)."[2] This was the last communication Heckmann received from Leung.

A number of ERTA provisions are important to the current litigation. Of paramount importance is ERTA Section 2.2, which contains a broadly worded mutual release of claims between Xu and Heckmann. Section 6 contains a reliance provision providing principally that each party relied on its own judgment in signing the ERTA. And finally, Section 7 contains an integration clause stipulating that the ERTA is the sole agreement between the parties. The relevant text of these provisions is discussed later in this opinion.

D. Heckmann Refuses to Perform Under the ERTA and Xu Files Suit

After the ERTA was signed, Xu resigned his directorship with Heckmann and as president of China Water. Heckmann wired Xu $20 million: $14 million in

[2] Br. in Supp. of Pls.' Mot. to Dismiss Heckmann Corp.'s Countercls. and for Partial J. on the Pleadings 27; Defs.' Countercl. ¶ 43.

exchange for the 13,032,100 Heckmann shares owned by Kotex and $6 million to reimburse Xu for the equipment purchases he allegedly made.

On May 3, 2009, two days after the ERTA permitted Xu and Kotex to begin selling their remaining Heckmann shares, Xu received a letter from Heckmann stating that Heckmann had decided to cancel the remaining shares belonging to Xu and Kotex. Heckmann's transfer agent, however, subsequently refused to cancel the shares without a court order or indemnity bond. Finding that it was unable to cancel the shares, Heckmann refused to deliver them to Xu and Kotex. On June 1, 2009, after Xu's demands for performance failed, he filed suit against Heckmann and various directors seeking, *inter alia*, specific performance of the ERTA.

E. Heckmann Counterclaims

Heckmann responded to Xu's suit by filing an answer and counterclaims on June 22, 2009. In that pleading, Heckmann asserts three counterclaims. First, Heckmann asserts that Xu breached the fiduciary duties he owed to Heckmann as a director. Second, Heckmann asserts that Xu breached the ERTA. And third, Heckmann asserts that Xu is not entitled to the $6 million paid to him as reimbursement for equipment purchases and that his retention of those funds is conversion. Xu's alleged conduct gave rise to the counterclaims and apparently motivated Heckmann to refuse to perform the ERTA. The asserted factual bases of each counterclaim are discussed in turn.

F. Asserted Facts Underlying Heckmann's Breach of Fiduciary Duty Counterclaim

Heckmann asserts that Xu breached his fiduciary duties by engaging in fraudulent conduct—before and after the Merger—that substantially harmed Heckmann. Heckmann argues that Xu had a duty to disclose this conduct before signing the ERTA and that his failure to do so was an additional breach of fiduciary duty.[3]

The fraudulent conduct allegedly committed by Xu is extensive. For beginners, Heckmann alleges that Xu's real name is not actually Xu Hong Bin and that he used this false name to conceal his criminal record.

Heckmann also alleges that for some time before entering into the Merger Agreement, Xu employed dozens of individuals at a center in southern China, none of whom were on China Water's payroll, to perpetrate an elaborate accounting fraud. Purportedly, these individuals would intercept operating results from the field for China Water and "filter" them, passing on artificially inflated results to China Water's Hong Kong headquarters for reporting purposes. Allegedly, this fraudulent scheme was so well concealed that it eluded two respected investment banking firms, two major China Water shareholders, and China Water's independent auditor.

[3] Moreover, although not technically a counterclaim, Heckmann asserts that it was fraudulently induced into signing the ERTA by Xu's failure to disclose his fraudulent conduct.

Heckmann further alleges that during Xu's tenure as president, China Water negotiated the acquisition of several beverage-related Chinese companies and purported to make large deposits towards these acquisitions. One such acquisition was for the purchase of Harbin Taoda, a bottled water company located in the city of Harbin in the Heilongjiang Province of northern China. In connection with this purchase, the seller received a deposit of $1.3 million, and expected to receive an additional $675,000 at closing. According to Heckmann, that was not how Xu presented this "acquisition in progress" during the due diligence process. Rather, China Water's books indicated a pre-paid deposit of approximately $12.3 million toward a purported purchase price of $13.9 million for Harbin Taoda. Heckmann alleges that this $12.3 million never went to the sellers of Harbin Taoda. Instead, it went to entities controlled by Xu.

The sham was ostensibly uncovered in the spring of 2009, after Xu had resigned his position with China Water. When the local CFO of China Water traveled to Harbin to complete due diligence with the seller, Mr. Wang Hong Zhou, Wang explained that the true purchase price for Harbin Taoda was in the $2-3 million range, not $13.9 million. Wang also advised that he had received only $1.3 million as a deposit, and that documents purporting to contain the signature, corporate seal, and Wang's authorization had been forged.

Finally, Heckmann alleges that during Xu's tenure as president, China Water did not make value added tax ("VAT") payments to the Chinese government on the sales that Xu's associates had fabricated. During the Merger due diligence process, Ernst & Young, LLP ("E&Y") discovered that 2007 VAT payments were less than expected based on China Water's reported operating results. When questioned about this discrepancy, Xu allegedly explained that many small businesses in China do not pay all of the VAT they owe because they would not otherwise be profitable. Heckmann argues that the real reason VAT payments were not made was because Xu had artificially inflated China Water's results and the discovery of that fact would have meant the end of his deal with Heckmann.

E&Y did not accept Xu's explanation for the non-payment of VAT and so informed Heckmann. Before the Merger, in the summer of 2008, Heckmann insisted that China Water reserve funds for the additional VAT payments.

After the Merger closed in October 2008, Heckmann learned that the VAT reserve was paid in September 2008. To understand why this occurred, Heckmann requested China Water's tax records, but was told that Xu needed them for a tax audit. After Xu left China Water, Heckmann was allegedly informed that the amounts reserved for VAT payments had been transferred to Xu.

G. Asserted Facts Underlying Heckmann's Breach of Contract Counterclaim

Heckmann alleges that Xu breached the ERTA by falsely representing he had the authority to sign on Kotex's behalf when in fact Leung's approval was also needed. Heckmann also argues that Xu breached the ERTA by misrepresenting his identity.

H. Asserted Facts Underlying Heckmann's Conversion Counterclaim

Heckmann asserts that Xu falsely represented that he personally made $6 million in reimbursable equipment purchases. Heckmann contends that because Xu did not actually make reimbursable equipment purchases, he has no claim to the $6 million Heckmann wired to him, but has nevertheless exercised dominion and control over the funds and has refused to return them. According to Heckmann, this makes Xu liable for conversion of the $6 million.

I. Xu's Motion to Dismiss Counterclaims and Motion for Judgment on the Pleadings

Xu responded to Heckmann's answer and counterclaims by filing a motion to dismiss those counterclaims, principally on the ground that they are all barred by the mutual release in ERTA Section 2.2. In the same filing, Xu asks for judgment on the pleadings with respect to Count IV of his complaint. Count IV seeks specific performance of the ERTA. In particular, Xu asks the Court to order Heckmann to release the Heckmann shares it has withheld from Xu and Kotex,

remove any restrictive securities legends from those shares, and refrain from issuing any stop transfer orders on the shares. Moreover, Xu seeks an order that would bar Heckmann from asserting any claims against Xu that existed as of the date of the ERTA, on the grounds that the mutual release in Section 2.2 precludes Heckmann from bringing such claims.

II. ANALYSIS

A. Xu's Motion to Dismiss Counterclaims

Pursuant to Court of Chancery Rule 12(b)(6), in considering Xu's motion to dismiss Heckmann's counterclaims, "[a]ll inferences from well-pled allegations of fact in the [counterclaims] must be construed in favor of [Heckmann]."[4] The Court may not dismiss Heckmann's counterclaims unless it determines with "reasonable certainty" that there is no set of facts that can be reasonably inferred from the allegations in the counterclaim which, if proven, would justify relief.[5] Factual inferences "will not be assumed to be true without specific allegations of fact which support the conclusion."[6] In evaluating Heckmann's counterclaims, the Court may also consider the unambiguous terms of the ERTA, which has been frequently referenced in Heckmann's counterclaim.[7]

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[4] *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 188 (Del. Ch. 2006).
[5] *Vanderbuilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996).
[6] *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983).
[7] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) ("[T]he court may consider, for certain purposes, the content of documents that are integral to or are incorporated

1. Breach of Fiduciary Duty Counterclaims

Heckmann's first counterclaim alleges that Xu, while a director of Heckmann, breached his fiduciary duties by embezzling money, committing forgery, and engaging in other fraudulent conduct that was disloyal and in bad faith.[8] For his part, Xu denies these allegations, but asserts that even if they were true, Heckmann's breach of fiduciary duty claims are barred by the general release in ERTA Section 2.2, which provides:

> In consideration of the matters referenced in this Agreement Heckmann and China Water, for themselves and their Related Parties, hereby forever release, discharge, cancel, waive, and acquit [Xu and Kotex] and their respective Related Parties of and from any and all Claims then existing as of the date of this Agreement, WHETHER KNOWN TO HECKMANN OR CHINA WATER AT THE TIME OF EXECUTION OF THIS AGREEMENT OR NOT, including without limitation, matters relating to the Acquisition, and any right such party may have to indemnification, defense or advancement of expenses. This release shall not apply to any breaches by [Xu and Kotex] of this Agreement.

Under New York[9] and Delaware law, contractual general release provisions are fully valid and enforceable.[10] To construe the scope of a release, the Court must

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by reference into the complaint . . ."); *see also* Ct. Ch. R. 10(c) ("A copy of a written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

[8] Defs.' Countercl. ¶ 52.

[9] The choice of law provision in ERTA Section 7.1 provides: "[e]xcept to the extent that the *corporate* laws of the State of Delaware apply to a party, this Agreement shall be governed by . . . the laws of the State of New York . . ." Thus, Xu's fiduciary duties to Heckmann are governed by Delaware law while general contract duties are governed by New York law. The ERTA's choice of law provision is written in Section 7.6 of the earlier-signed Consent Agreement and incorporated by reference into ERTA Section 7.1.

look at its overall language to determine the parties' intent.[11] If the contractual language is clear and unambiguous, the court must give effect to that language.[12]

Here, the language of ERTA Section 2.2 is clear. Heckmann agreed to "*forever* release, discharge, cancel, waive, and acquit [Xu] . . . of and from *any and all* Claims *then existing as of the date of this Agreement*, WHETHER KNOWN TO HECKMANN OR CHINA WATER AT THE TIME OF EXECUTION OF THIS AGREEMENT OR NOT . . . ."[13] On its face, Section 2.2 plainly evinces Heckmann's intent to release Xu of all claims existing on March 13, 2009, the date the ERTA was executed and the date Xu resigned his directorship. Because Heckmann's fiduciary duty claims relate to actions Xu purportedly took while serving as a Heckmann director, these claims were in existence as of the date of the ERTA and, assuming the ERTA is enforceable, were "forever released." Moreover, if the ERTA is enforceable, it does not matter that Heckmann was unaware of these claims at the time it signed the ERTA, because the ERTA specifically releases *unknown* claims. In negotiating the ERTA, the parties

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[10] *Mangini v. McClurg*, 24 N.Y.2d 556, 563 (N.Y. 1969) ("This is not to say that a release may be treated lightly. It is a jural act of high significance without which the settlement of disputes would be rendered all but impossible."); *Corp. Prop. Assocs. 6 v. Hallwood Grp., Inc.*, 817 A.2d 777, 779 (Del. 2003).

[11] *Adams v. Jankouskas*, 452 A.2d 148, 156 (Del. 1982).

[12] *Booth v. 3669 Delaware*, 92 N.Y.2d 934, 935 (N.Y. 1998); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *5 (Del. Ch. Feb. 17, 2004).

[13] ERTA § 2.2 (emphasis added).

emphasized the importance of the provision releasing unknown claims by drafting the language in capital letters.

In its counterclaim, Heckmann does not challenge the clear interpretation of the release provision. Rather, Heckmann argues that under Delaware law Xu cannot rely on the ERTA's general release because the ERTA was a "self interested transaction" that required Xu to fully disclose to Heckmann all the material facts relevant to the release.[14] In other words, Heckmann contends that Xu had a fiduciary duty to disclose all of the fraudulent activities he allegedly committed as a director so that Heckmann would be fully informed before signing the ERTA. Heckmann claims that Xu's failure to do so was a breach of fiduciary duty that renders the ERTA voidable.

In support of its argument, Heckmann cites Delaware cases for the general proposition that a director with a financial interest in a transaction between himself and the corporation must fully disclose all material facts related to the transaction.[15] In addition, Heckmann cites 8 *Del. C.* § 144(a) and related cases for the proposition that where a director fails to disclose material facts in connection

[14] According to Heckmann, the transaction was "self interested" because the general release in the ERTA would protect Xu from Heckmann's claims once Heckmann discovered Xu's alleged fraudulent conduct.

[15] For example, Heckmann cites *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (full disclosure required in a cash-out merger approved by directors sitting on both parent and subsidiary-target boards) and *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94 (Del. Ch. 1999) (full disclosure required where corporation was involved in a real estate sale with two of its directors).

with an interested transaction, the transaction is voidable unless the director establishes that it was entirely fair.[16] Heckmann argues that these general principles of Delaware law extend to transactions where a director negotiates a mutual release with the corporation. To support this position, however, Heckmann primarily relies on Arkansas case law establishing that "a fiduciary owes a duty of full disclosure when entering into a transaction with the fiduciary's corporation and . . . the fiduciary's failure to disclose material facts relating to a mutual release of claims between the parties is sufficient to set aside the release."[17] It appears that a majority of jurisdictions have adopted this rule.[18]

In its answer and counterclaim, Heckmann asserts that it was unaware of Xu's fraud when it negotiated the ERTA.[19] If this is true, Xu clearly had a fiduciary duty to inform Heckmann that the release would cover his alleged fraudulent conduct[20] because the information would have been material to Heckmann's decision to enter into the ERTA. This rule simply follows general

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[16] Heckmann cites *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 366 n.34 (Del. 1993) (a non-disclosing interested director must prove transaction is entirely fair or the transaction is voidable), *modified on other grounds*, 636 A.2d 956 (Del. 1994); *see also HMG/Courtland Props., Inc.*, 749 A.2d at 114 (holding that under 8 *Del. C.* § 144 "*undisclosed self-dealing*, in itself, is sufficient to rebut the presumption of the business judgment rule and invoke entire fairness review.").

[17] *Wal-Mart Stores, Inc. v. Coughlin*, 255 S.W.3d 424, 429 (Ark. 2007).

[18] *See e.g., Blue Chip Emerald L.L.C. v. Allied Partners Inc.*, 750 N.Y.S.2d 291, 295 (N.Y. App. Div. 2002) ("[A] fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract."); *Wal-Mart Stores, Inc.*, 255 S.W.3d at 429-30 (collecting cases).

[19] Defs.' Countercl. ¶ 5.

[20] I am assuming for purposes of this motion that such fraud occurred.

principles of Delaware law that require a director to make full disclosure of his interest in a transaction before engaging in that transaction with the corporation. If the corporation is unaware that it is releasing a director of potentially fraudulent conduct then it is unaware of the director's existing personal interest in the release.

There is an important distinction in the case law, however, that Xu identifies. Xu does not identify binding Delaware authority for this distinction, but rather identifies persuasive authority from New York.[21] The New York cases identified by Xu hold that, where a director negotiates a general release with his corporation *amid corporate suspicions or allegations that the director committed fraud*, the mutual release is intended to settle those fraud claims, even if the full scope of those claims is unknown when the release is signed.[22] In such circumstances, the director accused of fraud *does not* have a fiduciary duty to disclose all his wrongful acts prior to signing the release.[23] The corporation already believes that fraud has occurred. If the corporation settles its claims against the director by signing a general release in such circumstances, it cannot be said that the corporation was wholly deprived of the material information it needed to evaluate the advisability

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[21] *Allegheny Corp. v. Kirby*, 333 F.2d 327 (2d Cir. 1964) (applying New York law); *K3 Equip. Corp. v. Kintner*, 233 A.D.2d 556 (N.Y. App. Div. 1996).

[22] *Allegheny Corp.*, 333 F.2d at 333; *Bellefonte Re Ins. Co. v. Argonaut*, 757 F.2d 523, 527 (2d Cir. 1984) (applying New York law).

[23] *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 191 (S.D.N.Y. 2008) ("[T]he policy underlying *Alleghany* and *Bellefonte* applies with equal force to fiduciaries. The purpose of a settlement is to end litigation, not to provide a breather before the next round." (quoting *Tyson v. Cayton*, 784 F. Supp. 69, 75 (S.D.N.Y. 1992) (internal citations omitted))).

of settling its claims. The corporation is aware of the risk that the fraud may be greater than it suspects.[24] Most importantly, the corporation is aware that the director has an existing personal interest in the transaction.

The cases Heckmann relies on support this distinction. In each case cited by Heckmann, the releasing corporation had no reason to believe at the time it entered into the release that it had a fraud claim against the director.[25] On those facts, the courts typically conclude that the parties did not intend to settle fraud claims.[26]

This distinction makes sense. In practice, requiring a director accused of fraud by his corporation to disclose all prior wrongdoing before negotiating a settlement would make the settlement of fiduciary duty claims arising out of fraudulent conduct impossible. The main reason parties settle claims is to avoid uncertainty about their validity. Requiring a full confession of wrongdoing would remove that uncertainty, and would thus remove any incentive to settle. No director would confess a wrongdoing, particularly as to disputed claims, without

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[24] *See Bellefonte Re Ins. Co.*, 757 F.2d at 527 (rejecting plaintiffs' argument that they could not be bound by the settlement of their fraud claims because the scope of the fraud had not been fully disclosed).

[25] *See e.g.*, *Wal-Mart Stores, Inc.*, 255 S.W.3d at 426 ("*[A]fter* the execution of the agreement, Wal-Mart learned of [the director's] fraudulent conduct after a store associate alerted Wal-Mart's internal investigations group that [the director] had used a Wal-Mart gift card, issued internally for associate relations, for personal purchases.") (emphasis added); *Bellefonte Re Ins. Co.*, 757 F.2d at 527-28 (distinguishing cases involving "circumstances in which it was clear that no semblance of a fraud claim had come to light before the claim at issue was settled and it was clear that the parties had not intended to settle fraud claims" from cases in which the fraud alleged as a basis to rescind the settlement and release of claims was the same fraud alleged to have been settled and released.).

[26] *Id.* at 430-31.

assurance of a settlement—yet there could be no assurance that, upon hearing the confession of wrongdoing, the corporation would wish to settle.

Xu contends that Heckmann accused him of fraud prior to settlement negotiations and that the very purpose of the ERTA was to resolve the disputed allegations of fraud and allow the parties to go their separate ways.[27] If this is true, then Xu did not have a fiduciary duty to disclose the full extent of his fraud[28] because the ERTA was entered into amid allegations of fraud and, as explained above, Heckmann was fully informed of the risks of signing a general release under the circumstances. Moreover, the ERTA would have been specifically intended to settle the very fraud claims that Heckmann argues render the agreement voidable.

Heckmann has asserted specific facts in its counterclaim about Xu's alleged fraudulent conduct that, if proven, are more than sufficient to establish a breach of fiduciary duty by Xu *before* he signed the ERTA. The pivotal question is whether Heckmann was aware of this allegedly fraudulent conduct at the time it signed the ERTA. If Heckmann was aware, Xu did not breach his fiduciary duty by failing to disclose his alleged fraudulent conduct, and the ERTA settled all of Heckmann's claims against Xu that existed when the ERTA was signed, including claims for breach of fiduciary duty due to Xu's fraudulent conduct. In contrast, if Heckmann

[27] Pls.' Compl. ¶¶ 39-40.
[28] Again, assuming for purposes of this motion that such fraud occurred.

was not aware of Xu's fraudulent conduct, then Xu breached his fiduciary duty to disclose his interest in the ERTA, the ERTA is voidable at Heckmann's option, and Heckmann may pursue its counterclaim against Xu for breach of fiduciary duty due to his fraudulent conduct.

In ruling on a motion to dismiss counterclaims, I must accept all well-pled factual allegations in the counterclaim as true. As previously noted, Heckmann maintains that it was unaware of Xu's fraudulent conduct when it signed the ERTA and that the ERTA was not intended to settle potential fraud claims. In support of this contention, Heckmann discusses various fraudulent acts allegedly committed by Xu that it discovered *after* signing the ERTA. For example, Heckmann asserts that it discovered the embezzlement of Harbin Taoda acquisition funds in the spring of 2009, *after* Xu had resigned as required by the ERTA. Heckmann also asserts that it discovered that VAT payments were embezzled *after* Xu's departure.

It should be noted that there are factual allegations in Heckmann's counterclaim that give me reason to pause when accepting Heckmann's assertion that it was not aware of Xu's fraudulent conduct. For example, in paragraphs 23-25 of the counterclaim Heckmann acknowledges that it was aware Ernst & Young had not accepted Xu's explanation regarding the insufficient VAT payments relative to China Water revenues. In fact, Heckmann did not accept Xu's explanations either and "insisted that China Water reserve for the additional VAT

payments" before the Merger. In paragraphs 28-29 of the counterclaim Heckmann explains that post-Merger it "discovered that China Water's receivables were not being collected," that "sales figures were plummeting" and that after "extremely disappointing" 2008 operating results came through Heckmann representatives sought an explanation from Xu and received "inadequate" explanations.

In addition, Heckmann provides no explanation in its answer and counterclaim for entering into the ERTA.[29] Heckmann must have had a good reason to sign the ERTA, given that the ERTA included such a broad release of Heckmann's claims against Xu immediately after Heckmann had questioned him on poor operating results and found his answers "inadequate." But Heckmann is silent about its reasoning.

Despite the concerns articulated above, I must give Heckmann the benefit of the doubt on all inferences that can reasonably be drawn from factual allegations. The negative inference, of course, would be that Heckmann was aware of Xu's potentially fraudulent behavior. The positive inference—the one I must make on a motion to dismiss—is that Heckmann was unaware of Xu's potentially fraudulent behavior and entered into the ERTA because of other reservations it had about Xu. None of the factual assertions that have given me reason to pause lead inexorably to the conclusion that Heckmann suspected Xu of fraud. Accordingly, Xu's

[29] Defs.' Countercl. ¶ 30 (Heckmann asserts that Xu "purported to enter into the ERTA with Heckmann" without explaining why Heckmann CEO, Richard Heckmann, signed the ERTA).

motion to dismiss Heckmann's counterclaim for breach of fiduciary duties is denied.

2. Fraudulent Inducement

Heckmann also argues that the ERTA is unenforceable because Xu fraudulently induced Heckmann into signing it. Of course, fraudulent inducement is an affirmative defense to the enforcement of a contract, not a counterclaim. But the parties have briefed the issue of fraudulent inducement on this motion[30] and I believe it is appropriate to discuss it in connection with the foregoing analysis of Xu's fiduciary duties of disclosure.

As an affirmative defense to the formation of a contract, the elements of fraudulent inducement are dictated by principles of contract law rather than principles of corporate fiduciary duty.[31] Under New York law, "to set aside a release on grounds of fraud, the defrauded party must show a material misrepresentation of fact, made with knowledge of its falsity, with intent to deceive, justifiable reliance and damages."[32]

[30] The parties appear to have wandered into a discussion of fraudulent inducement because the alleged facts underlying this affirmative defense are the same facts underlying Heckmann's counterclaim that Xu breached his fiduciary duty to disclose his fraudulent conduct when negotiating the ERTA.

[31] Accordingly, New York law governs this question because, as noted above, the ERTA is governed by New York law when contract issues arise.

[32] *Ladenburg Thalmann & Co. v. Imaging Diagnostic Sys., Inc.*, 176 F. Supp. 2d 199, 205 (S.D.N.Y. 2001).

Heckmann argues that, at the time the ERTA was signed, Xu had (i) misrepresented the status of unpaid VAT liabilities, (ii) misrepresented the Harbin Taoda acquisition, (iii) falsely represented *in the ERTA* that he made $6 million in reimbursable equipment purchases with personal funds, and (iv) falsely represented *in the ERTA* that he was unaware of any pending third-party claims against Heckmann.

Xu maintains that he did not make any of the foregoing misrepresentations, but that, even if he did, Heckmann did not rely on them. Xu makes two arguments to demonstrate lack of reliance. First, Xu contends that because the ERTA settled fraud claims, any nondisclosure of fraudulent conduct could not have been "relied upon" by Heckmann. Second, Xu argues in the alternative that the ERTA contains an anti-reliance provision that precludes Heckmann from relying on any of Xu's representations external to the ERTA.

New York law is clear that where a general release is executed to settle potential fraud claims a party to that release cannot subsequently claim that it was fraudulently induced into signing the release because the allegedly dishonest party did not disclose the fraud committed[33] or the extent of the fraud committed.[34] When settling a fraud claim the allegedly dishonest party does not have to first

[33] *Consorcio Propide, S.A. de C.V*, 544 F. Supp. 2d at 190.
[34] *Bellefonte Re Ins. Co.*, 757 F.2d at 527 (applying New York law).

confess all the wrongful acts subject to the release.[35] In these circumstances, the releasing party cannot claim it "relied on" or was "induced" into the release by the nondisclosure of fraud because it is fully aware that it is settling potential fraud claims.

As discussed above, for purposes of this motion to dismiss, I accept Heckmann's factual assertion that it was unaware of Xu's fraud when it entered into the ERTA. Accordingly, if Heckmann was unaware of Xu's purported fraud, then it could have been fraudulently induced into signing the ERTA by any of the purported misrepresentations.[36] Of course, to prove fraudulent inducement Heckmann will have to demonstrate that all of the elements are met by a preponderance of the evidence.

At some later stage in the proceedings, if it is found that Heckmann knew of Xu's purported fraud when it signed the ERTA,[37] Heckmann will be barred from asserting that it was fraudulently induced by either Xu's misrepresentations about (i) unpaid and embezzled VAT liabilities or (ii) the embezzlement of funds from the Harbin Taoda acquisition. These events allegedly occurred before the ERTA

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[35] *Allegheny Corp.*, 333 F.2d at 333 ("There is no prerequisite to the settlement of a fraud case that the defendant must come forward and confess to all his wrongful acts in connection with the subject matter of the suit.").

[36] Though, as is discussed below, the ERTA's anti-reliance provision will bar Heckmann from asserting fraudulent inducement on the grounds that Xu misrepresented (i) the status of unpaid VAT liabilities or (ii) the embezzlement of funds in the Harbin Taoda acquisition.

[37] For example, when disputed facts are resolved during discovery or at trial it could be found that Heckmann suspected Xu of fraud when it signed the ERTA.

was negotiated and would constitute specific fraudulent acts released by the ERTA if Heckmann was settling fraud claims. Thus, in the event Heckmann suspected Xu of fraud when it signed the ERTA, it could not argue that these alleged misrepresentations fraudulently induced it into signing.

The remaining two misrepresentations allegedly made by Xu (*i.e.*, that he made $6 million in equipment purchases and that he was unaware of pending third-party claims) are not covered by the ERTA because they were made within the ERTA itself. Under New York law, a release of fraud claims can be challenged as fraudulently induced if the releasing party points to "a separate and distinct fraud from that contemplated by the agreement."[38] The fraud claims released by the ERTA were those in existence as of the date of the ERTA.[39] Fraudulent misrepresentations made within the ERTA itself would be separate and distinct from the fraudulent misrepresentations the ERTA released. Thus, if Xu's representations *in the ERTA* that he made $6 million in reimbursable equipment purchases or that he was unaware of third-party claims against Heckmann were false, those misrepresentations would not be released by the ERTA. Provided Heckmann can show by a preponderance of the evidence that either of these two misstatements fraudulently induced it into signing, it may have an affirmative

[38] *Consorcio Prodipe, S.A.*, 544 F. Supp. 2d at 190 (citing *DIRECTTV Group, Inc. v. Darlene Invs., L.L.C.*, 2006 WL 2773024, at *4 (S.D.N.Y. Sept. 27, 2006) (internal quotations omitted)); *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461-62 (Del. 1999).
[39] ERTA § 2.2.

defense against enforcement of the ERTA (or at the very least, an affirmative defense against enforcement of those fraudulently induced portions of the ERTA).

Xu also argues that Heckmann is barred from setting aside the release on fraudulent inducement grounds for the separate and independent reason that the ERTA contains a clear anti-reliance provision wherein Heckmann acknowledges that it did not rely on any representations made by Xu outside the four corners of the ERTA. A contract may bar a fraud in the inducement defense if its provisions, when read together, add up to a clear statement of anti-reliance by which the party promised it did not rely on statements outside the contract's four corners in deciding to sign.[40] A standard integration clause which does not contain explicit anti-reliance representations and which is not accompanied by other provisions clearly demonstrating an absence of reliance on outside statements will not bar a fraudulent inducement defense.[41]

ERTA Section 7.1 is an integration provision providing that the ERTA is "the sole and entire agreement of the Parties." Standing alone, this provision is insufficient to bar a fraudulent inducement defense. But ERTA Section 6 provides:

> The Parties represent and warrant that: (a) each has *relied* on his or its *own judgment* regarding the consideration for and language of this Agreement; (b) each has been given a reasonable period of time to consider this Agreement, has been advised to consult with independent counsel before signing this Agreement, and has consulted

[40] *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).
[41] *Id.*

> with independent counsel with respect hereto; (c) no party has in any way coerced or unduly influenced any other party to execute this Agreement; (d) *no party has relied upon any advice or any representation of any other party's counsel*; and (e) this Agreement is written in a manner that is understandable to all of the Parties.

Reading Section 7.1 and Section 6 together, it is evident that Heckmann made a clear statement of anti-reliance by which it acknowledged that it did not rely on representations outside the four corners of the ERTA. Section 6 stipulates that Heckmann relied on its "own judgment" in deciding to sign the ERTA and that it did not rely on advice or representations made by Xu's counsel, who represented Xu during settlement negotiations. This anti-reliance provision would bar a fraudulent inducement defense on the grounds that Xu misrepresented (i) the status of unpaid VAT liabilities or (ii) the embezzlement of funds in the Harbin Taoda acquisition. These representations are outside the four corners of the ERTA and Heckmann specifically disclaimed reliance on them.

But an anti-reliance provision does not bar a fraudulent inducement defense based on misrepresentations purportedly made in the ERTA itself; specifically that (iii) Xu made $6 million in reimbursable equipment purchases or (iv) that he was unaware of pending third-party claims against Heckmann. These representations are within the four corners of the document and so logically are not within the purview of the ERTA's anti-reliance provisions.

3. Breach of Contract Counterclaims

Heckmann contends that Xu breached ERTA Section 3.1 by falsely representing that he had the authority to sign the ERTA on behalf of Kotex. Xu responds that even if he lacked the authority to unilaterally bind Kotex, his action was ratified when the only other Kotex shareholder and director, Leung, sent a letter approving the ERTA. In turn, Heckmann challenges the efficacy of Leung's ratification letter by asserting that it might be a forged letter or that Leung may have been coerced into signing it.[42] Heckmann also contends that Xu breached the ERTA by misrepresenting his identity.

The conduct just discussed is the theoretical basis for Heckmann's breach of contract counterclaims as well as Heckmann's affirmative defense of failed contract formation. In this section I briefly analyze this conduct as it relates to Heckmann's breach of contract counterclaims. In my ruling on Xu's motion for judgment on the pleadings, I analyze this conduct as it relates to Heckmann's affirmative defense of failed contract formation.

There is no dispute that Xu represented he had the corporate authority to enter the ERTA on behalf of Kotex. ERTA Section 3.1 plainly states "[t]he execution . . . by [Xu] of this Agreement . . . [is] within [Xu's] corporate or individual power[] and ha[s] been duly authorized by all necessary corporate or

[42] Defs.' Countercl. ¶ 43.

individual action on the part of [Xu and Kotex]." This representation was made contemporaneously with the signing of the ERTA. But even if this representation had not been explicitly included in the ERTA it would have been inherent. All contracts include the inherent representation that the party entering into the contract has the authority to do so. This inherent representation is important because, if it is false, the contract may fail or be unenforceable as a matter of law. Thus, if a person signing a contract misrepresents that he has the necessary authority to do so, the legal questions that are triggered have to do with contract formation or enforceability, not breach of contract.

In this case, this especially makes sense as a matter of logic. Heckmann want to prove that Xu lacked authority to enter the ERTA in order to show that no contract was validly formed. If Xu's lack of authority renders the contract void from the beginning (or at least voidable at Heckmann's option) then Heckmann cannot contend that Xu's lack of authority is also a breach of contract, because the contract does not exist (or is unenforceable) by virtue of Xu's lack of authority.

Accordingly, because I conclude that Xu's purported lack of authority speaks to whether the ERTA was validly formed and not to whether it was

breached, Xu's motion to dismiss Heckmann's counterclaims for breach of contract is granted.[43]

4. Conversion Counterclaim

Heckmann contends that Xu falsely represented in the ERTA that he personally made $6 million in reimbursable equipment purchases and therefore has no right to the funds Heckmann wired to him for these purported purchases. Heckmann contends that Xu has exercised dominion and control over these funds, treating them as his own, and has refused to return them. Accordingly, Heckmann has counterclaimed against Xu for conversion.

Xu responds that he did, in fact, make the $6 million in purchases and that Heckmann's allegation that he did not make such purchases is "rank speculation," unsupported by any factual assertions from which the Court could draw a reasonable inference in Heckmann's favor. Xu also contends that, in any event, he is not liable for conversion because the ERTA did not require him to substantiate his purchases with receipts and Heckmann has no right to have the contract rewritten by the Court to include a requirement that reimbursement be conditioned on the provision of receipts. Finally, Xu argues that Delaware law does not recognize a cause of action for the conversion of money.

[43] Xu's purported misrepresentation of his identity may also speak to the validity of the ERTA's formation. The parties, however, have not identified sources of law that govern the effect of a false identity on the formation of a contract. Accordingly, this issue remains to be litigated at a later stage in the proceedings. At any rate, Xu's alleged use of a false identity does not give rise to a breach of contract claim.

Xu's last argument is dispositive. In Delaware, an action in conversion will not lie to enforce a claim for the payment of money.[44] While some jurisdictions recognize a narrow exception to this general rule where there is "an obligation to return the identical money delivered by the plaintiff to the defendant,"[45] because the money "can be described or identified as a specific chattel,"[46] that is not this case. Heckmann's claim for conversion is based on the payment of money tied to a disputed contract. Whether Heckmann is entitled to a return of this money depends on an analysis of contract principles, including whether Xu fraudulently induced Heckmann to pay the $6 million reimbursement.[47] Accordingly, Xu's motion to dismiss Heckmann's conversion counterclaim is granted.

B. Xu's Motion for Partial Judgment on the Pleadings

Count IV of Xu's Complaint seeks a declaratory judgment that Heckmann should be required to specifically perform its obligations under the ERTA.

When considering a motion under Court of Chancery Rule 12(c) for judgment on the pleadings, the Court "is required to view the facts pleaded and the inferences to be drawn from such facts in [the] light most favorable to the non-

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[44] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 890 (Del. Ch. 2009).
[45] *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988).
[46] *Id.*
[47] *See Koruda*, 971 A.2d at 889 ("[I]n order to assert a tort claim along with a contract claim, the plaintiff must generally allege that the defendant violated an independent legal duty, apart from the duty imposed by contract."). In this case, Xu's right to the $6 million reimbursement is a contractual right, for which he had a corresponding contractual duty to truthfully represent the amount of reimbursable purchases he had made.

moving party."[48] A motion for judgment on the pleadings must only be granted "when no material issue of fact exists and the movant is entitled to judgment as a matter of law."[49]

In requesting specific performance of the ERTA Xu seeks a final remedy from the Court. At least two considerations preclude the ordering of specific performance at this stage of the proceedings.

First, as noted above, Heckmann's counterclaim against Xu for breach of the fiduciary duty of disclosure has survived a motion to dismiss. The factual record underlying this claim will be more fully developed in discovery. Should that record lead to the conclusion that Xu owed (and breached) a fiduciary duty to Heckmann to disclose his allegedly fraudulent conduct prior to entering the ERTA, then the ERTA will be voidable at Heckmann's option.[50] Accordingly, the ERTA cannot be specifically enforced until this question has been resolved.

Second, Heckmann has asserted numerous affirmative defenses to enforcement of the ERTA in its answer. These defenses include, among other things, (i) that Xu fraudulently induced Heckmann and China Water into signing

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[48] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).
[49] *Id.*
[50] In that event, the mutual release would be ineffective and Heckmann would be permitted to pursue its breach of fiduciary duty claims based on Xu's alleged fraudulent conduct, as well as any other claims that would have been barred by the mutual release.

the ERTA;[51] (ii) that Xu lacked authority to sign the ERTA on behalf of Kotex and that Leung's subsequent ratification was ineffective; (iii) that Xu used a false identity when signing the ERTA; and (iv) that Xu has unclean hands. To grant specific performance of the ERTA each of these affirmative defenses must be addressed. At the present stage of the proceedings, however, a sufficient factual record has not been developed to determine the efficacy, if any, of these defenses. Accordingly, Xu's request for specific performance is premature and his motion for judgment on the pleadings is denied.

III. CONCLUSION

Based on the foregoing reasoning, Xu's motion to dismiss Heckmann's counterclaim for breach of fiduciary duty is denied while his motions to dismiss Heckmann's breach of contract and conversion counterclaims are granted. Xu's motion for partial judgment on the pleadings is denied.

IT IS SO ORDERED.

[51] I note here that the issue of fraudulent inducement was discussed at some length above but I did not specifically rule on it.