**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: NEWAGE, INC., *et al.*, Liquidating Debtors.	Chapter 11 Case No. 22-10819 (LSS) (Jointly Administered)
NAI LIQUIDATION TRUST, by and through its Liquidation Trustee, STEVEN BALASIANO, Plaintiff, v. FREDERICK W. COOPER, *et al.*, Defendants.	Adv. Pro. No. 23-50393 (LSS)

MEMORANDUM

Before the Court is the Motion to Dismiss[1] the Complaint[2] filed by the NAI Liquidation Trustee ("Trustee" or "Plaintiff") filed by certain defendants.[3] As denominated in the filings, these defendants fall into two groups: (i) the Ariix Sellers, which are Frederick W. Cooper ("Cooper"), Mark Wilson ("Wilson"), Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments, LLLP, Wilson Family Holdings, LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Riley Timmer ("Timmer") and

[1] Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments LLLP, Wilson Family Holdings LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's Mot. to Dismiss Compl., Dkt. No. 85.

[2] Compl., Dkt. No. 1 ("Complaint").

[3] Motions to dismiss filed by other defendants will be addressed in a separate decision.

Timmer Family Investments, LLLP and (ii) the KwickClick Defendants, which are KwikClick, Inc. ("KwikClick"), Brady Cooper ("B. Cooper") and Wenhan Zhang ("Zhang") and also includes Cooper and Wilson.

For the reasons discussed below, I will deny the Motion to Dismiss.

<u>BACKGROUND</u>[4]

Prepetition, NewAge developed, sold and distributed health and nutritional products through independent distributors called "Brand Partners."[5] Notwithstanding significant losses, Defendant Brent Willis, NewAge's CEO, used mergers and acquisitions to drive rapid growth.

In March 2020, NewAge began considering a merger with Ariix, LLC ("Ariix"), a competing multi-level marketing company founded by Cooper and Timmer and run by Cooper and Wilson.[6] Ariix owned and developed a proprietary customer relationship management system known as ICONN.[7] ICONN was used to keep sales records and to calculate commissions owed to Ariix's Brand Partners.[8] ICONN also featured "smart links" which streamlined the ordering and selling process to its customers.[9]

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[4] I set forth here only those facts necessary to rule on the Motion to Dismiss. As required, the facts recited herein are taken from the Complaint. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). A court is not required to make findings of fact or conclusions of law on a motion to dismiss under Fed. R. Civ. P. 12, made applicable by Fed. R. Bankr. P. 7012, and I make none. *See* FED. R. CIV. P. 52(a)(3), made applicable by FED. R. BANKR. P. 7052.

[5] Compl. ¶¶ 32, 61.

[6] Compl. ¶ 160.

[7] Compl. ¶ 194.

[8] Compl. ¶¶ 15, 195–197; Opening Br. 3 (The term Brand Partners was apparently used by both NewAge and Ariix to describe their non-employee distribution networks.).

[9] Compl. ¶ 196.

In the middle of merger discussions, in June 2020, Cooper and Wilson directed Zhang, Ariix's Chief Information Officer, to clone the ICONN software and transfer it to KwikClick.[10] Ariix did not disclose the cloning or transfer of ICONN to NewAge.[11] During the relevant time periods, Cooper was the majority stockholder and CEO of KwikClick.[12] Wilson, Zhang, Chandler, Yates, and B. Cooper were minority shareholders and/or officers of KwikClick.[13]

On July 20, 2020, NewAge announced that it had entered into a merger agreement (as subsequently revised, "Amended Merger Agreement") with Ariix Sellers.[14] After an amendment and waiver of certain closing conditions, on November 16, 2020, the merger closed and NewAge acquired Ariix.[15] As relevant here, the acquisition of Ariix included ICONN. The Amended Merger Agreement also contained certain compliance, non-solicitation and non-compete obligations with Ariix Sellers other than Cooper.[16]

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[10] Compl. ¶¶ 12, 198.

[11] Compl. ¶ 201.

[12] Compl. ¶ 199.

[13] Compl. ¶ 199.

[14] Compl. ¶ 163.

[15] Compl. ¶¶ 178, 205. Amended and Restated Agreement and Plan of Merger, Decl. of Justin R. Alberto in Opp. to Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments LLLP, Wilson Family Holdings LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's Mot. to Dismiss Compl. ("Alberto Decl.") Ex. A. 18, Dkt. No. 113-1.

[16] Compl. ¶ 169(i)–(m).

On the closing date, Cooper became a director of NewAge, and Wilson became an officer (Group President) of NewAge.[17] Cooper also continued to do work for KwikClick.[18]

On January 28, 2021, NewAge executed a non-compete, non-solicitation, and non-disparagement agreement with Cooper, retroactively effective to the date of the merger, in which Cooper agreed not to compete with NewAge, not to disclose or improperly use NewAge information, and not to solicit NewAge customers or Brand Partners.[19] On August 18, 2021, Cooper and Willis, entered into a letter agreement purporting to terminate the Cooper non-compete agreement and retroactively modify the Amended Merger Agreement to apply less stringent non-compete provisions to Cooper.[20]

Notwithstanding the acquisition of ICONN in the merger, NewAge entered into a Software Licensing and Exclusivity Agreement ("License Agreement") with KwikClick for, among other things, the use of a software program ("KwikClick software"). The License Agreement was executed for NewAge by Willis and for KwikClick by Cooper.[21] NewAge provided KwikClick $200,000 per month to expedite the development of the KwikClick software and ensure it would be ready for deployment with NewAge.[22]

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[17] Compl. ¶ 178.

[18] Compl. ¶ 207.

[19] Compl. ¶¶ 211–216.

[20] Compl. ¶¶ 231–234.

[21] Compl. ¶ 237.

[22] Compl. ¶¶ 218–227.

PROCEDURAL POSTURE

On August 30, 2022, NewAge and three affiliated entities[23] filed for chapter 11 relief.[24] On March 1, 2023, an order was entered confirming Debtors' plan of liquidation ("Plan").[25] Pursuant to the Plan, the NAI Liquidation Trust was created and Steven Balasiano was appointed Trustee. The Trust was vested with Debtors' remaining assets, including causes of action.[26]

On May 31, 2023, Plaintiff filed this adversary proceeding against twenty-six defendants; it sounds in twenty-eight Counts. The relevant Counts with respect to these Defendants are:

Count	Cause of Action	Defendant(s)
Two	Breach of Fiduciary Duty	Cooper, Wilson
Four	Aiding and Abetting Breach of Fiduciary Duties	All Defendants
Six	Breach of Contract – Amended Merger Agreement	Ariix Sellers
Seven	Breach of Contract – Amended Merger Agreement	Ariix Sellers, except Cooper
Eight	Indemnification	Ariix Sellers
Nine	Breach of Contract – Covenant Not to Compete and Not to Solicit	Cooper
Ten	Fraudulent Inducement – Amended Merger Agreement	Ariix Sellers
Eleven	Fraudulent Inducement – License Agreement	KwikClick Defendants
Twelve	Declaratory Judgment	KwikClick
Thirteen	Breach of Contract– License Agreement	KwikClick
Fourteen	Fraud	Cooper, Wilson
Fifteen	Civil Conspiracy	All Defendants

[23] Ariix, LLC, Morinda Holdings, Inc and Morinda, Inc. (collectively with NewAge, "Debtors").

[24] Compl. ¶ 24.

[25] Findings of Fact, Conclusions of Law, and Order Modifying and Confirming Debtors' Third Amended Proposed Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation and Granting Final Approval of Disclosure Statement, *In re NewAge, Inc.*, Case No. 22-10819, Dkt. No. 527-1.

[26] Compl. ¶¶ 29–30; Plan, art. 3.1.53.

Sixteen	Tortious Interference with Contractual Relations	KwikClick, Zhang B. Cooper
Seventeen	Tortious Interference with Contractual Relations	Kwikclick Defendants
Eighteen	Tortious Interference with Prospective Economic Advantage	All Defendants
Twenty	Conversion	All Defendants
Twenty-One	Violation of the Defend Trade Secrets Act	KwikClick Defendants
Twenty-Two	Misappropriation of Trade Secrets under Utah Uniform Trade Secrets Act	KwikClick Defendants
Twenty-Three	Declaratory Judgment	Cooper
Twenty-Four	Unjust Enrichment	KwikClick Defendants
Twenty-Six	Turn-over of Property of the Estate	KwikClick
Twenty-Seven	Avoidance and Recovery of Actual Fraudulent Transfer	KwikClick
Twenty-Eight	Avoidance and Recovery of Constructive Fraudulent Transfer	KwikClick Defendants

Briefing is complete and the matter is ripe for decision.[27]

[27] Opening Br. of Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments LLLP, Wilson Family Holdings LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's [ ] Mot. to Dismiss Compl., Dkt. No. 86 ("Opening Br.").

The NAI Liquidation Tr.'s Mem. of Law in Opp. to Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments LLLP, Wilson Family Holdings LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's Mot. to Dismiss, Dkt. No. 112 ("Answering Br.").

Reply Br. in Further Support of Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments LLLP, Wilson Family Holdings LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's Mot. to Dismiss Compl., Dkt. No. 116 ("Reply Br.").

LEGAL STANDARD

Defendants cite to the familiar standard on a Rule 12(b)(6) motion: "[t]he test in reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6) is whether, under any "plausible" reading of the pleadings, the plaintiff would be entitled to relief."[28] But, this is not the motion they brought. Defendants do not move to dismiss because Trustee has not stated a cause of action. Rather, as evidenced by the headings in the Opening Brief, Defendants move to dismiss (presumably the entire Complaint because specific counts are rarely referenced) because:

I. NewAge Did not Purchase ICONN

II. Patents Could not have been Awarded on KwikClick's Software Code if it was Comprised Substantially of the ICONN Code

III. The Trustee is Precluded by the Doctrine of Acquiescence from Now Claiming that NewAge Owns the KwikClick Software Code

IV. The Trustee's Claims against the Moving Defendants for Alleged Breaches of the Merger Agreement are Barred by the First Breach Rule

V. Cooper and Wilson did not Breach any Fiduciary Duties

VI. The January 2021 Cooper Non-Compete and August 2021 Letter are Void Under Utah Public Policy and Utah Code § 34-51-201.

Two of these grounds for dismissal (I, II) are really denials of the facts asserted in the Complaint. The other four grounds (III, IV, V, VI) are really defenses.

Given this context, what is the correct standard of review? First, a motion to dismiss is not used to resolve disputed facts.[29] Rather, the court must accept all well pled facts as

[28] Opening Br. 1 (quoting *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 772 (3d Cir. 2013)).

[29] *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 407 (D. Del. 2007).

true.[30] Thus, simply asserting a dispute of fact will not support dismissing a complaint. A complaint will only be dismissed if the facts pled therein (and, perhaps supporting documents which are appropriately reviewed on a motion to dismiss) defeat the cause of action.[31] Second, the court only considers an affirmative defense on a motion to dismiss if the defense is apparent on the face of the complaint.[32] In this context, therefore, I will review the Motion to Dismiss.[33]

DISCUSSION

THE COMPLAINT WILL NOT BE DISMISSED.

(i) The dispute regarding the ownership of ICONN does not mandate dismissal.

Defendants argue that NewAge never purchased the ICONN software.[34] Defendants direct the Court to the Amended Merger Agreement, specifically to the absence of ICONN from the Disclosure Schedule listing acquired Intellectual Property.[35] Defendants are

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[30] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[31] *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100 (3d Cir. 2018) (recognizing the extraordinary nature of the complaint and holding that by pleading four alternative accommodations and attaching doctor letters detailing her disabilities and medical needs, the plaintiff foreclosed her claim for housing discrimination based on a refusal to provide reasonable accommodations).

[32] *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 242 (3d Cir. 2005).

[33] The parties cited Delaware or Utah law in connection with certain state law defenses. Because they are in agreement, I will cite to that law as well.

[34] Opening Br. 2; Reply Br. 4.

[35] Opening Br. 3. I will consider the Amended Merger Agreement because Trustee submitted it through the Alberto Decl. For the sake of completeness, I will also consider the Disclosure Schedule to the Amended Merger Agreement which was attached to the Decl. of David S. Hunt in Supp. of Defs. KwikClick, Inc., Frederick Cooper, Mark Wilson, Jeffrey Yates, Cooper Family Investments, LP, Yates Family Investments, LLLP, Wilson Family Holdings, LLC, Chandler Family Investments 2.0, LLC, Ian Chandler, Brady Cooper, Riley Timmer, Timmer Family Investments, LLLP, and Wenhan Zhang's Mot. to Dismiss Compl. ("Hunt Decl.") Ex. B, 25–45, Dkt. Nos. 87-2,

correct that ICONN is not on Schedule 3.13(a) listing Ariix's Intellectual Property to be acquired.[36] As Plaintiff argues, however, the Amended Merger Agreement makes clear that Schedule 3.13 contains only Intellectual Property that is registered or has a pending application to be registered.[37] Moreover, the Amended Merger Agreement contains broad language defining Intellectual Property which includes "rights in any . . . product, design, Software, technology, or other intangible asset of any nature, whether in use, under development or design or inactive."[38]

More fundamentally, this is a merger transaction which vests all property in the surviving entities.[39] Not surprisingly, then, the Amended Merger Agreement contains no mention of excluded assets, but rather explains the effect of the merger will be that "all of the property, rights, privileges, powers and franchises" would be transferred to the surviving company.[40]

At best, Defendants have created an issue about interpretation of the Amended Merger Agreement, which I will not decide on a motion to dismiss.[41] In any event, couched in true motion to dismiss language: reading the Complaint and the Amended Merger

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88-1. While the Hunt Decl. calls into question whether the Disclosure Schedule is the final document ("Attached hereto as Exhibit B is a true and accurate draft Plan of Merger Disclosure Schedule, understood by me to conform with the final."), Trustee does not object to its consideration.

[36] Opening Br. 3; Reply Br. 4.

[37] Amended Merger Agreement 18.

[38] Amended Merger Agreement 58.

[39] Amended Merger Agreement §§ 1.3, 1.6, 1.8.

[40] Amended Merger Agreement 2–3.

[41] *Winfield v. Eloxx Pharms., Inc.*, C.A. No. 19-447-RGA, 2020 WL 1333008, at * 1 (D. Del. Mar. 23, 2020).

Agreement and taking all reasonable inferences in favor of Plaintiff, I conclude that Plaintiff has pled sufficient facts to plausibly support the allegation that NewAge acquired the ICONN software.

(ii) The dispute regarding KwikClick's patentability does not mandate dismissal.

Defendants' arguments regarding the patentability of KwikClick's software and/or its distinction from ICONN and smartlinks is confusing. Defendants do not link this disputed fact to any portion of the Complaint and for that reason alone, this is not a basis for dismissal.

But, Defendants appear to be disputing the genesis of ICONN and perhaps attempting to distinguish it from the KwikClick software. First, they seem to be suggesting that if in fact KwikClick's software was a 95% copy of ICONN—KwikClick would not have received three patents from the USTPO for the software because 35 U.S.C. § 102(a) prohibits issuance of a patent for technology known or used by the public before the effective filing date of the claimed invention. Second, Defendants contest that smartlinks is their proprietary product. They point to various website articles,[42] google search results[43] and a YouTube video[44] to support the proposition that smartlinks were publicly available as early as September 17, 2017.[45] Defendants also assert that Ariix publicly disseminated

[42] Opening Br. 4 n.6.

[43] Hunt Decl. Ex. C, 1–3.

[44] Opening Br. 4 n.7.

[45] Opening Br. 4; Hunt Decl. Ex. D.

details about its commission and compensation plans which is further evidence that the Ariix CRM and smartlinks were public.[46]

These arguments are another denial of the facts. I also agree with Plaintiff that considering the materials submitted by Defendants is improper at this stage of litigation.[47] These materials are nowhere mentioned in the Complaint and certainly are not integral to Plaintiff's causes of action.

In any event, couched in true motion to dismiss language: reading the Complaint and taking all reasonable inferences in favor of Plaintiff, I conclude that Plaintiff has pled sufficient facts to plausibly support the allegations that KwikClick's software was copied from the ICONN software. The Complaint contains allegations that a source code comparison between ICONN and KwikClick's software ordered by Willis showed a 95% match between the codes.[48] The Complaint also specifically alleges that Cooper and Wilson directed Ariix's Chief Information Officer to clone the ICONN software and send it to KwikClick.[49] Accordingly, this argument by Defendants also fails.

(iii) The doctrine of acquiescence does not mandate dismissal.

Citing to the Court of Chancery's decision in *Lehman*,[50] Defendants argue that Plaintiff is barred by the doctrine of acquiescence from asserting ownership of ICONN.[51]

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[46] Opening Br. 3–4; Reply Br. 4.

[47] Answering Br. 15–17.

[48] Compl. ¶ 229.

[49] Compl. ¶ 198.

[50] *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, C.A. No. 8321-VCG, 2014 WL 718430, at *9 (Del. Ch. Feb. 25, 2014), *aff'd* 105 A.3d 989 (Del. 2014).

[51] Opening Br. 5.

Plaintiff counters that this is a fact-based affirmative defense which should not be decided on a motion to dismiss.[52]

The doctrine of acquiescence is an equitable doctrine designed to prevent plaintiffs from asserting their rights after inaction or silence on their part.[53] To prevail under this defense, Defendants must show that "(1) [NewAge] remained silent (2) with knowledge of [its] rights (3) and with the knowledge or expectation that [KwikClick] would likely rely on [its] silence, (4) [KwikClick] knew of [NewAge]'s silence, and (5) [KwikClick] in fact relied to [its] detriment on [NewAge]'s silence."[54] Delaware courts have held that dismissal based on acquiescence is often "premature at th[e] pleading stage" because "[t]he acquiescence doctrine is particularly fact intensive."[55]

Defendants extract from the Complaint facts arguably suggesting that NewAge (i) remained silent with respect to its ownership interest in ICONN as KwikClick was further developing the software and (ii) that NewAge had knowledge of its rights.[56] Defendants point to nothing in the Complaint, however, alleging *KwikClick's* knowledge of and reliance on NewAge's silence.[57] Rather, Defendants cite to five separate sources beyond the

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[52] Answering Br. 18.

[53] *See In re Coinmint, LLC*, 261 A.3d 867, 895–96 (Del. Ch. 2021); *Lehman*, 2014 WL 718430, at *9.

[54] *Coinmint*, 261 A.3d at 896 (citing *Lehman Bros.*, 2014 WL 718430, at *10).

[55] *Himawan v. Cephalon, Inc.*, C.A. No. 2018-0075-SG, 2018 WL 6822708, at *11 (Del. Ch. Dec. 28, 2018).

[56] Opening Br. 6–7.

[57] *Lehman Bros.*, 2014 WL 718430, at *9.

Complaint to support such allegations.[58] Once again, these documents are not integral to the Complaint so I will not consider them.

More fundamentally, I do not consider affirmative defenses that are not apparent on the face of the complaint on a motion to dismiss.[59] For this reason as well, the Motion to Dismiss is denied as to this contention.

(iv) The first breach rule does not mandate dismissal.

Defendants argue that the first breach rule precludes Plaintiff's breach of contract claims (presumably Counts Six and Seven) relating to the Amended Merger Agreement.[60] Specifically, Defendants assert that the materially false and misleading statements by NewAge's former directors and officers, as alleged in the Complaint, were breaches of the representations and warranties contained in the Amended Merger Agreement.[61] Defendants reason that because NewAge was immediately in breach of the Amended Merger Agreement, such prior material breach precludes Plaintiff's claims.[62] Plaintiff responds that the first breach rule is a fact-specific affirmative defense that is inappropriate to be

[58] Opening Br. 7–9 nn.9–13 (citing KwikClick, Inc., OTC Filings and Disclosure; KwikClick, Inc., Registration of Securities (Form 10-12G) (Sep. 30, 2021); KwikClick, Inc., Annual Report (Form 10-K) (Apr. 15, 2022); KwikClick, Inc., Quarterly Report (Form 10-Q) (May 16, 2022); KwikClick, Inc., Quarterly Report (Form 10-Q) (Aug. 22, 2022)).

[59] *In re Tower Air*, 416 F.3d at 242.

[60] Opening Br. 10–13.

[61] Opening Br. 11–12.

[62] *Id.*

considered on a motion to dismiss.[63] Plaintiff also argues that it is allowed to assert alternative theories of liability against different parties.[64]

Under Utah law, the first breach rule provides that "a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform."[65] In determining whether the first breach rule applies, courts must determine whether a breach was material.[66] Likewise, courts applying the first breach rule must find that promises were mutually dependent to apply the defense.[67] These determinations are "question[s] for the fact finder" and cannot be "determine[d] as a matter of law."[68] Consequently, courts should be wary in granting summary judgment on this basis because whether a breach is material turns on a question of fact.[69]

Where courts are hesitant to address this issue on summary judgment, I am reluctant to do so at an even earlier stage. So, while the Complaint alleges that NewAge's directors and officers "repeatedly made false SEC filings failing to disclose NewAge's true condition," and while the Amended Merger Agreement contains a representation and warranty by NewAge that "none of [NewAge's] SEC Documents contained any untrue

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[63] Answering Br. 20–21.

[64] *Id.*

[65] *CCD, L.C. v. Millsap*, 116 P.3d 366, 373 (Utah 2005).

[66] *Larson v. Stauffer*, 518 P.3d 175, 181 (Utah Ct. App. 2022) ("The first breach rule requires a material breach from the first-breaching party.").

[67] *See id.*

[68] *Id.*

[69] *Cross v. Olsen*, 303 P.3d 1030, 1036 (Utah Ct. App. 2013) ("[s]ummary judgment should be granted with great caution." (quoting *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985))).

statement of a material fact or omitted to state a material fact,"[70] questions of fact remain which preclude dismissal at this stage.

(v) Denial of breaches of fiduciary duties does not mandate dismissal.

Defendants argue that Cooper and Wilson did not breach their fiduciary obligations to NewAge for several reasons: (1) Cooper recused himself from discussing and voting on the License Agreement; (2) Cooper and Wilson did not exercise influence over NewAge or its board; (3) NewAge and its board had knowledge of, consented to, and/or ratified Cooper's and Wilson's acts; and (4) NewAge's decision to enter into the License Agreement was a valid business decision protected by the business judgment rule.[71] Plaintiff counters that Defendants misconstrue and disregard the specific allegations supporting Cooper's and Wilson's breaches of fiduciary duties to NewAge.[72] Plaintiffs point to multiple paragraphs in the Complaint alleging specific facts supporting Wilson's and Cooper's breaches of fiduciary duties.[73]

As with other portions of the Opening Brief, Defendants' denial that they breached their duties cannot support a motion to dismiss as the denial raises factual issues. But, assuming that Defendants are really arguing that Plaintiff fails to state a claim, this argument, too, fails.

When pleading a cause of action, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to

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[70] Compl. ¶ 271; Amended Merger Agreement 29.

[71] Opening Br. 13–16.

[72] Answering Br. 22.

[73] Answering Br. 22.

relief."[74] For breach of fiduciary duty claims to survive a motion to dismiss, a complaint must sufficiently allege facts to support (1) the existence of a fiduciary duty and (2) the breach of that fiduciary duty.[75] Here, the Complaint avers that Cooper was a member of NewAge's board of directors while Wilson served as the Group President for NewAge since November 2020.[76] Under Delaware law, directors and officers owe fiduciary duties of loyalty, care and good faith to the corporate entity.[77] Accordingly, the Complaint sufficiently alleges facts supporting the position that Cooper and Wilson owed fiduciary duties to NewAge. What is required to establish a breach of fiduciary duty depends on the duty alleged to have been breached.

(a) Duty of Loyalty

The duty of loyalty mandates that the interests of the corporation predominate over the director or officer's personal interests.[78] To sufficiently state a claim for breach of the duty of loyalty, a plaintiff must plead that "defendants either (1) stood on both sides of the transaction and dictated its terms in a self-dealing way, or (2) received in the transaction a

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[74] *In re Tower Air*, 416 F.3d at 237.

[75] *In re PennySaver USA Publ'g, LLC*, 587 B.R. 445, 463–64 (Bankr. D. Del. 2018).

[76] Compl. ¶¶ 34–35.

[77] *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

[78] *Guth*, 5 A.2d at 510.

personal benefit that was not enjoyed by the shareholders generally."[79] The duty of loyalty can also be breached where a fiduciary acts in bad faith.[80] Bad faith can be shown where:

> [T]he fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.[81]

The Complaint alleges that Cooper and Wilson were shareholders of KwikClick.[82] The Complaint also alleges that Cooper advertised KwikClick and "his vision for social influencer sales," and executed the License Agreement on behalf of KwikClick.[83] The Complaint also alleges that Cooper attended NewAge board of directors meetings and that Cooper and Wilson gained access to NewAge's confidential business information through their positions at NewAge.[84] The Complaint further alleges that Cooper and Wilson used their fiduciary positions to harm NewAge by encouraging NewAge's Brand Partners to promote sales through KwikClick rather than with NewAge directly.[85] Likewise, the

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[79] *In re Coca-Cola Enters., Inc.*, C.A. No. 1927-CC, 2007 WL 3122370, at *4 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008).

[80] *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007) (citing *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006)).

[81] *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (quoting *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)).

[82] Compl. ¶¶ 34–35.

[83] Compl. ¶¶ 223, 237.

[84] Compl. ¶ 258.

[85] Compl. ¶ 246.

Complaint alleges that Wilson and Cooper solicited NewAge Brand Partners to leave NewAge and join KwikClick.[86]

These factual allegations sufficiently set forth Cooper's and Wilson's self-interested actions for purposes of notice pleading. Plaintiff alleges that Cooper and Wilson pursued personal opportunities to the detriment of NewAge. Because the Complaint sufficiently alleges that Cooper and Wilson acted in a self-interested manner, the Motion to Dismiss must be denied as to this contention.

(b) Duty of Care

"The fiduciary duty of due care requires that directors of a Delaware corporation both: (1) use that amount of care which ordinarily careful and prudent men would use in similar circumstances; and (2) consider all material information reasonably available."[87] The standard under the duty of care is gross negligence.[88] Gross negligence is defined as "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason."[89] Accordingly, a plaintiff must plead facts sufficient to show that the defendant was "recklessly uninformed or acted outside the bounds of reason."[90]

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86 *Id.*

87 *In re Bridgeport Holdings, Inc.*, 388 B.R. 548, 568 (Bankr. D. Del. 2008) (citing *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005)).

88 *In re DSI Renal Holdings, LLC*, 574 B.R. 446, 470 (Bankr. D. Del. 2017) (quoting *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff'd* 906 A.2d 114 (Del. 2006)).

89 *Id.*

90 *In re Bayou Steel BD Holdings, L.L.C.*, 651 B.R. 179, 185 (Bankr. D. Del. 2023) (quoting *In re Old Bpsush, Inc.*, No. 16-12373, 2021 WL 4453595, at *8 (Bankr. D. Del. Sep. 29, 2021)).

The Complaint asserts that Cooper and Wilson used their positions at NewAge to solicit funding for the development and later licensing of KwikClick's software despite knowing that this software rightfully belonged to NewAge.[91] If such allegations are proven to be true, they would support a finding that Cooper and Wilson acted "without the bounds of reason" or were "recklessly indifferent" or "deliberately disregarded NewAge's best interests. At this stage in the litigation, Plaintiff is entitled to all reasonable inferences. Accordingly, Plaintiff has pled facts sufficient to show that Cooper and Wilson breached their duty of care to NewAge.

(vi) Utah law on non-competition agreements does not mandate dismissal.

Defendants argue that the January 2021 and August 2021 non-compete agreements with Cooper are void under Utah law as a violation of public policy and they seek dismissal of Count Nine of this basis.[92] Plaintiff answers that the non-compete is enforceable under Utah law and even if it is not, the non-solicitation and confidentiality provisions of such agreement would still apply.[93]

As an initial matter, the argument that the non-competition agreement is void is an affirmative defense. As such, it is not considered on a motion to dismiss. But, to the extent I do review the issue, it appears that the non-compete may be enforceable.

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[91] Compl. ¶¶ 194–205.

[92] Opening Br. 17–18.

[93] Answering Br. 28–30.

Section 34-51-201(1) of the Utah Code provides:

> Except as provided in subsection (2) and in addition to any requirements imposed under common law, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this subsection is void.

As relevant here, subsection (2) provides:

> [t]his chapter does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business.

Defendants contend that Cooper's non-competition agreement is void because by its terms the restriction on employment is five years.[94]

The allegations in the Complaint are as follows. On January 28, 2021 (after the merger), NewAge and Cooper entered into a non-compete agreement in which he promised he would not misuse confidential information, solicit employees or Brand Partners for two years or compete with NewAge for five years.[95] On August 18, 2021, Cooper and Willis, entered into a letter agreement purporting to terminate the Cooper non-compete agreement and retroactively modify the Amended Merger Agreement to apply less stringent non-compete provisions to Cooper.[96] The August 2021 letter agreement aimed to reduce

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[94] Opening Br. 18.

[95] Compl. ¶¶ 211–16. Section 6.1(j) contemplated that Cooper deliver a non-compete agreement at the closing on the Amended Merger Agreement. That appears not to have happened.

[96] Compl. ¶¶ 231–234.

Cooper's non-compete period from five years to two years.[97] The Complaint alleges that the August 2021 letter agreement is void for lack of consideration.[98]

Reviewing the facts in the Complaint, I cannot find at this stage that Cooper's non-compete agreements are void under Utah law or for lack of consideration. Defendants completely ignore the exception found in section (2) of the above statute which carves out post-employment restrictive covenant arising out of a sale of a business. Section 6.1(j) of the Amended Merger Agreement contemplated that Cooper would deliver a non-compete agreement at the closing on the merger. Whether the January 2021 and/or August 2021 agreements fall within this exception is either a contested issue of fact, an undeveloped issue of law, or both. Defendants' Motion to Dismiss as to Count Nine is denied.

CONCLUSION

For the reasons stated above, the Motion to Dismiss is DENIED. A separate order will enter.

Dated: November 18, 2025

Laurie Selber Silverstein
United States Bankruptcy Judge

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97 Compl. ¶ 234.

98 Compl. ¶ 235.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: NEWAGE, INC., *et al.*, Liquidating Debtors.	Chapter 11 Case No. 22-10819 (LSS) (Jointly Administered)
NAI LIQUIDATION TRUST, by and through its Liquidation Trustee, STEVEN BALASIANO, Plaintiff, v. FREDERICK W. COOPER, *et al.*, Defendants.	Adv. Pro. No. 23-50393 (LSS) **Re: Docket No. 85**

ORDER DENYING MOTION TO DISMISS COMPLAINT

For the reasons set forth in the accompanying Memorandum of even date,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Complaint [Docket No. 85] is **DENIED**.

Dated: November 18, 2025

Laurie Selber Silverstein
United States Bankruptcy Judge