



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOUGLAS M. CHERTOK and VAST)
VENTURES LLC, a Florida limited)
liability company,)

Plaintiffs,)

v.)

C.A. No. _____

ZILLOW, INC., a Washington corporation)
(successor to NMD INTERACTIVE, INC.,)
a Delaware corporation, aka)
STREETEASY, INC.),)

Defendant.)

VERIFIED COMPLAINT

Plaintiffs Douglas M. Chertok (“Chertok”), an individual, and Vast Ventures LLC, a Florida limited liability company (“Vast”), by and through their undersigned counsel, for their Verified Complaint against Defendant Zillow, Inc., a Washington corporation (“Zillow”) allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to recover approximately \$6,300,000 in merger consideration (the “Merger Consideration”) and unpaid dividends (the “Dividends,” collectively, the “Funds”), plus accrued pre-judgment interest, from Zillow. Zillow unlawfully withheld the Funds from Plaintiffs Chertok and Vast for approximately six years (from 2013 until the present) after the closing of a purported merger (the “Merger”) by and among Zillow,

NMD Interactive, Inc. (doing business as StreetEasy (“StreetEasy”)), a Delaware corporation (“NMD”), and Strawberry Acquisition Inc., a Delaware corporation (“Merger Sub”).

2. Plaintiffs object to the Merger, contending that the Merger was not authorized. Notwithstanding its defects, the Merger closed in 2013. Plaintiffs received stock certificates from NMD before the Merger closed for the equivalent of 2,684,570 shares of common stock of NMD (the “NMD Shares”), and according to the documents that Plaintiffs received from NMD, Plaintiffs have been entitled to payment of the Merger Consideration since their withdrawal and loss of appraisal rights in October 2013, and December 2013, respectively. Since 2013, however, Zillow has retained the Merger Consideration owed to Plaintiffs and improperly refused to release the Merger Consideration to Plaintiffs. Among other things, Zillow unlawfully demanded that Plaintiffs provide releases and/or waivers of liability before paying the Merger Consideration.

3. Specifically, Zillow’s unlawful withholding of the Merger Consideration materially breached Zillow’s obligations (as NMD’s successor) under the Amended and Restated Certificate of Incorporation filed by NMD on August 30, 2006 (the “NMD Certificate”), which obligated Zillow to pay Plaintiffs the Merger Consideration in October 2013, and December 2013 –

the time Plaintiffs withdrew and lost their appraisal rights for the NMD Shares. (A copy of the NMD Certificate is attached hereto as Exhibit A). Instead of paying the Merger Consideration, Zillow required a pre-condition that Plaintiffs execute Letters of Transmittal (“LOTs”) that were required under the purported merger agreement by and among Zillow, NMD, Merger Sub, and Shareholder Representative Services LLC (the “Merger Agreement”). (A copy of the Merger Agreement is attached hereto as Exhibit B).

4. The LOTs contained releases and/or waivers of all claims against (among others) Zillow, NMD, and their respective directors, officers, and agents. Plaintiffs were neither parties to the Merger Agreement, nor consented to the Merger Agreement or the Merger. Accordingly, Plaintiffs had no duty to sign the LOTs, or to provide releases and/or waivers. Moreover, the NMD Certificate did not require executed LOTs, releases and/or waivers. In addition, Zillow intentionally flouted Delaware law by imposing that unlawful pre-condition of requiring releases and/or waivers knowing that Delaware legal precedent prohibits such conduct.

5. As recently as October 2019, Zillow contacted Plaintiffs by e-mail stating that it is holding the Funds. Although Zillow possessed Plaintiffs’ counsels’ names and addresses since 2013, and could have mailed checks at

any time over the last six years, Zillow instead intentionally withheld the Funds. Accordingly, Plaintiffs seek the Funds based upon two alternative theories: (a) breach of contract based upon the NMD Certificate and specific performance of the NMD Certificate, or, in the alternative, (b) Zillow's unjust enrichment at the expense of Plaintiffs.

THE PARTIES

6. Plaintiff, Douglas M. Chertok (previously defined as "Chertok") is an individual residing in Broward County, Florida.

7. Plaintiff Vast Ventures LLC (previously defined as "Vast") is a Florida limited liability company, with its principal place of business in Broward County, Florida. Chertok is Vast's sole managing member.

8. Defendant Zillow, Inc. (previously defined as "Zillow") is a Washington corporation.

JURISDICTION

9. This Court has subject matter jurisdiction over this Verified Complaint pursuant to 8 *Del. C.* §111, which grants this Court jurisdiction to interpret, apply, enforce, or determine the validity of corporate instruments and provisions of the Delaware General Corporate Law ("DGCL"), and 10 *Del. C.* § 341, which grants this Court jurisdiction to hear and determine all matters and causes in equity.

10. This Court has personal jurisdiction over Zillow because after the Merger closed on August 26, 2013, Zillow merged StreetEasy with and into Zillow on December 31, 2013, thereby acquiring all of NMD/StreetEasy's assets and liabilities.

FACTS

Background

11. Chertok founded NMD and was appointed its sole director in 2005. On August 16, 2013, Chertok was embroiled in litigation in the Federal courts in New York related to improper and fraudulent actions taken by others associated with NMD (the "NY Litigation"). The releases and/or waivers that Zillow later demanded from Plaintiffs would have impacted adversely Chertok's rights in connection with the NY Litigation. (*See infra* ¶¶29-35).

12. At the time of the NY Litigation, on August 16, 2013, NMD signed the Merger Agreement, which provided that Merger Sub, a wholly-owned Zillow subsidiary, would acquire NMD for \$50 million in cash. Schedule 2.3 of the Merger Agreement acknowledged that Chertok held 2,450,403 shares of NMD common stock, and Vast held 169,672 shares of NMD Series A Preferred Stock (convertible into 234,167 shares of NMD common stock). (A copy of the purported Disclosure Memorandum to the

Merger Agreement, dated August 16, 2013, which contains the Schedules to the Merger Agreement, is attached hereto as Exhibit C).

The Funds

13. According to an information statement summarizing the Merger (the “Information Statement”) that NMD sent to Chertok on or about August 29, 2013, each outstanding share of NMD common stock was entitled to receive approximately \$2.19 of merger consideration. (A copy of the Information Statement is attached hereto as Exhibit D).

14. Article Fourth, Section C, Paragraph 2.2 and Paragraph 2.3 of the NMD Certificate provide that, upon the closing of a merger, if the aggregate amount which the holders of Series A Preferred Stock are entitled to receive exceeds \$.9382 per share, then each such holder shall be entitled to receive as merger consideration the greater of that amount, or the amount such holder would receive if the holder converted the shares of Series A Preferred Stock into NMD common stock immediately prior to the merger.

15. Accordingly, pursuant to the NMD Certificate, Chertok is entitled to approximately \$5,366,382.57 (2,450,403 shares x \$2.19), and Vast is entitled to approximately \$512,825.73 (234,167 shares x \$2.19), respectively (previously defined collectively as the “Merger Consideration”).

16. In addition, pursuant to Schedule 6.1(b)(iii) of the Merger Agreement, NMD issued a cash dividend prior to the closing of the Merger of approximately \$0.1836 per share of NMD common stock. Accordingly, Chertok and Vast are entitled to the payment of cash dividends in the amounts of approximately \$449,893.99 (2,450,403 shares x \$0.1836) and \$42,993.06 (234,167 shares x \$0.1836), respectively (previously defined collectively as the “Dividends”).

17. Pursuant to the Article Fourth, Section C, Paragraph 1 and Paragraph 2.1 of the NMD Certificate, NMD is obligated to pay the Dividends to NMD’s stockholders upon the closing of a merger.

Zillow’s Payment Obligations

18. Chertok was unaware of the Merger at the time NMD and Zillow executed the Merger Agreement on August 16, 2013. Zillow publicly announced the Merger on August 19, 2013. According to the Information Statement, the stockholders of NMD approved the Merger by written consent.

19. Chertok and Vast were not parties to the Merger Agreement, and did not consent to the Merger Agreement or the Merger.

20. Although Section 6.5(b) of the Merger Agreement required NMD to send notice to NMD’s stockholders that did not consent to the Merger no later than August 23, 2013, NMD did not send the notice, the Merger

Agreement, schedules, and other notices to Chertok and Vast until August 29, 2013 – three days after the Merger closed on August 26, 2013.

21. On September 18, 2013, Chertok and Vast sent to NMD notices of appraisal demands for 2,400,000 of 2,450,403 common stock shares, and 84,836 of 169,672 preferred stock shares, respectively.

22. On October 24, 2013, Chertok and Vast sent to NMD notices of withdrawal of their appraisal rights for 2,395,000 of 2,400,000 common stock shares, and 84,336 of 84,836 Preferred Stock shares, respectively.

23. Article Fourth, Section C, Paragraph 2 of the NMD Certificate provides that upon the closing of a merger, NMD is obligated to pay NMD's stockholders the merger consideration.

24. Under Section 262 of the DGCL, appraisal rights expired with respect to some of Chertok's NMD Shares and some of Vast's NMD Shares at the time the rights were withdrawn, and appraisal rights expired with respect to all of Plaintiffs' NMD Shares 120-days after the Merger closed, which was December 26, 2013.

25. Zillow improperly withheld the Merger Consideration of Chertok and Vast in the amounts of approximately \$5,366,382.57, and \$512,825.73, respectively, since August 2013 (with respect to the NMD Shares not demanding appraisal), October 2013 (with respect to the NMD

Shares initially demanding appraisal, but later withdrawing the appraisal demand), and December 2013 (with respect to the NMD Shares continuing to demand appraisal at the time the appraisal right expired). In light of the fact that the NMD Certificate does not limit or eliminate the payment of interest, Zillow owes interest to Plaintiffs with respect to the amounts improperly withheld from Plaintiffs.

26. In addition, pursuant to Article Fourth, Section C, Paragraph 1 and Paragraph 2 of the NMD Certificate, Zillow owes Chertok and Vast dividend payments of approximately \$449,893.99 and \$42,993.06, respectively, since the Merger closed. Upon information and belief, Zillow did not pay the Dividends to Plaintiffs because Plaintiffs refused to execute the LOTs with the releases and/or waivers demanded by Zillow. In light of the fact that the NMD Certificate does not limit or eliminate the payment of interest, Zillow owes interest to Plaintiffs with respect to the amounts improperly withheld from Plaintiffs.

27. As of the date of this Verified Complaint, Zillow has not paid the Merger Consideration, the Dividends, or interest to Chertok or Vast in breach of Zillow's payment obligations under Article Fourth, Section C, Paragraph 1 and Paragraph 2 of the NMD Certificate and under Delaware law.

28. Zillow's payment obligations with respect to the Merger Consideration and the Dividends are ongoing because Section 8.1(b) of the Merger Agreement provides that "[t]he covenants and agreements contained in this Agreement or in the other Operative Documents [which includes the NMD Certificate] shall survive the Closing and shall continue until fully performed, satisfied or waived." Moreover, the NMD Certificate does not limit or eliminate Zillow's payment obligations; rather it obligates Zillow to pay the Funds to Plaintiffs, as stockholders of NMD.

The Releases and/or Waivers

29. Notwithstanding Zillow's legal obligation to pay the Merger Consideration and the Dividends to Chertok and Vast, Zillow unlawfully withheld the Funds from Plaintiffs for over six years because Zillow repeatedly conditioned the payment upon Plaintiffs' execution of the LOTs containing releases and/or waivers.

30. Specifically, in 2013, 2014, 2015, and 2019, Zillow repeatedly required Chertok and Vast to sign the LOTs pursuant to Section 1.7.2(b) of the Merger Agreement. Chertok and Vast, however, neither are parties to the Merger Agreement, nor did they consent to the Merger Agreement or the Merger. In fact, Section 9.6 of the Merger Agreement provides:

This Agreement shall be binding on and inure solely to the benefit of the parties and their respective successors, heirs, legal

representatives and permitted assigns, and, except for Section 6.13 (Indemnification of Company Directors and Officers) nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

Accordingly, neither Chertok nor Vast have any obligations under the Merger Agreement, and any purported obligations of the non-party, non-consenting stockholders – for example, the execution of LOTs, the execution of releases, and the execution of waivers – are unenforceable by Zillow.

31. Rather, Zillow's obligations to pay the Merger Consideration and the Dividends to Plaintiffs are based upon the NMD Certificate – not upon the Merger Agreement. The NMD Certificate did not require NMD's stockholders to execute LOTs, to execute releases, or to execute waivers prior to receiving payment in the event of a merger. Plaintiffs, therefore, had no obligation to perform any of the purported pre-conditions prior to Zillow's obligation to pay the Funds to Plaintiffs. In sum, Zillow's obligation to pay the Funds to Plaintiffs is unconditional under the NMD Certificate.

32. Moreover, upon information and belief, Zillow had knowledge that its demand for a release and/or waiver as a pre-condition to payment of the Funds to Plaintiffs was in conflict with Delaware law.

33. Zillow knew that Delaware law prohibits an acquiring corporation from requiring releases and/or waivers from selling corporation's

stockholders without furnishing additional consideration in exchange for the release and/or waiver. Specifically, in 2013 and 2014, Zillow's LOTs contained a release of all claims against Zillow, NMD, and their respective directors, officers, and agents. (*See* Merger Agreement at Schedule 1.7.2(b)).

34. After this Court's decision in *Cigna Health & Life v. Audax Health Sols., Inc.*, 107 A.3d 1082, 1091 (Del. Ch. 2014), Zillow's counsel contacted Chertok's counsel by e-mail on June 4, 2015, attaching a short-form LOT that removed the release contained in Zillow's prior LOT, and offering Chertok \$19,000 as consideration in exchange for a release. Zillow, however, edited the new short-form LOT, without disclosing the edits to Chertok, and surreptitiously inserted a waiver in another section of the short-form LOT. Upon information and belief, Zillow was attempting to deceive Plaintiffs into executing waivers. (A copy of Zillow's 2013 LOT, June 4, 2015 e-mail, and 2015 LOT are attached hereto as Exhibit E). Plaintiffs did not execute the short-form LOT (and, thus, did not execute the hidden waiver), and did not accept the consideration offered in exchange for the release.

35. Although Chertok and Vast declined to capitulate to Zillow's requirement that they release and/or waive any claims against Zillow, NMD, and their respective directors, officers, and agents in order to receive the Merger Consideration and the Dividends, Zillow's repeated attempts to

require the releases and/or waiver was in conflict with Delaware law and delayed Plaintiffs' receipt of the Funds.

Zillow Continues to Withhold the Funds

36. In response to inquiries from Plaintiffs' counsel as recently as October 2019, Zillow stated that it continues to hold approximately \$5,733,709.96 for Chertok and approximately \$547,926.57 for Vast.

37. According to Section 1.7.2(b) of Merger Agreement:

Any portion of the Merger Consideration that remains unclaimed by the former holders of Company Stock for six (6) months after the Effective Time shall be delivered to Parent. Any former holder of Company Stock that has not complied with this Section 1.7.2(b) prior to the end of such six-month period shall thereafter look only to Parent (subject to abandoned property, escheat and similar laws) but only as a general creditor thereof for payment of its claim for its portion of the Merger Consideration. Notwithstanding anything to the contrary, neither Parent nor any other party hereto shall be liable to a holder of shares of Company Stock for any Merger Consideration delivered to a public official pursuant to applicable law, including abandoned property, escheat and similar laws.

Zillow, therefore, had the Funds in its possession since February 26, 2014.

38. Plaintiffs' counsel replied and reiterated to Zillow's counsel that Zillow was authorized to mail checks for the Funds that Zillow was holding for Chertok and Vast to Plaintiffs' counsel, or to wire the Funds to Plaintiffs' counsel.

39. After August 26, 2019, Zillow no longer demanded that Plaintiffs execute the LOTs, and responded that it would mail checks for the Funds solely upon receipt of Plaintiffs' IRS Form W-9 (which contained Plaintiffs' tax identification numbers). Notably, upon information and belief, the IRS does not require Zillow to obtain an IRS Form W-9 from Plaintiffs. Although Zillow already possessed, or had access to, Plaintiffs' tax identification numbers since 2013 (as Plaintiffs' counsel explained to Zillow), Plaintiffs submitted executed IRS Form W-9s to Zillow on October 11, 2019. As of the date of this Verified Complaint, Zillow still has not paid the Funds to Chertok or Vast, and is still holding the Funds without any lawful reason or cause.

COUNT I
(Breach of Contract and Specific Performance)

40. Plaintiffs repeat and re-allege the allegations set forth in all prior paragraphs of this Verified Complaint with the same force and effect as if set forth fully herein.

41. Plaintiffs seek the relief of specific performance against Zillow for breach of contract based upon the NMD Certificate because Zillow refused to pay the Funds to Plaintiffs for six years, thereby denying Plaintiffs of the Merger Consideration and the Dividends.

42. Article Fourth, Section C, Paragraph 2.2 and Paragraph 2.3 of the NMD Certificate (which is a contract between NMD and its stockholders)

provide that upon closing a merger, NMD's stockholders are entitled to receive their portion of the merger consideration. According to the Information Statement, each share of NMD common stock is entitled to receive approximately \$2.19 of merger consideration.

43. NMD sent Chertok and Vast share certificates which evidence that Chertok holds 2,450,403 shares of NMD common stock, and Vast holds 169,672 shares of NMD Series A Preferred Stock (convertible into 234,167 shares of NMD common stock). According to the documents sent to Plaintiffs by NMD, Chertok is entitled to approximately \$5,366,382.57 (2,450,403 shares x \$2.19), and Vast is entitled to approximately \$512,825.73 (234,167 shares x \$2.19) of the Merger Consideration.

44. Under the NMD Certificate and Section 262 of the DGCL, Zillow was obligated to pay the Merger Consideration to Plaintiffs no later than October 24, 2013, the date that Plaintiffs withdrew their appraisal demands, or December 26, 2013, the date that all of Plaintiffs' appraisal rights expired.

45. Under Delaware law, Zillow also is obligated to pay Plaintiffs pre-judgment interest running from the date that the Merger Consideration should have been paid to the date of payment. The payment of interest is not limited or eliminated by any provision of the NMD Certificate.

46. To date, Zillow has not paid any portion of the Merger Consideration as required by the NMD Certificate and Delaware law, or any accrued interest.

47. In addition, Schedule 6.1(b)(iii) of the Merger Agreement provides that NMD issued a cash dividend prior to the Merger closing of approximately \$0.1836 per share of NMD common stock.

48. Chertok and Vast, therefore, are entitled to cash dividends in the amounts of approximately \$449,893.99 (2,450,403 shares x \$0.1836) and \$42,993.06 (234,167 shares x \$0.1836), respectively.

49. Article Fourth, Section C, Paragraph 1 and Paragraph 2.1 of the NMD Certificate obligate NMD to pay the Dividends to NMD's stockholders upon closing a merger.

50. Under Delaware law, Zillow also is obligated to pay Plaintiffs pre-judgment interest running from the date that the Dividend should have been paid to the date of payment. The payment of interest is not limited or eliminated by any provision of the NMD Certificate.

51. To date, Zillow has not paid any portion of the Dividends to Chertok and Vast as required by the NMD Certificate and Delaware law, or any accrued interest.

52. Zillow breached the NMD Certificate by withholding the Funds from Plaintiffs for six years after Zillow's obligation to pay Plaintiffs the Funds commenced, and by requiring that Plaintiffs execute the LOTs (which contained releases and/or waivers), prior to paying Plaintiffs the Funds. Accordingly, this Court should direct Zillow (a) to specifically perform its payment obligations under the NMD Certificate, and (b) to pay Plaintiffs an amount to be determined at trial, but no less than the approximately \$6,372,095.35, plus pre-judgment interest and costs.

ALTERNATIVE RELIEF

COUNT II (Unjust Enrichment)

53. Plaintiffs repeat and re-allege the allegations set forth in all prior paragraphs of this Verified Complaint with the same force and effect as if set forth fully herein.

54. The doctrine of unjust enrichment is based upon the retention of money of another against the fundamental principles of justice or equity and good conscience. Under unjust enrichment, courts look for the following elements: (a) an enrichment, (b) an impoverishment, (c) a relation between the enrichment and impoverishment, (d) the absence of justification, and (e) the absence of a remedy provided by law.

55. Regarding elements (a) through (c) above, in October 2019, Zillow contacted Plaintiffs' counsel by e-mail confirming that Zillow still is holding approximately \$5,733,709.96 for Chertok and approximately \$547,926.57 for Vast. By holding Plaintiffs' money without any restrictions on Zillow's use of such monies, Zillow was enriched, Plaintiffs were impoverished, and there is a direct relation between the enrichment and impoverishment. Moreover, Zillow's withholding of Plaintiffs' money contradicts fundamental principles of equity and good conscience.

56. Regarding element (d) above, Zillow had no justification for retaining this money. From 2013 to 2019, Zillow improperly conditioned the payment of the Funds to Plaintiffs upon Plaintiffs executing the LOTs required by the Merger Agreement. These LOTs released and/or waived all claims against Zillow, NMD, and their directors, officers, and agents. Plaintiffs, however, neither were parties to the Merger Agreement, nor consented to the Merger Agreement or the Merger. Plaintiffs, therefore, have no obligations under the Merger Agreement, and, thus, are not bound by the requirements in the Merger Agreement to execute the LOTs or to provide releases or waivers. Moreover, the NMD Certificate does not require stockholders to execute the LOTs or to provide releases or waivers.

Amazingly, after August 2019, Zillow withdrew its demand that Plaintiffs execute the LOTs, but Zillow still withheld the Funds.

57. In October 2019, Zillow continued to condition the payment of the Merger Consideration to Chertok and Vast (and, thus, continued to improperly delay payment of the Merger Consideration to Plaintiffs) upon Plaintiffs each submitting an IRS Form W-9, which (upon information and belief) is not required by the IRS. Moreover, although Zillow possessed, or had access to, Plaintiffs' tax identification numbers since 2013, Plaintiffs submitted executed IRS Form W-9s to Zillow. Accordingly, Zillow has no justification for retaining this money and was unjustly enriched by its wrongful conduct.

58. Regarding element (e) above, Plaintiffs are alleging this Court II in the alternative, and if this Court denies the relief respectfully required in Counts I of this Verified Complaint, then Plaintiffs will continue to have no available remedy at law to recover the Funds.

59. In sum, Zillow has been unjustly enriched at the expense of Plaintiffs in an amount to be proven at trial, but no less than approximately \$6,372,095.35, plus pre-judgment interest and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Chertok and Vast pray for judgment and relief against Defendant as follows:

- a. A decision (i) holding that Zillow breached the NMD Certificate by withholding the Funds from Plaintiffs for six years after Zillow's obligation to pay Plaintiffs the Funds commenced, and by requiring that Plaintiffs execute the LOTs (which contained releases and/or waivers), prior to paying Plaintiffs the Funds, and (ii) ordering that Zillow specifically perform its payment obligations under the NMD Certificate and pay the Funds to Plaintiffs;
- b. In the alternative, a decision (i) holding that Zillow was unjustly enriched at the expense of Plaintiffs, and (ii) ordering that Zillow pay the Funds to Plaintiffs;
- c. In any event, an order directing Zillow to pay to Plaintiffs an amount to be determined at trial, but no less than approximately \$6,372,095.35, plus pre-judgment interest and costs;
- d. An order awarding Plaintiffs their costs and expenses, which includes reasonable attorney's fees and costs, incurred by Plaintiffs in this action; and

- e. The granting to Plaintiffs of such other and further relief as this Court deems just, proper, and equitable.

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