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Case No. 2019-0849-AGB

OIN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

DOUGLAS M. CHERTOK and VAST VENTURES LLC, a Florida limited liability company, Plaintiffs, vs. ZILLOW, INC., a Washington corporation (successor to NMD INTERACTIVE, INC., a Delaware corporation, aka STREETEASY, INC.), Defendant.	C.A. No. 2019-0849-AGB

DEFENDANT ZILLOW INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

BUCHANAN INGERSOLL & ROONEY PC

Geoffrey G. Grivner (# 4711)
919 North Market Street
Suite 990
Wilmington, DE 19801
Telephone: (302) 552-4200
Facsimile: (302) 552-4295

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I. PRELIMINARY STATEMENT

This action presents a rather unusual set of circumstances – for the last six years Defendant Zillow, Inc. ("Zillow" or "Defendant") has been attempting to pay Plaintiffs Douglas M. Chertok ("Chertok") and Vast Ventures LLC ("Vast" and, together with Chertok, "Plaintiffs") certain merger consideration ("Merger Consideration") and pre-merger dividend payments (the "NMD Dividend Payments" and together with the Merger Consideration, the "Funds") they claim they are owed and are now seeking through this suit. Plaintiffs have repeatedly refused payment, and continue their refusal to this day. Despite Zillow's willingness to cooperate and tender payment to Plaintiffs, Plaintiffs' October 24, 2019 Verified Complaint ("Complaint") must be dismissed because their claims are untimely and fail to properly state a claim.

On August 16, 2013, Zillow entered an agreement to acquire NMD Interactive, Inc., d/b/a StreetEasy, a Delaware corporation ("NMD") (the "Merger Agreement"). The Merger Agreement provided that upon surrender of a certificate for cancellation together with a Letter of Transmittal ("LOT") the holder of the certificate shall be entitled to receive their portion of the Merger Consideration. Prior to the Merger, NMD stockholders were also entitled to certain dividend payments issued by NMD pre-closing. Plaintiffs, claimed holders of certificates, refused to sign the LOT and expressed concerns about certain terms contained

therein. Notwithstanding it had no obligation to do so, in response, Zillow provided Plaintiffs an abbreviated LOT, alleviating each of their concerns, but Plaintiffs maintained their refusal to sign the LOT.

Continuing its effort to resolve this matter in good faith, Zillow withdrew the additional requirements of the Merger Agreement with respect to Plaintiffs and no longer required Plaintiffs to sign the LOT. Instead, Zillow proceeded to make several attempts to provide Plaintiffs with the claimed Funds. Instead of accepting payment, Plaintiffs responded to Zillow's efforts to pay the Funds by failing to verify or provide account information, tax information, mailing addresses, and other information that would allow Zillow to make payment to Plaintiffs. In fact, Zillow actually caused checks to be tendered to Plaintiffs' former counsel representing those amounts of the Dividend Payments they claim, but Plaintiffs returned such payments to Zillow.

Instead of accepting payment, on October 24, 2019, roughly **six years** after this dispute first arose, and well past the expiration of all applicable statutes of limitations, Plaintiffs filed the instant action alleging, inexplicably, breach of contract or, alternatively, unjust enrichment requesting that Zillow pay the Funds to Plaintiffs (which it has repeatedly attempted to do), in addition to significant costs and prejudgment interest accumulated over the more than six years Plaintiffs refused

to accept payment.[1] However, the Merger Agreement, upon which Plaintiffs' claims must be based, limits their rights to only those of general creditors and does not provide for interest payments. Plaintiffs' unjust enrichment claim is equally flawed in that Zillow has not been enriched as a result of any alleged impoverishment of Plaintiffs in light of Zillow's willingness to pay Plaintiffs for the last six years. For these reasons, Plaintiffs' Complaint must be dismissed with prejudice.

This is Zillow's Opening Brief in Support of Its Motion to Dismiss.

II. FACTUAL BACKGROUND[2]

A. The Parties

Defendant Zillow, Inc. is a Washington corporation. Zillow is an online real estate database company that was founded in 2006. Compl. ¶ 8.

Plaintiff Chertok was appointed director of NMD, a Delaware corporation, in 2005. NMD was an online real estate marketplace for reliable sales and rental listings, comprehensive data and information about metropolitan areas. *Id.* at ¶ 7. Vast Ventures LLC is a Florida limited liability company, with its principal place of

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[1] While not before the Court on this motion to dismiss, Zillow reserves argument to dispute the amount Plaintiffs allege they are owed in their complaint.

[2] Solely for purposes of the motion to dismiss, Defendants accept Plaintiffs' allegations as true except where those allegations are refuted by the documents on which the Amended Complaint relies (and which are thus incorporated by reference). Statements in this Factual Background that do not include a citation to the Amended Complaint or one of its exhibits are provided by way of background and/or context, and the Court need not rely on them to resolve Defendants' motion to dismiss.

business in Broward County, Florida. *Id.* Vast is a venture fund that invests in emerging companies. Chertok is a managing director of Vast and Vast is a stockholder of NMD. *Id.*

B. The Merger Agreement, the Merger Consideration, and NMD Dividend Payments Owed to Shareholders

On August 16, 2013, NMD agreed to merge with Zillow pursuant to the Merger Agreement (the "Merger"). *Id.* at ¶ 12. The Agreement provided that Strawberry Acquisition Inc., a Delaware corporation and wholly-owned Zillow subsidiary, would acquire NMD for $50 million in cash. *Id.* 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). *Id.* at ¶ 13 and Ex. C. Chertok and Vast claim that they are entitle to Merger Consideration. *Id.* at ¶ 15.

In addition to the Merger Consideration, NMD stockholders were entitled to certain dividend payments issued by NMD pursuant to the August 16, 2013 unanimous consent of the NMD Board (the "NMD Board Consent") contemporaneously with the closing of the Merger. *Id*. at ¶ 16. Chertok and Vast claim that they are also entitled to NMD Dividend Payments. *Id.* and Ex. C.

On September 18, 2013, Chertok and Vast sent NMD notices of appraisal demands for common stock shares, and preferred stock shares. *Id.* at ¶ 21. Later, however, on October 24, 2013, Chertok and Vast sent NMD notices of withdrawal

of their appraisal rights for certain common stock and preferred stock shares. *Id.* at ¶ 22. Concurrently with Plaintiffs' withdrawal, Plaintiffs' remaining appraisal rights expired. *Id.* at ¶ 24.

As beneficiaries to the Merger Agreement, Plaintiffs' rights and limitations with respect to the Merger Consideration are defined therein. For example, after having withdrawn their appraisal rights, or their appraisal rights otherwise expired, Plaintiffs are not entitled to interest payments. Section 1.7.1 of the Merger Agreement provides:

> [I]f any holder of Dissenting Shares shall effectively withdraw or lose (through failure to perfect or otherwise) such holder's appraisal rights, then, as of the later of the Effective Time and the occurrence of such event, such holder's shares shall automatically be converted into and represent only the right to receive the Merger Consideration to which such holder is then entitled under this Agreement, **without interest** thereon and upon surrender of the certificate.

Id. at Ex. C (emphasis added).

Following the expiration of Plaintiffs' appraisal rights in 2013, Zillow began its six year journey to pay Chertok and Vast, which continues through today, notwithstanding the current litigation.[3] Pursuant to Section 1.7.2(b) of the Merger Agreement, NMD stockholders are to receive their funds as follows:

> Upon surrender of a certificate for cancellation to the Exchange Agent or to such other agent or agents as may be appointed by Parent, together

[3] Pursuant to Section 1.7.2 of the Merger Agreement, all remaining amounts of the Merger Consideration were delivered to Zillow on or before February 26, 2014. *Id.* at ¶ 37.

> with a letter of transmittal (the "Letter of Transmittal" [or "LOT"]) substantially in the form attached hereto as Schedule 1.7.2(b), duly executed, and such other documents as may reasonably be required by Parent or the Exchange Agent, the holder of such certificate shall be entitled to receive in exchange therefor the portion of the Merger Consideration that such holder has the right to receive pursuant to the provisions of Section 1.7.1(and subject to deduction for the Stockholder Representative Expense Fund pursuant to Section 1.10(c)), and the certificate so surrendered shall forthwith be cancelled.

Id. at Ex. C.

Notwithstanding Plaintiffs' obligations to provide Zillow with signed LOTs in order for Zillow to tender the Merger Consideration to Plaintiffs, Plaintiffs refused to sign the LOTs, and certain releases contained therein. *Id.* at ¶¶ 26, 29-30. Plaintiffs failed to assert any rights or bring suit against Zillow with respect to their claimed rights to the Funds.

Nevertheless, still eager and willing to cooperate and make payment to Plaintiffs, Zillow provided Plaintiffs with an abbreviated LOT, addressing their alleged concerns and removing release and waiver provisions. On June 4, 2015, in delivering the revised LOT to Plaintiffs, Zillow's then-counsel noted:

> Since the escrow has expired, we removed the provisions regarding the agreement by the stockholder to be bound by the escrow/indemnification, and we also removed the release, as I know that was something to which your client previously objected. It is essentially now just an instrument of transfer to accompany the share certificates, although it does not contain a short confidentiality clause (identical to that signed by all other former stockholders) since we want to be sure that the information statement and other stockholder materials provided to Mr. Chertok in connection with the merger remain confidential.

Id. at Ex. E at 17 (and attached hereto as Exhibit A for the Court's reference). Despite the Merger Agreement's requirements surrounding the LOT, and that the revised LOT did not require Plaintiffs to agree to any releases or waiver provisions, Plaintiffs still refused to sign the LOT and accept payment of the Funds asserting the new LOT contained a "hidden waiver," but yet made no effort to identify such reference in their pleading. *Id.* at ¶ 34. Once again, Plaintiffs did not assert any rights against Zillow or bring suit at that time.

Thereafter, in a good faith attempt to resolve Plaintiff's alleged issues, and make payment to Plaintiffs, Zillow withdrew its request for the modified LOT and, once again, offered to make payment to Plaintiffs.[4] *Id.* at ¶ 39. Once again, Plaintiffs refused to accept payment of the Funds. To date, Zillow continues to hold the Funds ready for payment in compliance with its obligations under the Merger Agreement, as well as pursuant to the NMD Board Consent with respect to the NMD Dividend Payments. Plaintiffs' failure to cooperate and accept payment continues.

[4] Zillow required only that Plaintiffs provide it with tax and identification information in order to disburse the Funds to Plaintiffs.

III. ARGUMENT

A. Standard of Review

To survive a motion to dismiss, a plaintiff must plead facts sufficient to state a valid legal claim under which relief can be obtained. *See Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38 (Del. 1996); *see also In re Santa Fe Pac. Corp. S'holder Litig*., 669 A.2d 59, 65-66 (Del. 1995). Although the Court assumes "the truthfulness of well-pleaded allegations and [will] draw reasonable inferences in favor of the non-moving party," the Court does not "accept conclusory allegations unaccompanied by specific supporting factual allegations." *Id.*; *see also Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *12 (Del. Ch. Aug. 28, 2012) (*quoting Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)). Where the Court "determines with 'reasonable certainty' that no set of facts can be inferred from the pleading upon which plaintiff could prevail," the Court should dismiss the complaint. *SPX Corp. v. Garda USA, Inc.*, 2012 WL 6841398, at *2 (Del. Super. Dec. 6, 2012). When deciding a motion to dismiss, the Court may consider the complaint and the content of documents that are integral to or are incorporated by reference into the complaint. *In re BHC Commc'ns S'holder Litig.*, 789 A.2d 1, 9 (Del. Ch. 2001).

B. Plaintiffs' Complaint is Untimely and Barred by the Statute of Limitations

Simply stated, this action must be dismissed because the applicable statute of limitations expired long ago. As the Court is well aware, breach of contract claims must be brought within three years of the accrual of the cause of action.[5] *See Del. C.* § 8106; *see also AM Gen. Holdings LLC v. Renco Group, Inc.*, 2016 WL 4440476 (Del. Ch. Aug. 22, 2016). This three-year statute of limitations applies even though this claim was brought in this Court, given that Plaintiffs are seeking legal (monetary damages) relief for a legal (breach of contract) claim. *See AM Gen. Holdings,* 2016 Del. Ch. LEXIS 132, at *23 ("[a]lthough statutes of limitations are not controlling in equity, equity follows the law and, in appropriate circumstances, applies the statute of limitations by analogy, denying relief when claims are brought after the analogous statutory period") (internal quotations omitted); *see also Winner Acceptance Corp. v. Return on Capital Corp.,* 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008) ("When exercising ancillary jurisdiction over legal claims, however, this Court will apply the applicable statute of limitations found at law").

[5] As explained below, breach of contract claim accrues at the time of the alleged breach, regardless of whether the Plaintiff is aware of the breach. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

Further, the Court may also apply the doctrine of laches to dismiss a case where "the complaint itself alleges facts that show that the complaint is filed too late . . ." *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993). The doctrine of laches "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights." *Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 8 (Del. 2009) (*quoting Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

Here, Plaintiffs filed the instant action on October 24, 2019, **six years after** Zillow's alleged actions or inactions that allegedly gave rise to Plaintiffs' damages. In particular, Plaintiffs concede that the Merger closed on August 26, 2013. Compl. ¶ 2. Plaintiffs allege that their entitlement to the Merger Consideration arose in October 2013 and December 2013, respectively. *Id.* Separately, the NMD Dividend Payments were due upon the Merger closing. Ex. B and C.

Conceding the untimeliness of their Complaint, Plaintiffs state that Zillow's alleged "improper withholdings" began in August 2013, October 2013, and December 2013. *Id.* at ¶ 25. Accordingly, Plaintiffs were clearly aware that they had not received the Funds after each of these dates passed and, therefore, could have filed the instant Complaint at any point within three years following each alleged nonpayment, at the latest by December 2016 (three years after the last alleged nonpayment date), but inexplicably failed to do so. Such a failure is particularly confusing given that Plaintiffs' own pleadings claim that Zillow "could

have mailed checks at any time over the last six years . . .” *Id.* at ¶ 5. Using Plaintiffs’ own logic, there is no reason why this lawsuit could not have been filed within the applicable statute of limitations period.[6]

Moreover, even if Plaintiffs could somehow claim a lack of awareness of a possible cause of action based on Zillow’s nonpayment of the Funds, although such a claim would be disingenuous, Plaintiffs’ claims would still be barred where the statute of limitations begins to run at the time of the alleged breach, not Plaintiffs’ discovery of the breach. *See Wal-Mart Stores*, 860 A.2d at 319.

Plaintiffs also claim that failed negotiations for payment occurred in 2013, 2014, and 2015. Compl. ¶ 30. Even if Plaintiffs could credibly argue that the alleged breach of contract began at the time of the failed negotiations for payment, rather than the nonpayment of the Funds themselves, Plaintiffs’ claims are still barred where they have failed to seek relief within the applicable statute of limitations period following each of these instances. *See id*.

Plaintiffs appear to recognize that the only way to circumvent the issue and avoid the application of the statute of limitations would be to allege that Zillow’s wrongdoing constitutes one continuous, single, ongoing breach. As a result, Plaintiffs falsely claim that Zillow refused to pay the Funds “as recently as October

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[6] Plaintiffs also allege that Zillow has had the relevant Funds in its possession since February 26, 2014. Compl. ¶ 36. Either way, the same argument applies.

2019," and allege continued withholding of the Funds. *Id.* at ¶¶ 5, 36-39. However, to characterize Zillow's conduct as one continuous breach over the course of six years would simply and unjustly allow Plaintiffs to continue to make demands for payment of the Merger Consideration and the NMD Dividend Payments, increase their alleged interest damages in perpetuity, and bring this lawsuit at their leisure. Such a result is not tenable.

Indeed, "the continuing breach doctrine is narrow and typically is applied only in unusual situations." *See AM Gen. Holdings,* 2016 Del. Ch. LEXIS 132, at *38 (internal quotations omitted). It does not apply where a court can determine that the plaintiff could have alleged a *prima facie* case for breach of contract after a single incident, even where there are "numerous repeated wrongs of similar, if not same, character over an extended period." *Id.* The continuing breach doctrine is further inapplicable where, like here, the amount of damages is certain and not based on a contingent event that has not yet occurred. *Id.*

In *AM Gen. Holdings,* this Court held that while the alleged breaches were repetitive, they were not continuous for the purposes of the application of the doctrine, given that each of the alleged breaches "resulted in itemized damages that were determinable the moment they occurred." *Id.* at *42-43; *see also Ocimum Biosolutions (India) Ltd. v. AstraZeneca UK Ltd.*, 2019 Del. Super. LEXIS 640, at *35 (Del. Super. Ct. Dec. 04, 2019) ("If a plaintiff could allege a prima facie case

for breach of contract after a single incident, the doctrine does not apply. . .”). The same is true here, where Plaintiffs are able to thoroughly plead itemized damages that were due to them as early as 2013, and have set forth those damages in their pleadings. *Id.* at ¶¶ 25-26.

Plaintiffs’ alternative claim for relief for unjust enrichment is also governed by a three-year statute of limitations. *Pulieri v. Boardwalk Props., LLC,* 2015 WL 691449, at *12 (Del. Ch. Feb. 18, 2015) (“The analogous statute of limitations for a claim of unjust enrichment is three years, and an unjust enrichment claim accrues when the wrongful act causing the enrichment and impoverishment occurred.”). Given that this is an alternative claim for relief that is alleged to have occurred at the same time, Zillow’s arguments related to the three-year statute of limitations related to Plaintiffs’ breach of contract claim apply equally to Plaintiffs’ alternative unjust enrichment claim.

For these reasons, Plaintiffs’ claims fall outside the applicable three-year statute of limitations and should, therefore, be dismissed with prejudice.

C. The Merger Agreement is the Governing Contract at Issue in this Dispute

Plaintiffs have improperly attempted to bring their breach of contract claim as a breach of the NMD certificate of incorporation (the “Certificate”). This approach is flawed because the certificate of incorporation does not include the necessary contractual provisions to obligate any specific payment to Plaintiffs. Therefore,

Plaintiffs' claim for the Merger Consideration must have been brought in their capacity as third party beneficiaries to the Merger Agreement, the only agreement which provides for payments of Merger Consideration to Plaintiffs, upon which this suit is premised. Likewise, the Plaintiffs' claim for the NMD Dividend Payments is premised on NMD Board's unanimous consent, which is also acknowledged in the Merger Agreement, and cannot be brought as a breach of contract claim under the Certificate.

In their Complaint, Plaintiffs recite various provisions of the NMD Certificate which provide the manner in which **hypothetical** dividends and merger consideration funds are to be allocated amongst preferred and common stockholders. *See Compl.* ¶¶14-17, 23, 26, 41-52, Ex. A. The Certificate does not, however, provide any specific terms by which Plaintiffs are owed anything at all. Instead, Plaintiffs would have to look to and rely upon the Merger Agreement and the NMD Board Consent for that. Solely relying upon the NMD Certificate for its breach of contract and specific performance claim leaves Plaintiffs without a key component of an enforceable contract -- price. *See Raisler Sprinkler Co. v. Automatic Sprinkler Co.*, 171 A. 214, 219 (Del. Super. Ct. 1934) (noting price as essential term of enforceable contract).

Indeed, Plaintiffs' right to the Merger Consideration arise out of the Merger Agreement, to which they are third party beneficiaries. *See, e.g. Ark. Teacher Ret.*

Sys. v. Alon USA Energy, Inc., 2019 Del. Ch. LEXIS 245, at *28 n.54 (Del. Ch. June 28, 2019); see also *Amirsaleh v. Bd. of Trade of the City of New York, Inc.*, 2008 WL 4182998, at *4 (Del. Ch. Sept. 11, 2008) (finding that members of a company were intended beneficiaries of merger agreement entered into by the company because "the Agreement manifests an unambiguous intent to benefit the [company's] [m]embers"); *NAMA Hldgs. v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 424 (Del. Ch. 2007) ("While not a signatory to that [venture] agreement, section 12.18(j) explicitly states that NAMA is a third-party beneficiary of section 12.18 in its entirety."); *Hadley v. Shaffer*, 2003 WL 21960406, at *5 (D. Del. Aug. 12, 2003) (finding shareholders to be third-party beneficiaries of a merger agreement that required stockholder approval and contained a stockholder payment provision). *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *3-5 (Del. Ch. Feb. 13, 2004) (finding employees to be intended third-party beneficiaries of stock purchase agreement that directed the grant of options directly to the employees).

That the NMD Certificate only supports hypothetical damages means that Plaintiffs are unable to plead the three requisite elements of a breach of contract claim as to the NMD Certificate. Under Delaware law, for a claim of breach of contract to survive a motion to dismiss, a plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the

plaintiff. *See VLIW Tech., LLC v. Hewlett-Packard Co*., 840 A.2d 606, 612 (Del. 2003); *see also Daniels v. Dover Downs Hotel*, 2017 Del. Super. LEXIS 227, at *2 (Del. Super. Ct. May 09, 2017). As to elements one and two, Plaintiffs allege that a contract exists - the NMD Certificate - and allege that Zillow breached the same. But Plaintiffs necessarily rely on the Merger Agreement to establish damages, the third requisite element. Plaintiffs cannot get around the fact that any damages under the NMD Certificate are merely hypothetical, thus causing them to blatantly cherry-pick palatable provisions from both the NMD Certificate and the Merger Agreement to craft an acceptable damages narrative for themselves. Such practice highlights that Plaintiffs have utterly failed to plead a *prima facie* claim for breach of the NMD Certificate alone. As such, the claim must be dismissed. *See Daniels*, 2017 Del. Super. LEXIS 227 at *2 (granting the defendant's motion to dismiss after the plaintiff failed to adequately allege damages based on the contract breach).

Likewise, Plaintiffs claim for the NMD Dividend Payments as a breach of the NMD Certificate must fail. While this Court has the authority to enforce payment of board approved dividends, it has not and should not do so under the guise of a breach of a certificate of incorporation. *See, e.g., NBC Universal, Inc v. Paxson Comm. Corp.*, 2005 Del. Ch. LEXIS 56 (Del. Ch. Apr. 29, 2005) (addressing claim for unpaid dividends pursuant to a Certificate of Designation that specified dividends

owed); *Lehman Bros. Holdings v. Spanish Broad. Sys.*, 2014 Del. Ch. LEXIS 28 (Del. Ch. Feb. 25, 2014) (same).

Zillow, in its capacity as NMD's successor or otherwise, has no obligation to pay Plaintiffs the Merger Consideration or NMD Dividend Payments outside of those obligations arising from the Merger Agreement and NMD Board Consent. As a result, Plaintiffs' claim for breach of the NMD Certificate claim must be dismissed.

D. Plaintiffs Have Not Complied with the Merger Agreement

On the face of their Complaint, Plaintiffs admit that they have refused to comply with the terms of the Merger Agreement. Accordingly, Plaintiffs' breach of contract claim as to the Merger Consideration must be dismissed because their own, initial breach was material and relieved Zillow of any obligation to perform thereunder. Simply put, Plaintiffs' claim for breach of contract must be dismissed where Plaintiffs fail to (and cannot) state a claim thereof.

"[I]f plaintiff is first guilty of a material breach of contract, it may not complain if defendant subsequently refuses to perform." *Physiotherapy Corp. v. Moncure*, 2018 Del. Ch. LEXIS 82, at *8 n.36 (Del. Ch. Mar. 12, 2018) (citing *Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. Super. 1969)). A material breach is determined by considering several factors:

> 1) the extent to which the injured party will be deprived of the benefit which he reasonably expected; 2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; 3) the extent to which the party failing to perform or

> to offer to perform will suffer forfeiture; 4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; 5) and the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See BioLife Sols., Inc. v. Endocare, Inc., 838 A.2d 268, 278 (Del. Ch. 2003).

Pursuant to the Merger Agreement, Plaintiffs were required to surrender a certificate of cancellation and a LOT, and only thereafter would Plaintiffs be entitled to receive their portion of the Merger Consideration. *See* Ex. C. However, as stated herein, Plaintiffs refused to sign any version of the LOT, despite Zillow providing Plaintiffs with an abbreviated LOT, alleviating the specific concerns Plaintiffs raised with the prior version of the LOT. *See supra.*

By refusing to sign the LOT, Zillow is denied the fundamental benefit of the Merger Agreement – the unclouded merger with NMD. Further, six years after the Merger, numerous attempts made by Zillow to alleviate Plaintiffs' concerns and make payments to them, and the Plaintiffs' filing of instant action, it is reasonably certain that Plaintiffs are unlikely to cure their failure. Lastly, Plaintiffs refusal to accept payment by Zillow of the Funds in an effort to leverage greater compensation is in opposition to the notions of good faith and fair dealing. Accordingly, Plaintiffs' breach of the Merger Agreement, under which they now assert claims, is material and bars them from bringing a breach of contract claim against Zillow thereunder. *See BioLife Sols., Inc.* 838 A.2d at 278.

E. The Complaint Fails to Allege a Claim for Unjust Enrichment

Using twisted logic, Count II of the Complaint attempts to assert that, as a result of Plaintiffs' unwillingness to cooperate or assert its purported legal rights, Zillow has been unjustly enriched. Plaintiffs' argument must fail because they cannot establish the elements of an unjust enrichment claim.

Unjust enrichment occurs when there is 1) an enrichment; 2) an impoverishment; 3) a relation between the enrichment and impoverishment; 4) the absence of justification; and 5) the absence of a remedy provided at law. *See Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). The relationship between the alleged enrichment and impoverishment must illuminate why the recipient's retention of the benefit would be an "injustice." *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 Del. Ch. LEXIS 92, at *5 (Del. Ch. June 29, 2007). Ultimately, an unjust enrichment claim must establish the plaintiff's right to be restored to their previous position "by restoring the very property that the claimant gave up" or "a money equivalent." *See Official Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (In re HH Liquidation, LLC)*, 590 B.R. 211, 286 (Bankr. D. Del. 2018) (citing *Restatement (Third) of Restitution and Unjust Enrichment* § 1 (2011)).

Here, Zillow has not been enriched and Plaintiffs have not been impoverished. Zillow has not obtained money or property from the Plaintiffs that would constitute an enrichment. *See id*. Conversely, Plaintiffs have not "given up"

anything of value to Zillow, or because of Zillow, that would constitute an impoverishment. *See id.* (reasoning that unjust enrichment requires that the claimant give up money or property to the recipient). Rather, in complete contrast to a claim for unjust enrichment, Plaintiffs remain in possession of stock certificates that are the basis of their claim and have refused to accept Zillow's attempts. *See id.* As such, Zillow is holding the Funds until Plaintiffs will accept payment. Had Plaintiffs "given up" their stock certificates, and Zillow failed to transmit the Funds, then Plaintiffs *potentially* would have an unjust enrichment claim, however that is not the case here. In reality, however, Zillow has been holding onto the Funds and are ready to make payment but Plaintiffs continue to refuse to accept payment. For these reasons, an unjust enrichment claim cannot survive.

IV. CONCLUSION

For the foregoing reasons, Zillow respectfully requests that its Motion to Dismiss be granted, in its entirety, and that Plaintiffs' Verified Complaint be dismissed with prejudice.

BUCHANAN INGERSOLL & ROONEY PC

/s/ Geoffrey G. Grivner
Geoffrey G. Grivner (# 4711)
919 North Market Street
Suite 990
Wilmington, DE 19801
Telephone: (302) 552-4200
Facsimile: (302) 552-4295
geoffrey.grivner@bipc.com

Attorney for Defendant Zillow, Inc.

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Dated: February 17, 2020

CERTIFICATE OF SERVICE

I, Geoffrey G. Grivner, do hereby certify that on this 17th day of February, 2020, a copy of the foregoing was served on the following via Lexis/Nexis File and Serve:

Michael J. Maimone
Faegre, Drinker, Biddle & Reath LLP
222 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Attorney for Plaintiffs

/s/ Geoffrey G. Grivner
Geoffrey G. Grivner (#4711)