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United States District Court,
 D. Utah, Central Division.
 Ronald W. MELNYK; Darwin Melnyk; Jeff
 Hesemann; Nancy A. Hesemann; Darren
 Gilroy; James P. Gleason; Peter Karafezov; S.
 Katherine Joseph; Steven M.
 Marshall; Annette C. Nelson, and Reed A. Sheard,
 Plaintiffs,
 v.
 CONSONUS, INC.; Consonus Holdings, Inc.;
 Questar Infocomm, Inc.; Clyde M.
 Heiner; Connie Holbrook; Kelly B. Maxfield; S.E.
 Parks; Keith O. Rattie; and
 Glenn Robinson, Defendants
 CONSONUS HOLDING CO., n/k/a Consonus, Inc.;
 and Questar Infocomm,
 Counterclaimants,
 v.
 Ronald W. MELNYK and Darwin Melnyk,
 Counterclaim Defendants.
No. 2:03-CV-00528 DB.

Sept. 12, 2005.

[R. Brent Stephens](#), [Dennis V. Dahle](#), Snow
 Christensen & Martineau, Salt Lake City, UT, for
 Plaintiffs and Counter Defendants.

[Ryan M. Harris](#), Jones Waldo Holbrook &
 McDonough, Salt Lake City, UT, for Defendants.

[Timothy C. Houpt](#), [Adam B. Price](#), Jones Waldo
 Holbrook & McDonough, Salt Lake City, UT, for
 Defendants and Counter Claimants.

[Anthony L. Rampton](#), Jones Waldo Holbrook &
 McDonough, Salt Lake City, UT, for Counter
 Claimants.

ORDER

[BENSON, J.](#)

*1 Before the Court is Defendants' Motion for Partial
 Summary Judgment on Counts 3, 8, 9, 10, 11, 12, 13,
 and 14 of Plaintiffs' Complaint. These Counts allege,
 respectively, Failure of Statutory Notice for Cash-out
 Merger, Fraudulent Non-disclosure in Tender Offer
 and Merger Process; Violation of the Williams Act §

14; Violation of 10b and Rule 10b-5; Fraud in Offer
 and Purchase of Security in Connection with Tender
 Offer ([Utah Code Ann. § 61-1-22](#)); Fraud in Offer
 and Purchase of Security in Connection with Merger
 ([Utah Code Ann. § 61-1-22](#)); Control Person
 Liability Under Federal Law; and Control Person
 Liability Under State Law. The parties appeared
 before the Court on August 8, 2005 to argue the
 motion. Having considered the parties' arguments,
 briefs, and the relevant law, the Court issues the
 following Order.

BACKGROUND

This case presents a dispute between parties having a
 somewhat complex business relationship. Recited in
 the most simple of terms, it involves Defendants'
 acquisition of a company, the failure of the company
 to be successful, and the eventual merger of the
 company into a parent subsidiary. A more detailed
 recitation of the case is as follows.

Plaintiffs Ronald and Darwin Melnyk ("the
 Melnyks") were the principals of a company named
 Consonus-Oregon in 1999. The company was a
 provider of managed services based in Portland,
 Oregon. Companies in the managed services industry
 provide infrastructure and services for creating,
 transmitting, and receiving electronic data. All of the
 Plaintiffs were shareholders of Consonus-Oregon.

Defendant Questar Infocomm, a subsidiary of
 Questar, became interested in Consonus-Oregon as a
 possible acquisition that would allow the company to
 have a stronger foothold in the managed services
 industry. In 1999, Questar Infocomm made a \$1.5
 million equity investment in Consonus-Oregon. In
 May or June 2000, Questar Infocomm acquired
 Consonus-Oregon, which was merged with two other
 acquisitions. The resulting subsidiary company was
 named Consonus, Inc. Ron Melnyk became a director
 for Consonus, Inc., and Darwin Melnyk became
 Senior Vice President and Chief Technology Officer.
 They, along with the other Plaintiffs, became
 minority shareholders of Consonus, Inc., while
 Questar Infocomm became the majority shareholder.
 The individually named Defendants to this case were
 all officers of Consonus, Inc., and/or Questar
 Infocomm.

Immediately after the merger took place, the parties
 began to disagree on how to manage Consonus, Inc.

The Melnyks presented specific business plans that they apparently assumed or hoped would be executed, but the plans were not acted on as they had envisioned. The company made various efforts toward obtaining venture capital funding and preparing for an IPO, but the efforts were not successful. The company struggled as the Internet bubble burst, and the company suffered a large setback in February 2002 with the failure of a fire suppression system in one of its data centers. As a result of the fire suppression system failure, Safeway, one of the data center's customers, asserted a claim against Consonus, Inc. for \$11 million in damages.

*2 In the ensuing months, the Melnyks continued to disagree with the company's management. Ron Melnyk specifically expressed concern over a data center lease that he alleged was unfairly benefitting Questar Infocomm. The Melnyks' felt that they did not receive a satisfactory response to their concerns.

In March 2003, Questar Infocomm offered to buy outstanding Consonus, Inc. shares from minority shareholders for \$0.50 per share. Several shareholders responded to the tender offer, and, as a result, Questar Infocomm holdings in Consonus, Inc. increased from 82% to 90%. Ron Melnyk objected to the tender offer's timing and price, among other things.

In May 2003, the Board of Directors voted and approved a short-form merger between Questar Infocomm and Consonus, Inc. Pursuant to the short-form merger, the minority shareholders of Consonus, Inc. were cashed out. *See* Utah Code Ann. § 61-10a-1104. Plaintiffs initially sought a temporary restraining order and preliminary injunction from this Court to prevent the merger, but later withdrew their motion in accordance with a stipulated agreement. Plaintiffs then continued with the instant litigation.

Plaintiffs allege that during discovery they learned of numerous acts constituting serious breaches of fiduciary duty on the part of Defendants, including conflicted transactions that benefitted Questar Infocomm to the detriment of Consonus, Inc. Plaintiffs make numerous allegations regarding these conflicted transactions and various failures of the Defendants to safeguard minority shareholders. Plaintiffs' overarching theory is that Defendants planned the tender offer and merger as a way of concealing their misdeeds and of distancing themselves from any potential liability.

In the current motion, Defendants attack Plaintiffs'

claims brought under federal and state securities laws, as well as Plaintiffs' common law claim for fraudulent non-disclosure.

ANALYSIS

Summary Judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. [Fed.R.Civ.P. 56\(c\)](#). In order to defeat a motion for summary judgment, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322 n. 3, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court views the evidence and any inferences drawn therefrom in the light most favorable to the non-movant. *See Doi v. Univ. of Utah*, No. 2:03CV216, 2004 U.S. Dist. LEXIS 22787, at *3 (D.Utah Oct. 28, 2004).

I. COMPLIANCE WITH UTAH SHORT-FORM MERGER STATUTE

Defendants first argue that Count 3 must be dismissed because Defendants complied with all requirements of Utah's short-form merger statute and because the statute does not provide a cause of action with a damages remedy. The statute at issue, [Utah Code § 16-10a-1104\(5\)](#), is entitled "Merger of Parent and Subsidiary" and states the following:

The effective date of the merger may not be earlier than the date on which all shareholders of the subsidiary waived the mailing requirement of Subsection (4) or ten days after the date the parent mailed a copy or summary of the plan of merger to each shareholder of the subsidiary who did not waive the mailing requirement.

*3 Defendants state that notice was mailed on May 23, 2003 to all shareholders. Defendants then filed their merger documents on June 6, 2003. Plaintiffs contend that the notice of merger "was not mailed to minority shareholder Peter Karavosov on May 23, 2003, or otherwise received by him." Karavosov is a Plaintiff in this dispute. Defendants argue that even assuming Karavosov did not receive a mailed notice, all Plaintiffs undeniably had actual notice by June 5, 2003--the date Plaintiffs filed this lawsuit and a motion for injunctive relief to prevent the merger. In addition, Plaintiffs, including Karavosov, stipulated to the merger going forward on July 14, 2003. Defendants argue that this stipulation operated as a waiver of mailed notice. Defendants also point out that the statute does not provide a damages remedy.

The Court agrees with Defendants that Plaintiffs do not have a viable cause of action or remedy under

this statute. At most, Plaintiffs might succeed in altering the effective date of the merger, which is a remedy they have not sought. There are no cases in which this statute has been used to obtain damages. Defendant's motion for partial summary judgment on Count 3 is therefore GRANTED.

II. RULE 10b-5 CLAIMS

A. Standing for Rule 10b-5 Claims

Defendants next argue that seven of the Plaintiffs lack standing to bring Rule 10b-5 claims because they did not buy or sell their shares in response to the tender offer. Rule 10b-5 applies to a purchaser or seller of securities. 17 C.F.R. § 240.10b-5; Blue Chip Stamps, Inc. v. Manor Drug Stores, 421 U.S. 723, 731-55, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975); Grubb v. FDIC, 868 F.2d 1151, 1159 (10th Cir.1989). Plaintiffs encourage the Court to find standing based on the "forced seller" doctrine, which originated in the Second Circuit. See Vine v. Beneficial Finance Co., 374 F.2d 627, 635 (2nd Cir.1967). The forced seller doctrine operates in some circumstances to give standing to plaintiffs who did not buy or sell shares, but who were later required to give up their shares. *Id.*

The Court rules in favor of Defendants for the reasons set forth in their briefing. Specifically, the doctrine has not been adopted by the Tenth Circuit, the doctrine is of questionable continued validity, and the facts of this case do not lend to its application. Accordingly, Defendants' motion for summary judgment on Count 10, as to seven of the Plaintiffs, is GRANTED.

B. Causation and Damages under Rule 10b-5

Defendants next argue that none of the Plaintiffs can succeed with a claim under Rule 10b-5 because none of them can prove causation and damages. According to Plaintiffs' allegations, the tender offer and short-form merger were part of Defendants' oppressive scheme to gain enough control over the company to unfairly squeeze out Plaintiffs. Defendants argue that alleged misrepresentations in the short-form merger could not have caused Plaintiffs any harm because Defendants never actually required Plaintiff's cooperation to accomplish a cash-out of Plaintiffs' shares. Defendants point out that they could at any time have effectuated a long-form merger, which in Utah requires a majority vote, because Defendants already held 82% of the shares before the tender offer.

*4 Defendants rely on Virginia Bankshares v. Sandberg, 501 U.S. 1083, 1099, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991); Grace v. Rosenstock, 228 F.3d 40, 48 (2nd Cir.2000); and Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1556-59 (10th Cir.1992). In Virginia Bankshares, the Supreme Court found that shareholders whose proxies were not needed to accomplish a freeze-out merger could not show causation in their 17 C.F.R. § 240.14a-9 challenge of a misleading proxy statement. 501 U.S. at 1086. Consequently, the shareholders had no private right of action. *Id.*; see also Boone, 972 F.2d at 1557. In Grace, the court applied the rationale of Virginia Bankshares in a Rule 10b-5 context. 228 F.3d at 49 ("Virginia Bankshares applies to claims of proxy fraud brought under § 10(b) and Rule 10b-5, and a plaintiff may not recover on such a claim without proving that his injury was caused by the fraud. Plaintiffs here, because minority-shareholder votes were not required for approval of the merger that was the subject of the proxy statements, did not show causation based on the approval of the merger."). In Boone, the court likewise applied Virginia Bankshares in a Rule 10b-5 context, finding that plaintiff minority shareholders failed to show that misrepresentations in a proxy statement caused the economic injuries they allegedly suffered.

Plaintiffs argue that they can show causation because they lost important state remedies by being subjected to a short-form merger rather than a long-form merger. Virginia Bankshares raised the possibility that causation might be shown by the loss of a state remedy. 501 U.S. at 2766; Grace, 228 F.3d at 49; Boone, 972 F.2d at 1557. Specifically, Plaintiffs argue that they lost (1) an "entire fairness" review by the Board (which amounts to an exercise of fiduciary duty); (2) various remedies based on a violation of the "entire fairness" standard; and (3) a recommendation from the Board to the shareholders about the merger (which also amounts to an exercise of fiduciary duty).

Consistent with Boone, the Court rejects Plaintiffs' arguments inasmuch as they are based on entire fairness and fiduciary duty. Faced with similar arguments, the court in Boone held as follows:

Although plaintiffs insist that 'principles of corporate law applicable to management buyouts' require that the self-dealing defendants prove the 'entire fairness' of the merger, ... the Court in Virginia Bankshares imposed no such requirement on the defendants. We find no reason to do so here, and we reject any theory of causation plaintiffs present based solely on allegations of a breach of

corporate fiduciary duty under state law. [Boone, 972 F.2d at 1557](#). Defendants owed a fiduciary duty to Plaintiffs regardless of whether the merger was long-form or short-form. Lost opportunities for the Board to exercise its fiduciary duty in alternate ways are not a sound basis for alleging damages. Moreover, contrary to Plaintiffs' assertion, the "entire fairness" doctrine of Delaware is not the established law in Utah. Only one Utah case has mentioned "entire fairness," and it did so only in a parenthetical citation. [Bingham Consol. Co. v. Groesbeck, 105 P.3d 365, 371 \(Utah Ct.App.2004\)](#). In Delaware, unlike Utah, the entire fairness doctrine is a fully developed standard related to specific statutes. See [8 Del.Code Ann. § 144 \(2005\)](#).

*5 Finally, assuming Consonus underwent a long-form instead of short-form merger, the Utah statute would likely have precluded Defendants from making the recommendation Plaintiffs claim they lost. Under Utah law, a board of directors contemplating a long-form merger is expected to make a recommendation regarding the merger to the shareholders "unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation...." [Utah Code Ann. § 16-10a-1103\(2\)](#). Therefore, Plaintiffs have not shown that they were harmed by having been subjected to a short-form rather than long-form merger. [\[FN1\]](#)

[FN1](#). Regardless of whether a merger is a long or short-form merger, the Utah Code provides the same "dissenters' rights" remedy. [Utah Code Ann. § § 16-10a-1106\(1\), 16-10a-1302\(1\)](#).

For all of the above reasons, the Court GRANTS Defendants' motion as to Count 10 and causation and damages.

C. Breach of Fiduciary Duty and Liability Under Rule 10b-5

Defendants next argue that none of the Plaintiffs can succeed with a claim under Count 10 because the true action complained of is merely breach of fiduciary duty. Defendants assert that pursuant to the Supreme Court's decision in [Santa Fe Indus., Inc., v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 \(1977\)](#), and its progeny, the federal securities laws cannot be used to redress acts of internal corporate mismanagement and breach of fiduciary duty. Plaintiffs recognize the precedent set by *Sante Fe*, but argue that it does not apply in this case because

Defendants' mismanagement and failure to disclose its mismanagement were so grossly abusive as to render Defendants' alleged omissions and misrepresentations material and actionable under the federal securities laws. Both parties cite numerous cases to support their respective arguments.

Santa Fe "requires a court to distinguish between an actionable omission or misrepresentation of a material fact and a claim solely for breach of a state-law fiduciary duty." [Kas v. Fin. Gen. Bankshares, Inc., 796 F.2d 508, 513 \(D.C.Cir.1986\)](#). "This distinction has admittedly proven somewhat difficult to apply in practice." *Id.* Courts have presented different formulations for distinguishing actionable from non-actionable claims under *Santa Fe*. See, e.g., [Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 638-39 \(3d Cir.1989\)](#) (citing [Field v. Trump, 850 F.2d 938, 948 \(2d Cir.1988\)](#)) (non-disclosure is actionable where shareholders were lulled into foregoing remedy); [Kas, 796 F.2d at 513](#) (claim is not actionable under federal law if its validity rests solely on legal determination that transaction was unfair or that director breached fiduciary duty); [Panter v. Marshall Field & Co., 646 F.2d 271, 288 \(7th Cir.1980\)](#) (claim is not cognizable under federal law if "central thrust" arises from act of corporate mismanagement)).

Recognizing that courts have dealt with this issue in different ways, the Court concludes in this case that Plaintiffs' claims are not actionable under Rule 10b-5 because the claims are essentially grounded in corporate mismanagement and breach of fiduciary duty. In Plaintiffs' statement of facts, Plaintiffs refer specifically to misrepresentations regarding an allegedly oppressive lease arrangement; the fairness of the price offered for the minority shareholder's shares; and the position that the merger was in the best interests of the shareholders. Plaintiffs refer specifically to omissions regarding the allegedly bad motives of the tender offer in furthering a squeeze out; and multiple transactions that allegedly oppressed minority shareholders (including the "37 Bad Acts"). These claims all have breach of fiduciary duty and corporate mismanagement at their heart, and are therefore inappropriate for Rule 10b-5 litigation. See [Craftmatic, 890 F.2d at 638](#) ("[W]e must be alert to ensure that the purpose of *Santa Fe* is not undermined by "artful legal draftsmanship;" claims essentially grounded on corporate mismanagement are not cognizable under federal law."); see also [In re Williams Sec. Litig., 339 F.Supp.2d 1206, 1218 \(N.D.Okla.2003\)](#); [Brown v. Perrette, 1999 Del. Ch. LEXIS 92, *21 \(May 14, 1999\)](#) ("[P]laintiff may not

'bootstrap' a claim of breach of fiduciary duty into a federal securities law claim by alleging that directors failed to disclose that breach of fiduciary duty") (citations and quotations omitted); *In re Mesa Airlines, Inc.*, 1996 U.S. Dist. LEXIS 22820, *41-42 (May 31, 1996, D.N.M.) ("[T]o be actionable [under federal law] the undisclosed information must be material for reasons other than mismanagement or bad faith."); [Hundahl v. United Benefit Ins. Co.](#), 465 F.Supp. 1349, 1365-66 (N.D.Tex.1979). Finally, the Court recognizes that Plaintiffs' driving theory-- that the tender offer and merger were an oppressive scheme to squeeze out minority shareholders does not appear to be redressable by federal securities laws under select precedent. See [Isquith v. Caremark Int'l](#), 136 F.3d 531, 536 (7th Cir.1998) ("In *Santa Fe*, ... the Supreme Court made clear for the first time that securities fraud does not include the oppression of minority shareholders... No more does securities fraud include unsound or oppressive corporate reorganizations, which is the essential complaint of the plaintiff class in this case."). For all of the above reasons, the Court GRANTS Defendants' motion as to Count 10.

III. WILLIAMS ACT § 14(e) CLAIMS

*6 Defendants argue, and the Court agrees, that Plaintiffs' Williams Act § 14(e) claims must fail for essentially the same reasons that Plaintiffs' other federal securities claims fail. First, Plaintiffs cannot show causation and damages arising from the allegedly misleading tender offer and short-form merger, as discussed above in Part II.B. This is because Defendants did not need Plaintiffs' cooperation to effect a cash out of the minority shareholders and because Plaintiffs have not shown that they were harmed by being subjected to a short-form rather than long-form merger. Plaintiffs concede in their brief that there must be a causal link between the harm suffered and the misleading tender offer. Pl. Memo in Opp., pp. 14-15. This link has not been shown. [\[FN2\]](#)

[FN2](#). Defendants point out that where Plaintiffs cannot show causation and harm, they also cannot show detrimental reliance. Several jurisdictions expressly require a showing of detrimental reliance to maintain a § 14(e) suit. See [Panter](#), 646 F.2d at 283; [Chris-Craft Indus., Inc. v. Piper Aircraft Corp.](#), 480 F.2d 341, 373 (2nd Cir.1973); [Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group](#), 295 F.Supp.2d 75, 82 (D.D.C.2003); [Salsitz v. Peltz](#), 227 F.Supp.2d 222, 225 (S.D.N.Y.2002);

[Hundahl](#), 465 F.Supp. at 1366-69. In addition, the seven non-tendering Plaintiffs apparently did not rely on the allegedly misleading tender offer at all. Dft's Memo in Support, pp. 8-9.

Second, the federal securities laws do not properly reach claims based on breach of fiduciary duty and subsequent failure to disclose that breach, as discussed above in Part II.C. Otherwise,

every complaint about the mismanagement of a corporation that issues securities subject to federal securities law [will] be shoehorned into federal court on the theory that management had defrauded the shareholders by concealing the mismanagement. This principle would carry the securities laws far outside their intended domain. And it would violate the principle that the only loss of which complaint is possible under the antifraud provisions of those laws is a loss that candor would have averted.

[Isquith](#), 136 F.3d at 534. The Court recognizes that the cases cited in Part II.C involve claims brought under Rule 10b-5 and § 14a-9 instead of § 14(e). The Court finds no persuasive rationale, however, for treating § 14(e) differently. [\[FN3\]](#) Indeed, many of the relevant cases speak of "federal law" in general, without limiting their analyses to the specific federal statute at issue. See, e.g., *id.*; [Craftmatic](#), 890 F.2d at 638 ("[C]laims essentially grounded on corporate mismanagement are not cognizable under federal law.").

[FN3](#). Section 14(e), which tracks the substance of Rule 10b-5 and § 14a-9 in significant measure, provides as follows:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation....
17 C.F.R. § 240.14(e).

The Court therefore GRANTS Defendants motion for summary judgment as to Count 9.

IV. STATE SECURITIES CLAIMS

A. Count 12: Fraud in the Offer to Purchase and the

Purchase of a Security in Connection with the Merger

Defendants argue that Count 12 must be dismissed as to all Plaintiffs. In Count 12, Plaintiffs assert that Defendants violated [Utah Code Ann. § 61-1-1](#) during the short-form merger by making untrue statements of material fact and by omitting to state material facts. Pl. Complaint, ¶¶ 186-87. [Section 61-1-1\(2\)](#) provides that it is unlawful

for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to ... make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading....

Defendants argue that any alleged misrepresentation or omission made in connection with the short-form merger cannot be considered material because Plaintiffs had no choice but to participate. The Court finds Defendants' reasoning persuasive and applicable to this case.

*7 In a short-form merger, the minority shareholders do not make an investment decision; instead, they are divested of their shares by operation of law. See [Utah Code Ann. § 16-10a-1104](#). The majority shareholders have a statutory right to effect the short-form merger, regardless of whether minority shareholders assent. See *id.* Thus, any misrepresentation or omission made to minority shareholders during a short-form merger would not affect the outcome, and therefore could not be considered material. A material fact is "something which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell." [S & F Supply Co. v. Hunter](#), 527 P.2d 217, 221 (Utah 1974). In a short-form merger, the minority shareholder makes no determination of whether to buy or sell, and any representations made are thus irrelevant. Cf. [Isquith](#), 136 F.3d at 534-36 (citing cases holding that "there can be no suit under the securities laws by someone who has not made an investment decision, that is, who has not made a *choice*, a voluntary decision albeit one induced by the fraud, to buy or sell securities." (emphasis in original) (citations omitted)).

Closely related to a failure to show materiality is a failure to show causation of damages. In their complaint, Plaintiffs state that the actions described in Count 12 caused them to sustain damages. Pl. Complaint ¶ 189. As discussed above in Part II.B,

however, Plaintiffs fail to show that the short form merger caused them any specific harm given that Defendants could have effected a long-form merger at any time. Plaintiffs may show at trial that they were harmed by underlying breaches of fiduciary duty, but those are separate claims from the claims of Count 12.

For the foregoing reasons, the Court GRANTS Defendants' motion as to Count 12.

B. Count 11: Fraud in the Offer to Purchase and the Purchase of a Security in Connection with the Tender Offer

Defendants argue next that the seven Plaintiffs who did not sell their shares have no standing to bring the claims of Count 11 under [Utah Code Ann. § 61-1-22\(1\)](#). [Section 61-1-22\(1\)](#) provides that "[a] person who offers or sells a security in violation of [[§ 61-1-1](#)] is liable to the person selling the security to or buying the security from him...." [Section 61-1-22\(1\)](#) thus expressly gives standing to plaintiffs who buy or sell a security, but does not provide standing to other plaintiffs. The Utah Court of Appeals has affirmed that "[p]otential purchasers or mere offerees do not have a cause of action under [[Section 61-1-22\(1\)](#)]." [Levitz v. Warrington](#), 877 P.2d 1245, 1246 (Utah Ct.App.1994). Accordingly, the Court holds that the seven Plaintiffs who did not tender their shares have no standing to bring the claims listed in Count 11.

As to the remaining four Plaintiffs, the Court finds that their claims fail as to causation and damages for the reasons discussed in Part II.B. In addition, Defendants urge the Court to apply the principle discussed in Part II.C--that the federal securities laws do not reach claims grounded in breach of fiduciary duty--to Plaintiffs' state securities claims. While there are no Utah cases applying the principle in this manner, the Court finds support for its application in [section 61-1-27 of the Utah Code](#). [Section 61-1-27](#) provides that the "interpretation and administration of" the Utah Uniform Securities Act is to be coordinated with "related federal regulation." The Court therefore finds it appropriate to apply the principle to Plaintiffs' state securities claims.

*8 For all of the above reasons, the Court GRANTS Defendants' motion for summary judgment on Count 11.

V. FEDERAL AND STATE CONTROL PERSON LIABILITY

Defendants correctly assert that there can be no

control person liability once the underlying securities claims are dismissed. See City of Philadelphia v. Fleming Cos., Inc., 264 F.3d 1245, 1270-71 (10th Cir.2001) (dismissing claims for control person liability when underlying claims of primary liability were dismissed); Utah Code Ann. § 61-1-22(4) (stating that control person liability attaches to a person who controls "a seller or buyer liable under Subsection (1)"). Accordingly, Defendants' motion is GRANTED as to Counts 13 and 14.

VI. COMMON LAW CLAIM

Count 8 contains Plaintiffs' common law claim, which Plaintiffs have titled "Fraudulent Non-disclosure in Tender Offer and Merger Process." Pl. Complaint ¶¶ 160-65. In that Count, Plaintiffs allege that Defendants failed to disclose relevant and material facts regarding self dealing and conflicting interests, and that this non-disclosure proximately caused injury to Plaintiffs. *Id.* ¶ 162.

Defendants argue first that Count 8 must be dismissed as it applies to the tender offer and short-form merger. Defendants rely on arguments that have already been addressed in other parts of this order. Specifically, Defendants argue that any non-disclosure could not be considered material because the short-form merger would have occurred regardless of whether the minority shareholders assented. For the same reason, any non-disclosure in the short-form merger could not have caused a discrete injury to Plaintiffs. See *Brown v. Perrette*, 1999 Del. Ch. LEXIS 92, * 17-19 (holding that in cases where breach of fiduciary duty is alleged, if non-disclosure of the breach did not produce any independently remedial harm, a non-disclosure claim will fail for lack of injury causation). Similarly, any non-disclosure in the tender offer would not have proximately caused Plaintiffs' injury because Plaintiffs' cooperation was not needed to effectuate a cash-out of the minority shareholders and because Plaintiffs did not suffer any unique harm by being subjected to a short form, rather than long-form, merger.

Plaintiffs cannot maintain a claim for fraudulent non-disclosure where they cannot show materiality or causation of injury. See Armed Forces Ins. Exch. v. Harrison, 70 P.3d 35, 40 (Utah 2003) (The elements required to "bring a claim sounding in fraud are (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a

representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage." (quotation and citation omitted)). Because Plaintiffs cannot prove these necessary elements in this claim, the Court GRANTS Defendants' motion for summary judgment on Count 8.

CONCLUSION

*9 For the foregoing reasons, the Court GRANTS Defendants' motion as to all Counts.

IT IS SO ORDERED

Slip Copy, 2005 WL 2263950 (D.Utah)

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