COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2084CV01663-BLS2

ATHRU GROUP HOLDINGS, LLC

v.

SHYFT ANALYTICS, INC; MEDIDATA SOLUTIONS, INC.; HEALTH ENTERPRISE PARTNERS II, L.P.; MCKESSON VENTURES LLC; OPTUM VENTURE PARTNERS, L.P.; ROBERT B. SCHULZ; MONASHEE ASSOCIATES, LLC; RAMBLE POINT LLC; ESTATE OF DANIEL M. CAIN; MILESTONE VENTURE PARTNERS IV LP; MILESTONE SHYFT SPV III LLC; STEVEN HIRSCHFELD; AND ZACKARY KING

MEMORANDUM AND ORDER ALLOWING DEFENDANTS' MOTIONS TO DISMISS

Athru Group Holdings, LLC, used to own about one-fifth of SHYFT Analytics, Inc. In late 2017, Athru sold that stake for 75 cents per share to eleven of the defendants, including Medidata Solutions, Inc.,[1] pursuant to a written stock purchase agreement.[2] Medidata acquired SHYFT outright six months later, paying $2.95 per share to buy all the capital stock and vested stock options that it did not already own, including the SHYFT shares that Athru had sold to other defendants. Athru contends that it never would have sold its stake if it had known that Medidata was interested in acquiring the whole company or that SHYFT was willing to be acquired. It asserts claims for breach of fiduciary duty, fraud, breach of contract, and violation of G.L. c. 93A.

The Court will **allow** the defendants' motions to dismiss this action. The claim for breach of fiduciary duty fails because Zackary King and Steven Hirschfeld had no duty to disclose the alleged interest in possibly merging SHYFT into Medidata. The fraud claims similarly fail because SHYFT, Medidata, and King had no duty to disclose possible interest in a merger before buying Athru's stake in SHYFT. The c. 93A count is wholly derivative of the fraud claims, and thus also fails. And the claims for breach of the stock purchase agreement must be raised in the private dispute resolution process required by that contract.

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[1] Zackary King and SHYFT itself did not buy any SHYFT shares from Athru.

[2] At that time, Athru was known as Trinity Group Holdings, LLC. The stock purchase agreement is attached to and thus is part of the complaint. See Mass. R. Civ. P. 10(c).

The Court will dismiss the three contract claims without prejudice to Athru raising those claims though the contractual dispute resolution process. It will dismiss the other counts in the complaint **with** prejudice under Mass. R. Civ. P. 12(b)(6) because they fail to state any claim upon which relief may be granted. See *Mestek, Inc.* v. *United Pacific Ins. Co.*, 40 Mass. App. Ct. 729, 731, rev. denied, 423 Mass. 1108 (1996) (dismissal under Rule 12(b)(6) "operates as a dismissal on the merits … with res judicata effect") (quoting *Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983)).

1. **Fiduciary Duty Claim**. Athru alleges that, before it closed on the sale of its SHYFT shares, Medidata had some interest in acquiring SHYFT and, in turn, SHYFT had some interest in being acquired. In count VII of its complaint, Athru claims that King and Hirschfeld breached fiduciary duties by not disclosing this alleged interest in a possible merger to Athru when it was negotiating to sell its shares in SHYFT. At the time, Athru was a shareholder, King was CEO and a director, and Hirschfeld was a director of SHYFT.

The Court will dismiss this claim because the facts that Athru alleges in its complaint do not plausibly suggest that King or Hirschfeld owed or breached any fiduciary duty to disclose this information to Athru.[3]

Since SHYFT is and was a Delaware corporation, its internal affairs—including the extent to which its corporate officials owe fiduciary duties—are governed by Delaware law. See *Harrison* v. *NetCentric Corp.*, 433 Mass. 465, 471 (2001).

Directors of Delaware corporations fiduciary duties of care and loyalty to the shareholders; those duties may require disclosure of information in some circumstances. See generally *In re Wayport, Inc. Litig.*, 76 A.3d 296, 314–315 (Del. Ch. 2013). Athru argues that the "special facts" doctrine applies here.[4] This doctrine provides that "when a corporate fiduciary buys shares directly from or sells shares directly to an existing outside stockholder," they must disclose

[3] To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege facts that, if true, would "plausibly suggest[] … an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

[4] The other scenarios in which a director of a Delaware corporation may owe a duty to disclose information to shareholders—when the directors ask shareholders to take some action or to ratify a transaction, or when a director makes statements to shareholders or publicly and thus has a duty to speak falsely—are not relevant in this case. Cf. *In re Wayport*, *supra*.

any "special knowledge of future plans" that is material to the shareholder's decisions. *Id*., quoting *Lank* v. *Steiner*, 224 A.2d 242, 244 (Del. 1966).

The special facts doctrine does not apply to King because he did not buy or offer to buy any shares of SHYFT from Athru. Cf. *Bamford* v. *Penfold, L.P*., No. CV 2019-0005-JTL, 2020 WL 967942, at *21 (Del. Ch. Feb. 28, 2020) (in dispute about limited liability company restructuring, special facts doctrine did not apply to LLC member who did not seek to buy part of plaintiff's interest).

Nor has Athru shown that the doctrine applies to Hirschfeld, as the complaint does not allege facts plausibly suggesting that Hirschfeld knew anything about the alleged interest in merging SHYFT into Medidata. Corporate fiduciaries "may not be faulted for not disclosing" information "of which [they] were not aware." *In re Anderson, Clayton Shareholders Litig*., 519A.2d 680, 693 (Del. Ch. 1986). In other words, there can be "no liability for failing to disclose what a person does not know." *Underwood* v. *Risman*, 414 Mass. 96, 100 (1993).

In any case, this claim fails because neither King nor Hirschfeld would have had any duty to disclose to Athru the alleged inchoate interest in merging SHYFT into Medidata, even if King had bought SHYFT shares from Athru and even if Hirschfeld was aware of the alleged interest in a possible merger

Athru contends that, since Medidata acquired SHYFT just over six months after Athru sold its shares, SHYFT and Medidata "obviously had at least internal analysis and preliminary discussions" about Medidata's desire to acquire SHYFT, and SHYFT's desire to be acquired, before the closing with Athru. And the complaint alleges additional facts that arguably support that conjecture. But Athru does **not** contend that Medidata made an offer to buy all of SHYFT, or that Medidata and SHYFT had agreed on any material terms of such a transaction, before the time that Athru sold its shares.

These allegations do not plausibly suggest that King or Hirschfeld had any duty to disclose the alleged preliminary discussions. "Efforts by public corporations to arrange mergers are immaterial …, as a matter of law, until the firms have agreed on the price and structure of the transaction." *Bershad* v. *Curtiss-Wright Corp*., 535 A.2d 840, 847 (Del. 1987). Even assuming that Medidata and SHYFT had in fact begun discussing a possible acquisition, as Athru contends, SHYFT's officers and directors had no duty to disclose such preliminary talks or negotiations to Athru or other SHYFT shareholders. See *Krim* v. *ProNet, Inc*., 744 A.2d 523, 528–529 (Del. Ch. 1999) (applying *Bershad*).

2. **Fraud and Misrepresentation Claims**. Athru also contends that the failure to disclose the alleged interest in merging SHYFT into Medidata constitutes fraud. It claims that SHYFT, Medidata, and King committed negligent misrepresentation (count IV), intentional misrepresentation (count V), and fraud or deceit (count VI), by not disclosing this alleged mutual interest.

Athru says in a footnote (in tiny print) that it "will not pursue" the negligent misrepresentation claim. The Court understands that to mean that Athru does not oppose the motion to dismiss with respect to count IV.

The Court will dismiss the intentional fraud claims because the facts alleged in the complaint do not plausibly suggest that SHYFT, Medidata, or King had any duty to disclose the alleged interest in a possible acquisition by Medidata.[5] "Fraud by omission requires both concealment of material information and a duty requiring disclosure." *Sahin* v. *Sahin*, 435 Mass. 396, 402 n.9 (2001). If there is no duty to disclose information, then "nondisclosure does not amount to fraud and is not a conventional tort of any kind." *Wolf* v. *Prudential-Bache Securities, Inc.*, 41 Mass. App. Ct. 474, 476 (1996) (affirming Rule 12(b)(6) dismissal of fraud claim), quoting *Greenery Rehabilitation Group, Inc.* v. *Antaramian*, 36 Mass. App. Ct. 73, 77–78 (1994).

"A duty to disclose exists where '(i) there is a fiduciary or other similar relation of trust and confidence, (ii) there are matters known to the speaker that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading, or (iii) the nondisclosed fact is basic to, or goes to the essence of, the transaction.' " *Knapp* v. *Neptune Towers Assocs.*, 72 Mass. App. Ct. 502, 507 (2008), quoting *Stolzoff* v. *Waste Sys. Intl., Inc.*, 58 Mass. App. Ct. 747, 763 (2003).

Athru argues that SHYFT, Medidata, and King had a duty of disclosure because the alleged interest in merging SHYFT into Medidata was "basic to" Athru's agreement to sell its shares of SHYFT to the defendants (other than King). The complaint does not state a viable claim of fraud on this theory because the parties' stock purchase agreement makes clear that an assumption that SHYFT

[5] The Court cannot discern any meaningful difference between counts V and VI. They contain much the same factual allegations. And the terms intentional misrepresentation, fraud, and deceit all refer to the same cause of action. See *Brewster Wallcovering Co.* v. *Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 605 (2007); *Reisman* v. *KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 108–109 (2003).

was not likely to be acquired soon was **not** basic to the transaction and that, in any case, Athru assumed the risk that someone could acquire SHYFT by paying a premium to the purchase price accepted by Athru.

Though Athru alleges it would not have sold its shares had it known there was any interest in SHYFT being acquired or by Medidata in doing the acquiring, that is not enough to plausibly suggest that the allegedly withheld information went to the essence of the transaction. "[T]here is a duty to disclose only facts that are basic to the transaction, rather than those that are simply material." See *Wolf*, 41 Mass. App. Ct. at 477. In *Wolf*, the plaintiffs alleged that they would not have bought limited partnership units if they had known the general partner had been convicted of embezzlement and mail fraud, and claimed that the failure to disclose that information was fraudulent. *Id*. at 475–476. The Appeals Court affirmed a Rule 12(b)(6) dismissal of the action on the ground that this information, though it may have been material to plaintiffs' purchases of limited partnership units, was not basic to the transaction and thus nondisclosure did not amount to fraud. *Id*. at 476. The same is true here.

Wolf adopted the Restatement of Torts' explanation of what it means for a fact to be "basic to" a transaction.

> **A basic fact is a fact that is assumed by the parties as a basis for the transaction itself**. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic.

Wolf, *supra*, at 477, quoting Restatement (Second) of Torts, comment j to § 551(2)(e) (1977) (emphasis added).

We know from its stock purchase agreement that Athru did **not** assume that SHYFT was unlikely to be acquired after Athru sold its shares of SHYFT. To the contrary, Athru agreed to sell its stake for 75 cents per share (just over $9.2 million in total) plus "future contingent compensation" to be paid if SHYFT was acquired later on for more than $2.25 per share. Athru expressly acknowledged in writing that SHYFT might be sold at any time and that any such sale might be at a premium to the price at which Athru agreed to sell its shares. And Athru represented and warranted that it had received all the information it considered necessary for deciding whether to sell its SHYFT shares, acknowledged that Medidata and the other purchasers might have

information about SHYFT that was not known to Athru, stated that it decided to sell those shares despite that lack of knowledge, and waived and released any claim against Medidata and the other purchasers with respect to the nondisclosure of any additional information about SHYFT.

By agreeing to these terms, Athru made clear that the allegedly undisclosed interest in merging SHYFT into Medidata was not basic to the transaction, and also that Athru knowingly assumed the risk that SHYFT may be acquired after Athru sold its shares. Athru negotiated fair compensation should that happen.

This knowing assumption of risk is an additional reason why SHYFT, Medidata, and King had no duty to disclose the alleged inchoate interest in selling SHYFT to Medidata. Even if a fact is basic to a transaction, a participant "has no duty of disclosure" if the parties "expressly or impliedly placed the risk as to the existence of a fact" on the other party. Restatement (Second) of Torts, comment j to § 551(2)(e), last sentence.

A duty to disclose facts that are basic to a transaction arises only where "the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware." *Knapp* v. *Neptune Towers Assocs.*, No. 0484CV00211-BLS1, 23 Mass. L. Rptr. 4, 2007 WL 2367743, at *7 (Suffolk Sup. Ct. Aug. 2, 2007) (van Gestel, J.), *aff'd*, 72 Mass. App. Ct. 502 (2008), quoting Restatement, *supra*, comment *l* to § 551(2)(e).

But the facts alleged in the complaint do not plausibly suggest there was anything shocking, unfair, or even surprising about SHYFT and Medidata thinking about a merger and not disclosing that possibility before buying Athru's shares of SHYFT. Athru was not unaware of the possibility that SHYFT could be sold at per share price substantially higher than the one accepted by Athru. It willingly shouldered the risk that SHYFT could thereafter be acquired at a premium by someone else, and negotiated fair compensation if that contingency occurred.

Athru contends there is a second reason, separate and apart from its "basic to the transaction" theory, why King was may be sued for fraud—it argues that King had a fiduciary duty to disclose the allegedly concealed information. This basis for the fraud claims against King fails as well. There can be no claim of fraud based on a purported fiduciary duty to disclose information against

someone who, as a matter of law and as discussed above, actually has no fiduciary duty to make such a disclosure.

In sum, the fraud claims fail as a matter of law because SHYFT, Medidata, and King had no duty to disclose to Athru any interest they may have had at that time in merging SHYFT into Medidata.

3. **Chapter 93A Claim**. Athru says its claim under G.L. c. 93A in count VIII is based solely on the alleged fraudulent conduct of SHYFT, Medidata, and King.

In a footnote, Athru says it "will not pursue Chapter 93A relief against the other Defendants." The Court understands that to mean that Athru does not oppose the motion to dismiss the c. 93A claim with respect to the ten other defendants.

As to SHYFT, Medidata, and King, the c. 93A claim fails because (as discussed above) the facts alleged in the complaint do not plausibly suggest that they had any duty to disclose the alleged interest in possibly merging SHYFT into Medidata, and thus do not support a claim against them for fraud.

Where a claim under c. 93A is "wholly derivative" of a tort claim, and the complaint does not plausibly suggest that defendants committed a tort, the complaint also fails to state a claim that the defendants engaged in an unfair or deceptive act or practice that violates c. 93A. See *Pembroke Country Club, Inc.* v. *Regency Savings Bank, F.S.B.*, 62 Mass. App. Ct. 34, 40-41 (2004) (where c. 93A claim is "wholly derivative" of tortious interference claim, evidence insufficient to establish that claim is likewise insufficient to establish violation of c. 93A); see also *Dulgarian* v. *Stone*, 420 Mass. 843, 853 (1995) (where c. 93A claim was based entirely on alleged defamation, and challenged statements did not support cause of action for defamation, they also did not support cause of action under c. 93A).

Since the c. 93A claim in this case is "solely based" on an "underlying claim for common law fraud," and the fraud claim fails as a matter of law, it necessarily follows that the c. 93A also fails as a matter of law. *Macoviak* v. *Chase Home Mortgage Corp.*, 40 Mass. App. Ct. 755, 760, rev. denied, 423 Mass. 1109 (1996); see also *Park Drive Towing, Inc.* v. *City of Revere*, 442 Mass. 80, 86 (2004) (where c. 93A claim is "derivative of" breach of contract claim, and plaintiff could not show it had any contract with defendant, the c. 93A claim "must also fail").

4. **Contract Claims**. Finally, Athru asserts claims under the "future contingent consideration" provisions of the stock purchase agreement. In count I, Athru contends that Medidata and the other defendants that bought SHYFT stock

from Athru have not paid the full contingent consideration they owe as a result of Medidata's acquisition of SHYFT. In counts II and III, Athru claims that these defendants breached their obligation to provide Athru with reasonable access to personnel and information to verify the contingent compensation.

Athru and the other parties to this contract agreed that "[i]f there is a dispute with respect to any payment" under the contingent compensation provision, and the parties "cannot agree on the resolution of the dispute," then Athru and the stock purchasers "shall jointly designate an independent certified public accounting firm to resolve the dispute."

Athru cannot by-pass this mandatory dispute resolution procedure. The obligation to submit a contract dispute to an accounting firm for resolution applies not only to Athru's claim about the amount of contingent compensation to be paid, but also to its claims about whether the other contracting parties have provided sufficient information to verify their calculations.

The contract says that any dispute "with respect to" contingent compensation must be presented to the accounting firm for decision. "By its ordinary meaning, the phrase 'with respect to,' like other similar phrases (e.g., 'relating to,' 'in connection with,' 'associated with,' 'with reference to'), suggests an 'expansive sweep' and 'broad scope.' " *Acushnet Co.* v. *Beam, Inc.*, 92 Mass. App. Ct. 687, 695 (2018), quoting *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997).

If the parties intended to limit this dispute-resolution procedure to a calculation of the proper payment amount, they would have said so. Their choice of the "with respect to" phrasing makes this provision broad enough to encompass claims that defendants deprived Athru of access to personnel and information guaranteed by the contingent compensation provision. The accounting firm can direct the contract defendants to provide access to all necessary information. Such an order may be enforced in court if necessary.

Athru argues that it does not have to submit this dispute to an accounting firm because the contracting defendants breached their contractual obligations to give Athru sufficient access to personnel and information and to negotiate in good faith to resolve the payment dispute. This argument fails because compliance with those two contractual obligations is not a condition precedent to the agreed-upon dispute resolution procedure.

If contracting parties want to create a condition precedent, they can do so by saying that a right may later be exercised "on the condition that," "provided that, or "if," some condition is satisfied, or by using similarly explicit language. *Massachusetts Port Auth.* v. *Johnson Controls, Inc.*, 54 Mass. App. Ct. 541, 544 (2002). " 'Emphatic words' are generally considered necessary to create a condition precedent that will limit or forfeit rights under an agreement." *Massachusetts Mun. Wholesale Elec. Co*. v. *Town of Danvers*, 411 Mass. 39, 46 (1991). Without a clear indication that the parties intended to do so, a contract does not create a condition precedent to the exercise of a right or performance of an obligation. *MassPort* v. *Johnson Controls*, *supra*; accord *Halstrom* v. *Dube*, 481 Mass. 480, 483 n.8 (2019).

Nothing in the parties' stock purchase agreement suggests that the access to information and good-faith negotiation obligations were conditions precedent, and that Athru could refuse to submit these disputes to an accounting firm if those conditions were not met.

ORDER

Defendants' motion to dismiss is **allowed**. Final judgment shall enter dismissing the contract claims in counts I, II, and III without prejudice, so that Plaintiff may pursue them in the dispute resolution procedure provided for in the parties' contract, and dismissing all other claims with prejudice.

Kenneth W. Salinger
Justice of the Superior Court

22 March 2021