IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE

JOHN MARKOW, PAUL NEE, and CAROL LAHIFF, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. N15C-06-152 WCC CCLD
SYNAGEVA BIOPHARMA CORP.,	)	
Defendant.	)	

Submitted: October 26, 2015
Decided: March 3, 2016

Defendant's Motion to Dismiss –DENIED

MEMORANDUM OPINION

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CARPENTER, J.

On June 15, 2015, Plaintiffs filed a class action Complaint against Defendant for breach of contract and breach of the implied covenant of good faith and fair dealing. Before the Court is Defendant's Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons articulated below, the Motion is denied.

FACTS

This contract dispute arises in connection with John Markow, Paul Nee, and Carol Lahiff's (collectively, "Plaintiffs") employment at Synageva Biopharma Corporation ("Synageva" or "Defendant"). Synageva is a biopharmaceutical company that specializes in researching, developing, and commercializing therapeutic products for patients suffering from rare diseases.[1] In February 2015, the Food and Drug Administration ("FDA") accepted Kanuma, Synageva's "flagship drug" used to treat lysomal acid deficiency, for priority review and set a target action date of September 8, 2015.[2] In anticipation of Kanuma's approval, the Company sought to "ramp up staffing in the first half of 2015."[3]

[1] Pls. Compl. ¶ 2.
[2] *Id*. ¶ 3.
[3] *Id*. ¶ 37.

Synageva's 2014 Equity Incentive Plan

To attract "key employees," Synageva offers "stock-based long-term incentive[s]" as part of its total compensation package.[4] Pursuant to the Company's 2014 Equity Incentive Plan ("EIP" or "the Plan"), Synageva grants eligible participants "[Incentive Stock Options ("ISOs")], Non-Qualified Options, Stock Grants and Stock-Based Awards."[5] Section 2 of the Plan provides that its purpose is "to encourage ownership of Shares by Employees and directors … *to attract* and retain such people, to induce them to work for the benefit of the Company… and to provide additional incentive for them to promote the success of the Company…."[6]

Section 4 of the EIP designates Synageva's Board of Directors ("the Board") as the Plan's "Administrator," except to the extent the Board opts to delegate this authority to its Compensation Committee.[7] So long as it exercises its power in a

[4] *Id.* ¶¶ 30-31 (citing Synageva's Annual Proxy Statement filed with the U.S. Securities and Exchange Commission in April 2014). These stock rights were also offered to certain directors and consultants of the Company and its affiliates in addition to key employees. *Id.*

[5] *Id.* ¶ 33 (quoting Section 2 of the Plan).

[6] *Id.* ¶¶ 30-33 (quoting EIP § 2) (emphasis added). In seeking shareholder approval of the EIP, Synageva also included in its proxy statement that the Company's "future success depends, in large part, upon [its] ability to maintain a competitive position in attracting, retaining and motivating key personnel." *Id.* ¶ 31. Synageva's shareholders approved the EIP at the June 4, 2014 annual meeting. *Id.* ¶ 32.

[7] *Id.* ¶ 35 (discussing EIP § 4 which states "[t]he Administrator of the Plan will be the Board of Directors, except to the extent the Board … delegates its authority to the [Compensation] Committee, in which case the Committee shall be the Administrator."). *See also* Def. Mot. to Dismiss, Ex. D [hereinafter "EIP"]. While the power to grant Stock Rights to Synageva directors and officers is exclusively reserved for either the Board or Committee, either body is permitted

manner consistent with the EIP and in accordance with certain tax objectives, the Administrator has broad authority, including the ability to "[s]pecify…terms and conditions upon which…Stock Rights may be granted."[8]

Plaintiffs' Employment Agreements

Throughout early 2015, each individual Plaintiff received an offer letter from Synageva in connection with their respective positions at the Company. The letters specified that the offers were for "at-will" employment and contained terms specific to each Plaintiff's salary, bonus opportunities, employee benefits, and options to purchase shares of the Company's common stock in accordance with the EIP.[9] Each offer expressly stated that it was contingent upon Plaintiff's (1) acceptance by a prescribed date, (2) agreement to start work "on or about" a prescribed date, (3) background check, (4) references, and (5) signing of Synageva's Non-Competition Confidential Information and Interventions Agreement no later than the agreed-upon start date.[10] To accept Synageva's offer of employment, Plaintiffs were requested to sign their respective offer letters and return them to Stephen Andre ("Andre"), the Company's Senior Vice President of Human Resources.[11]

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to "delegate all or any portion" of its remaining "responsibilities and powers to any other person selected by it." EIP § 4.

[8] EIP § 4.

[9] Def. Br. in Supp. of Mot. to Dismiss, Ex. A-C.

[10] *Id*.

[11] *Id*.

Prior to accepting their positions with the Company, the Plaintiffs allegedly each sought clarification from Synageva representatives regarding whether the shares pertaining to the Option Grants would be priced "at or near" their respective start dates.[12] The portion of the offer letters relevant to Plaintiffs' inquiry provides:

> *Subject to the approval of the Synageva Board of Directors*, the Company *will grant* you the following options to purchase shares of the Company's Common Stock pursuant to the Company's 2014 Equity Incentive Plan:
>
> *In connection with your employment* you *shall be granted* an Option Grant to purchase … shares of the Company's Common Stock. This Option Grant will vest 25% on the one year anniversary of your start date and the remaining options will vest equally on a monthly basis over the subsequent three (3) years as long as your employment at Synageva is continued.
>
> The exercise price for your options will be the fair market value of the Company's Common Stock *on the grant date* of such options.[13]

According to Plaintiffs, Defendant led each of them to believe that their shares would be priced "at or near" their respective hire dates.[14]

Although his offer letter is dated March 9, 2015,[15] Plaintiff John Markow, who had previously done consulting work for Synageva, is alleged to have been approached with an offer to join the Company as its Chief Compliance Officer as

[12] Pls. Compl. ¶ 7.
[13] Def. Br. in Supp. of Mot. to Dismiss, Ex. A-C (emphasis added). This provision is identical in each of the offer letters with the exception of the number of shares covered under each Plaintiff's Option Grant.
[14] Pls. Compl. ¶ 7.
[15] Def. Br. in Supp. of Mot. to Dismiss, Ex. A.

early as February 2015.[16] In connection with his role, Markow was offered 20,000 stock options.[17] On March 2, 2015, Markow contacted Andre in Human Resources to inquire about when the options would be priced and Andre allegedly informed him that the options would be priced at the next Board meeting, which was set for March 11, 2015.[18] Following this exchange, Markow accepted the offer on March 5, 2015 and commenced employment at Synageva on March 23, 2015, at which point the Company's stock price closed at $106.04 per share.[19]

Synageva offered Plaintiff Paul Nee the position of Senior Director of Business Analytics in a letter dated January 26, 2015, which he electronically countersigned and accepted on January 28, 2015.[20] As part of the offer, Nee would be granted an Option to purchase 10,000 shares of the Company's common stock in connection with his employment.[21] Sometime prior to accepting the position, Nee claims he received assurance from Andre that his shares would be priced according to his start date.[22] According to Nee, it was the "upside potential from

[16] Pls. Compl. ¶¶ 38-39.
[17] Def. Br. in Supp. of Mot. to Dismiss, Ex. A.
[18] Pls. Compl. ¶¶ 40-42.
[19] *Id*. ¶ 42.
[20] *Id*. ¶ 48.
[21] Def. Br. in Supp. of Mot. to Dismiss, Ex. B.
[22] Pls. Compl. ¶ 50.

the equity portion of his offer" that induced him to work for the Synageva.[23] On Nee's start date, April 13, 2015, the Company's stock closed at $103.11.[24]

Plaintiff Carol Lahiff's offer letter for the position of Synageva's Director of Revenue is dated March 20, 2015.[25] The letter provided that she would be granted an Option to purchase 5,000 shares of Company stock in connection with her employment. Lahiff maintains Chrystine Lake, Synageva's Recruiting Specialist, confirmed in an email dated March 19, 2015 that her shares would be priced "at/on hire date."[26] Lahiff accepted Synageva's offer of employment on March 22, 2015 and started at the Company on April 21, 2015, when the Company's stock price closed at $106.24 per share.[27]

The Alexion Merger

Beginning sometime around February 2015, Synageva began discussing a potential merger with Alexion.[28] After months of negotiations, the companies executed a Merger Agreement on May 5, 2015 whereby Alexion would initiate an exchange offer to purchase all Synageva's issued and outstanding common stock

[23] *Id*. ¶ 51.
[24] *Id*. ¶ 49.
[25] Def. Br. in Supp. of Mot. to Dismiss, Ex. C.
[26] Pls. Compl. ¶ 53.
[27] *Id*. ¶¶ 52, 54.
[28] *Id*. ¶ 55; Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 4-5.

for a total implied value of $230.00 per share.[29] The following day, Synageva and Alexion issued a joint press release publicizing the merger.[30] As a result of the announcement, Synageva's stock price more than doubled, as reflected by its closing at $203.39 per share on May 6, 2015 from $95.87 per share on May 5, 2015.[31]

In the months leading up to the merger, Synageva's Board held approximately thirteen meetings to discuss the Alexion transaction.[32] While it addressed a number of employee compensation matters throughout that period, the Board did not price the Option Grants prior to approving the Alexion merger.[33] Rather, on June 2, 2015, Andre sent an email to Synageva's employees notifying them that, "[a]s promised in [their] offer letter[s], the Board …ha[d] granted [their] new hire options… on May 22, 2015 at a strike price of $218.11, …the fair market value on the date of grant."[34] The $218.11 reflected Synageva's closing stock price on May 22, 2015, the highest it had been in the month of May.[35] The email also provided:

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[29] Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 4-5 (alleging that the offer was to purchase Synageva common stock for $115.00 in cash and 0.6581 shares of Alexion common stock for every share of Synageva stock owned).
[30] Pls. Compl. ¶¶ 69-71.
[31] *Id*.
[32] *Id*. ¶¶ 55-68.
[33] *Id*. ¶ 68.
[34] *Id*. ¶ 74.
[35] *Id*. ¶ 75.

> These options will be treated the same as all Synageva employee options and will vest immediately upon the close of the merger …. The options will be cancelled and you will receive approximately the value between your strike price and $230, in cash and Alexion stock as described in the merger agreement.[36]

The following day, Synageva sent a second email urging employees to accept the options as soon as possible due to the "time sensitive" nature of the pending merger.[37] The Board's pricing decision is alleged to have effectively "retracted millions of dollars in compensation bargained for by the Plaintiffs and the Class."[38]

As a result, Plaintiffs, individually and on behalf of similarly situated Synageva employees, filed a class action Complaint against Synageva on June 15, 2015. Count I alleges Defendant breached the Employment Agreements by "purposely or unreasonably" waiting until after the merger announcement to price their stock options, thereby "significantly eroding the value of Plaintiffs' and the Class' bargained-for compensation."[39] Count II alleges Defendant breached the implied covenant of good faith and fair dealing in the Employment Agreements by exercising its discretion to price the options unreasonably and in bad faith and engaging in extraordinary conduct "to ensure the Plaintiffs and the Class would not fully enjoy the benefit of their equity bargain."[40] Defendant responded by filing the instant Motion to Dismiss the Complaint with prejudice on August 7, 2015

[36] *Id*. ¶ 74.
[37] *Id*. ¶ 78.
[38] *Id*. ¶ 76.
[39] *Id*. ¶¶ 101, 103.
[40] *Id*. ¶ 107.

pursuant to Superior Court Civil Rule 12(b)(6). The Court now turns to the substance of that Motion.

STANDARD OF REVIEW

In Delaware, "the interpretation of a contract is a question of law suitable for determination on a motion to dismiss."[41] Pursuant to Superior Court Civil Rule 12(b)(6), the Court will dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted."[42] Dismissal is limited to those cases in which the Court determines "with *reasonable certainty* that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[43] In deciding Defendant's motion, the Court must assume as true the well-pleaded allegations of the Complaint,[44] and afford Plaintiffs "the benefit of all reasonable inferences that can be drawn from [their] pleading."[45]

DISCUSSION

Defendant moves to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) on the grounds that (1) their breach of contract claim is unsupported by the

[41] *See L&L Broad. LLC v. Triad Broad. Co., LLC*, 2014 WL 1724769, at *3 (Del. Super. Apr. 8, 2014).
[42] *See* Super. Ct. Civ. R. 12(b)(6).
[43] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3 (Del. Super. Apr. 16, 2014) (emphasis added) (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[44] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996). *See also Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995) (providing that complaint is "well-plead" if it puts opposing party on notice of claim brought against it); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under "Delaware's judicial system of notice pleading, a plaintiff need not plead evidence" but must "only allege facts that, if true, state a claim upon which relief can be granted").
[45] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (providing also that the Court is not required to blindly accept all allegations or draw all inferences in the plaintiff's favor).

express, unambiguous, and integrated language of the Employment Agreements;[46] and (2) the breach of implied covenant claim impermissibly attempts to imply a term –that the options be priced by hire date—which contradicts the express language of the Employment Agreements.[47] The Court will address the parties' contentions with respect to each claim below.

I. Breach of Contract

To survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must allege (1) the existence of a contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damage.[48] Here, Plaintiffs allege Defendant breached the Employment Agreements by failing to price their stock options at or near their hire dates, thereby depriving them of their bargained-for compensation. As a result, Plaintiffs seek damages equal to the difference between Synageva's closing stock price on their respective hire dates and the strike price of $230.00 multiplied by the number of stock options each employee was awarded.[49]

The parties do not dispute, for purposes of the present motion, the sufficiency of Plaintiffs' allegations with respect to the elements of an existing contract and, if proven, the damages that would flow from the breach. Rather, they

[46] Def. Br. in Supp. of Mot. to Dismiss, at 8-21.
[47] *Id*. at 23.
[48] *See VLIW Tech., LLC*, 840 A.2d at 612.
[49] Pls. Compl. ¶¶ 96-103; Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 7.

disagree as to whether Plaintiffs have adequately alleged that Defendant breached the Employment Agreements. In other words, does the Complaint set forth facts reasonably susceptible of proving that Defendant was obligated to price Plaintiffs' stock options at or near their start dates such that its conduct in doing otherwise amounted to a breach of contract?

In addressing issues of contract interpretation, the Court aims to determine the parties' shared intent, referring first to "the relevant document, read as a whole, in order to divine that intent."[50] The Court will interpret contract terms according to their "common or ordinary meaning" and contract provisions as a whole, "giving effect to each and every term…in a manner that does not render any provision 'illusory or meaningless.'"[51] If contractual language "is plain and clear on its face, *i.e.*, it…conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent."[52] Indeed, the parol evidence rule will prevent "the admission of evidence extrinsic to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that

[50] *See MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *5 (Del. Ch. Dec. 30, 2010) (quoting *Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at *6 (Del. Ch. June 13, 2008)). *See also Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003) (noting that that Court must first look to the entire agreement to see if the parties' intent can be discerned from the express words used therein); *Concord Mall, LLC v. Best Buy Stores, L.P.*, 2004 WL 1588248, at *3 (Del. Super. July 12, 2004).

[51] *See Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *6-7 (Del. Ch. Dec. 22, 2010) ("As part of that review, the court interprets the words 'using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise.'" (quoting *Schuss*, 2008 WL 2433842, at *6)).

[52] *See Choupak v. Rivkin*, 2015 WL 1589610, at *18 (Del. Ch. Apr. 6, 2015) (quoting *City Investing Co. Liquid. Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del.1993)).

contract."[53] If, however, the terms are ambiguous, evidence extrinsic to the document may be considered to determine the parties' intentions.[54] Ambiguity exists "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." [55] At the motion to dismiss stage, the Court "cannot choose between two differing reasonable interpretations of ambiguous provisions."[56] In other words, "[d]ismissal is proper only if the defendant['s] interpretation is the *only* reasonable construction as a matter of law."[57] "[W]hen parties present differing—but reasonable— interpretations of a contract term, the Court turns to extrinsic evidence to understand the parties' agreement. Such an inquiry cannot proceed on a motion to dismiss."[58]

Here, the parties agree that the "Employment Agreements," as referred to for purposes of this litigation, encompass, at a minimum, the terms of the executed

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[53] *See Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012) ("The policy underlying that rule is cautionary: to avoid upsetting the sanctity of fully integrated written agreements.").
[54] *See AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008).
[55] *See L&L Broad. LLC*, 2014 WL 1724769, at *3 (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)) (internal quotation marks omitted).
[56] *See VLIW Tech., LLC*, 840 A.2d at 615 (Del. 2003) ("[F]or purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party.").
[57] *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).
[58] *Renco Grp., Inc. v. MacAndrews AMG Hldgs., LLC*, 2015 WL 394011, at *5 (Del. Ch. Jan. 29, 2015) (citing *Appriva S'holder Litig. Co., LLC v. EV3, Inc*., 937 A.2d 1275, 1291 (Del. 2007). *See also Eisenmann Corp. v. Gen. Motors Corp*., 2000 WL 140781, at *21 (Del. Super. Jan. 28, 2000) ("This Court, in the context of a Motion to Dismiss, will not foreclose the way for the light that reveals the true intention of the transaction, especially if the instrument does not appear to contain the entire agreement between the parties." (citing *Norfolk Southern Bus Corp. v. Virginia Dare Transp. Co.,*159 F.2d 306, 309 (4th Cir.1947) *cert. denied,* 331 U.S. 827 (1947))).

offer letters and the EIP.[59] Defendant's Motion to Dismiss urges the Court to look no further than the four corners of these documents as the source of Synageva's obligations to Plaintiffs. Defendant contends the Agreements are fully integrated and unambiguously "condition[] the timing of the Option Grants on…[B]oard approval."[60] Plaintiffs counter that the express language of Agreements, as characterized by executed offer letters and the EIP, actually supports their position that the Board was obligated to price the options at or near their start dates. However, Plaintiffs reject the characterization of these two documents as a "fully integrated" contract and ask the Court to consider extrinsic evidence of the parties' shared intent.

Notably, both parties rely on the express language of the Agreements as supporting their respective position. Defendant focuses on the line in the offer letters providing "[s]ubject to the approval of the Synageva Board of Directors, the Company will grant you the following options to purchase shares…pursuant to the Company's 2014 Equity Incentive Plan."[61] Defendant contends a requirement that options be granted at or near Plaintiffs' hire dates would rob the Board of its discretion "to approve."[62] From Plaintiffs' perspective, it is reasonable to interpret

[59] Def. Br. in Supp. of Mot. to Dismiss, at 8-21.
[60] *Id*. at 8-21; Def. Reply Br. at 4-9.
[61] Def. Br. in Supp. of Mot. to Dismiss, Ex. A-C.
[62] Defendant also emphasizes that the Agreements do not mention a specific grant date, but do expressly require other conduct be completed by specific dates such that the drafter's omission of

the language "*[i]n connection with your employment*, you *shall* be granted the Option" as imposing an obligation upon the Board to grant the Options coincident to the start of Plaintiffs' employment or indicating that the decision to grant the Options had already been made by the Board to entice their acceptance of employment.[63] Plaintiffs argue this language would be rendered meaningless if the Board had unfettered discretion because it could select grant dates at any time or not at all.[64] Rather, they construe the Board's discretionary power as extending to the initial decision of whether to approve the contents of each Plaintiff's offer. According to Plaintiffs, this construction also aligns with the EIP's objective of using stock incentives to attract and retain certain employees.[65]

Ultimately, the Court cannot conclude Defendant's interpretation is the only reasonable construction of the Employment Agreements. The provision addressing the Option Grants in the offer letters alone is "fairly susceptible to different interpretations."[66] While Defendant is correct that, generally, one would reasonably construe the phrase "[s]ubject to the approval of the …Board" as one

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the former must be construed as unambiguous retention of discretion with respect to grant dates. *Id*. at 20.

[63] Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 8-10. Plaintiffs also contend their construction is consistent with the Agreements' vesting provision, which states that the Option Grant would vest "25% on the one year anniversary of your *start date* and the remaining options will vest equally on a monthly basis over the subsequent three (3) years *as long as your employment at Synageva is continued*." *Id*. at 10 (quoting offer letters).

[64] *Id*. at 9-10, 12.

[65] *Id*. at 12 (referring to EIP ¶ 2 discussed *supra*).

[66] *See L&L Broad. LLC*, 2014 WL 1724769, at *3.

conferring discretion, the use of the word "shall" in the next sentence with respect to the same subject matter, granting stock options, does just the opposite. This presents an ambiguity as to *when*, if ever, the Board became obligated to grant the options and fix the underlying stock price. At this juncture, the Court cannot say Plaintiffs are unreasonable in interpreting "[i]n connection with your employment, you *shall* be granted the Option" as requiring the Board to price their stock options at or near the start of their employment. Nor does consideration of the language in the EIP compel a different result. Although the Plan, like many equity plans, gives the Board broad discretion over determinations affecting Company stock, it also imposes certain limitations on that discretion.[67] Confronted with conflicting yet reasonable constructions of an ambiguous Agreement, the Court finds Defendant's Motion to Dismiss with respect to Plaintiffs' breach of contract claim must be denied.[68]

[67] For example, one limitation is that the Board cannot set the exercise price of the shares lower than the FMV as of the Option grant date. EIP § 30. For this language to operate as a limit in any sense of the term there would presumably have to be an established grant date for the Board to adhere to – it could not simply be determined arbitrarily. Indeed, it appears that once the Board sets an exercise price, it is precluded from reducing that price without shareholder approval, except in the context of certain corporate transactions. EIP § 23. While it would appear to the Court that Section 23 of the EIP may be relevant given the Alexion merger, neither party has raised its applicability thus far.

[68] *See VLIW Tech., LLC*, 840 A.2d at 615 ("[F]or purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party."). *See also Renco Grp., Inc.*, 2015 WL 394011, at *5 (citing *Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1291).

II. Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendant next urges the Court to dismiss Plaintiffs' breach of the implied covenant claim because (1) the term sought to be implied—timing of the Option Grants—impermissibly contradicts express provisions in the Agreements giving the Board discretion to make such determinations;[69] and (2) Plaintiffs' reasonable expectations were met under the Agreements.[70]

In Delaware, the implied covenant of good faith and fair dealing inheres in every contract, including those governing employment.[71] The covenant requires parties to a contract "to refrain from arbitrary or unreasonable conduct" which deprives a party "from receiving the fruits of the bargain."[72] To state a claim for breach of the implied covenant, a plaintiff must allege: (1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damage.[73] Importantly, the covenant "seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their

[69] Def. Br. in Supp. of Mot. to Dismiss, at 23-25.
[70] Def. Reply Br., at 19.
[71] *See Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005).
[72] *See Narrowstep, Inc.*, 2010 WL 5422405, at *10 (quoting *Kurdova v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888-89 (Del. Ch. 2009)).
[73] *See Wiggs v. Summit Midstream P'rs, LLC*, 2013 WL 1286180, at *9 (Del. Ch. Mar. 28, 2013) (citing *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del.Ch. Nov.10, 1998)). "General allegations of bad faith conduct are not sufficient." *Kuroda*, 971 A.2d at 888.

original negotiations if they had thought to address them."[74] It will not be utilized to create "free-floating dut[ies] ... unattached to the underlying legal document" and is traditionally invoked only where the contract is silent with respect to the issue in dispute.[75] More recent case law reflects a willingness to allow implied covenant claims to survive, despite the presence of relevant contractual language, where a defendant failed to "uphold the plaintiff's reasonable expectations under that provision"[76] or failed to exercise discretion under the contract *reasonably*.[77]

Here, Plaintiffs allege the Employment Agreements were premised on Defendant's implied contractual obligation to price the Option Grants at or near their start dates.[78] According to Plaintiffs, the Board acted unreasonably and in bad faith by purposely waiting until after the merger was announced to price the Option Grants because it did so "knowing the announcement would cause [Synageva's] stock price to shoot up, in order to save Alexion tens of millions of

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[74] *See Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del.2013) (quoting with approval *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440–42 (Del. Ch.2012), *rev'd in part on other grounds*, 68 A.3d 665 (Del.2013)). *See also Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del.2013) ("[A] party may only invoke the protections of the covenant when it is clear from the underlying contract that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter.") (internal quotation omitted).

[75] *See Charlotte Broad., LLC*, 2015 WL 3863245, at *6 (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del.2005)).

[76] *See Renco Grp., Inc.*, 2015 WL 394011, at *6 (citing *Gerber*, 67 A.3d at 422 (holding an implied covenant claim sufficient where plaintiff possessed "a reasonable contractual expectation that the [d]efendants would properly follow the [contract's] substitute standards")).

[77] *See Black Horse Capital, LP v. Xstelos Hldgs, Inc.*, 2014 WL 5025926, at *30 (Del. Ch. Sept. 30, 2014) (emphasis added) (quoting *Gerber*, 67 A.3d at 419)).

[78] Pls. Compl. ¶ 107; Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 22.

dollars in the merger and secure their post-merger employment positions and/or financial windfalls."[79] Such conduct, Plaintiffs contend, frustrated their reasonable expectation of receiving "the fair value of their options, as bargained for under their employment agreements."[80]

The Court finds these allegations sufficient, at this juncture, to state a claim for breach of the implied covenant of good faith and fair dealing. Plaintiffs have alleged that the Board of Directors commenced merger discussions with Alexion in February 2015, not long before they received their offers of employment. Plaintiffs also allege Defendant induced their acceptance of employment by representing certain price dates for Option Grants and then purposely delayed pricing the stock options in contravention of those representations at Plaintiffs' expense.[81] Additionally, the Complaint cites Defendant's SEC filings as illustrating that it acted unreasonably in failing to price their options at or near

[79] Pls. Compl. ¶¶ 81-85; Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 23. In support of their claim, Plaintiffs also emphasize that the Board, in its meeting just prior to announcing the merger, granted and priced 43,200 additional options to Synageva's Chief Executive Officer when the strike price was $95.87, purportedly yielding the CEO approximately $4.5 million in additional compensation.

[80] Pls. Compl. ¶ 108 ("The Board had ample opportunity to comply with the terms of the Employment Agreements and price the Option Grants – it met 13 times before the Merger was announced, yet declined to take any affirmative step to price these options."); Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 23-24.

[81] Pls. Answering Br. in Opp'n to Def. Mot. to Dismiss, at 24 (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101-02 (Del. 1992) ("An employer acts in bad faith when it induces another to enter into an employment contract through actions, words, or the withholding of information, which is intentionally deceptive in some way material to the contract.")).

their start dates, because it had done so for prior employees.[82] Thus, even if Plaintiffs fail to prove Defendant's actions amounted to a breach of contract, it is reasonably conceivable that they could demonstrate Defendant exercised any discretionary power with respect to the timing of the Option Grants unreasonably. Defendant's Motion to Dismiss Plaintiffs' implied covenant claim is also denied.

CONCLUSION

For the reasons set forth above, the Motion to Dismiss is DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[82] Pls. Compl. ¶¶ 91-94.