IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL CHOUPAK and SERGUEI SOFINSKI, Plaintiffs, v. VLADIMIR RIVKIN, Defendant.	)	C.A. No. 7000-VCL
VLADIMIR RIVKIN, Counterclaim Plaintiff, v. MICHAEL CHOUPAK and INTERMEDIA.NET, INC., Counterclaim Defendants.	)	

MEMORANDUM OPINION

Date Submitted: March 2, 2015
Date Decided: April 6, 2015

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LASTER, Vice Chancellor.

In early 2000, plaintiff Michael Choupak promised defendant Vladimir Rivkin that he would receive 4% of the equity of Choupak's start-up company. Later in 2000, Choupak signed a stock option agreement granting Rivkin an option for 2,000,000 shares that would vest over four years. In 2001, Choupak permitted Rivkin and other senior employees to exercise all of their options and pay the strike price with unsecured notes. Rivkin received 2,000,000 shares of common stock, equal to 4.4% of the equity.

In 2008, Rivkin needed cash, and he sold his shares for $300,000 to Choupak and another executive, plaintiff Serguei Sofinski. In 2011, Choupak sold his company to Oak Hill Capital Partners for $127,500,000 (the "Oak Hill Merger"). Rivkin wanted some of that money. He dug up his employment agreement and his original stock option agreement and noted that they referred to shares of "preferred stock" rather than "common stock." He wrote to Choupak and asserted that he had never received shares of preferred stock representing 4% of the equity. He purported to exercise his option for preferred stock and demanded that Choupak either issue him the shares or turn over 4% of the proceeds from the Oak Hill Merger. He also accused Choupak of defrauding him when purchasing his shares in 2008.

Choupak and Sofinski filed this lawsuit. They sought declarations that Rivkin received more than 4% of the equity when he was issued his shares of common stock, that Rivkin never had a right to an additional 4% of the equity in the form of shares of preferred stock, and that they validly purchased Rivkin's shares in 2008 without engaging in fraud. Rivkin responded with counterclaims and third party claims, the gist of which was that Rivkin should get his preferred stock or money damages.

This decision enters judgment against Rivkin on all counts and shifts fees against him under a contractual provision in Rivkin's employment agreement. Separately, in light of the numerous and striking problems with Rivkin's testimony, his fabrication of critical documents, and his discovery misconduct, this decision shifts fees against him under the bad faith exception to the American Rule.

I. FACTUAL BACKGROUND

Trial took place on January 21, 2015. The following facts were proven by a preponderance of the evidence.

A. Choupak Founds Intermedia.

In 1993, Michael Choupak founded Intermedia[1] to provide website hosting services to local businesses in Minneapolis. Today, Intermedia is a successful national provider of cloud-based, business-class email services.

In 1995, during the early stages of the dot-com era, Choupak moved the Company's operations to Palo Alto. Two years later, Choupak hired Sofinski, a hosting manager, and Constatin Filin, a software engineer, to help the Company transition its

[1] Choupak formed Intermedia as a Minnesota corporation under the name Intermedia, Inc. In 1999, he changed the name to Intermedia.NET, Inc. In January 2008, Choupak formed a Delaware corporation called Intermedia.net, Inc., and in October 2008, he merged the Minnesota entity into the Delaware corporation. The merger was solely for purposes of reincorporation. The differences between the entities are not material to this case, so this decision refers to "Intermedia" or the "Company." The decision also glosses over other immaterial details. For example, the Minnesota corporation had articles of incorporation, but the Delaware corporation has a certificate of incorporation. This decision refers to both interchangeably as the "Charter."

business from websites to email services. Cash was tight, and stock was part of Silicon Valley's culture, so Choupak promised stock options to Sofinski and Filin.

B. Rivkin Joins Intermedia.

In late 1999, Choupak met Rivkin, who was working as a real estate broker. Rivkin had recently graduated from law school, and Choupak thought he could help with various projects at Intermedia, including (i) organizing and cleaning up the corporate books and records, (ii) preparing a stock option plan, (iii) resolving a dispute with a former employee, and (iv) raising capital. Choupak hoped to delegate these tasks to Rivkin and others so he could focus on expanding Intermedia's business.

Rivkin had not yet passed the bar (he never did). He told Choupak that in California, passing the bar was not a prerequisite to practicing law in-house. That representation was inaccurate.[2]

In March 2000, Rivkin started work. In an email sent to all employees on March 13, Choupak welcomed Rivkin, stating: "I should have made this announcement two

[2] "No person shall practice law in California unless the person is an active member of the State Bar." Cal. Bus. & Prof. Code § 6125 "Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar . . . is guilty of a misdemeanor. . . ." *Id.* § 6126(a). "It is well settled in California that 'practicing law' means more than just appearing in court. [T]he practice of the law ... includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be []pending in a court." *Estate of Condon*, 65 Cal. App. 4th 1138, 1142 (Cal. Ct. App. 1998) (internal quotation marks omitted). Rivkin prepared legal instruments and contracts, held himself out as an attorney, and provided advice to Choupak on legal matters. *See, e.g.*, JX 14; JX 24; JX 25; JX 26.

weeks ago before you had a chance to meet or speak with Gregg Eyman and Vladimir Rivkin. Both are joining Intermedia.NET this month." JX 14.

Because of Intermedia's financial limitations, Choupak and Rivkin agreed that Rivkin would work on a part-time, as-needed basis. In return for his services, Rivkin would receive 4% of the Company's equity, and his 4% interest would not be diluted by subsequent issuances. At the time, neither of them understood how anti-dilution protection worked; they just knew Rivkin would not receive less than 4% of the equity. Intermedia paid Rivkin a token salary of $1 per month, because Rivkin believed that he could obtain superior tax treatment for his equity if he received nominal cash compensation as an employee. Choupak told Rivkin that any more significant cash compensation was "a future topic to be discussed once we have the first round completed (money in the bank)." JX 38.

In July 2000, Rivkin prepared an employment agreement for himself using the Company's standard form as a template. JX 43 (the "Employment Agreement"). Rivkin backdated it to March 1, 2000, reflecting when he started at Intermedia. Rivkin added a new section to document his agreement with Choupak about equity compensation:

> Employee shall receive options to purchase 4% of the company's *preferred stock* at a price of $00.15 per share, vested over a period of four years. The vesting shall be on monthly basis, and occur on the first of each month, starting on March 1st, 2000. Anti-Dilution shall apply until initial public offering or acquisition of the Company by another private or public entity. The provisions of the stock option agreement and stock option plan shall govern the stock option benefit(s). In case company re-incorporates, merges or uses another instrument to change corporate form, employee shall be issued equivalent percentage of stock from the new entity, resulting from the re-incorporation, merger or other change of form instrument.

JX 43 § 5(e) (emphasis added).

Section 5(e) spoke of "preferred stock" without providing any details. It did not identify a class or series of preferred stock, and there were no references to rights, powers, preferences, limitations, or other features. At the time, Intermedia was not authorized to issue preferred stock. Although Choupak later amended the Charter to authorize blank check preferred, he never designated any particular series of preferred stock, and no shares of preferred stock were ever issued. The Employment Agreement referenced a security that did not exist and failed to specify in what ways the non-existent security would be "preferred" over the common stock.

Similar problems afflicted the term "Anti-Dilution." The Employment Agreement did not include any provisions to implement that general concept. Anti-dilution comes in multiple forms, with weighted-average and full-ratchet protection being the most common. When stock option agreements, warrants, certificates of designation, and other corporate documents provide for anti-dilution protection, they establish triggering events, formulas for the calculations, and implementing procedures. With the Employment Agreement, there was no way to determine how the anti-dilution concept would operate.

The lack of detail rendered the terms "preferred stock" and "anti-dilution" ambiguous. Having considered the evidence, I find that by using these terms, Rivkin tried to document his right to receive 4% of Intermedia's equity and the fact that his ownership percentage would not drop below the 4% figure. By using the term "preferred stock," Rivkin contemplated a stock that had a preference in the form of anti-dilution protection. By using the term "Anti-Dilution," he sought to specify the nature of the preference. At

trial, Rivkin could not name any other right, power, or preference that he thought the preferred stock had. Tr. 81-83.

Choupak signed the Employment Agreement without focusing on the references to preferred stock and anti-dilution. He trusted Rivkin, and he often signed documents that Rivkin presented without paying much attention. Choupak acknowledged that he remained responsible for what he had signed.

C. The Stock Option Plan

One of Rivkin's tasks was to prepare a stock option plan for Intermedia. Having just graduated from law school, Rivkin did not have the expertise for this task, so he turned to the Silicon Valley Law Group ("SVLG").

At Rivkin's request, SVLG prepared three sets of documents: (i) a stock option plan called the 2000 Stock Option Plan (the "2000 Plan"), (ii) a set of form documents called for by the 2000 Plan, including an employee stock option agreement and an exercise notice, and (iii) a third document called an "Executive Stock Option Agreement." The first two were what Choupak asked Rivkin to create. The Executive Stock Option Agreement was a special agreement Rivkin wanted for himself.

Between May and November 2000, the documents went through many drafts. As drafted by SVLG, all of them contemplated options for common stock. The final version of the Executive Stock Option Agreement, however, purported to grant Rivkin an option for preferred stock. Rivkin made this change to the final version. His Employment Agreement spoke of preferred stock, and he edited the final version to conform to that

reference. Because the Executive Stock Option Agreement mentioned preferred stock, this opinion refers to it as the "Preferred Stock Option."

On November 20, 2000, Choupak approved the 2000 Plan. He also signed the Preferred Stock Option. As with the Employment Agreement, Choupak did not focus on the reference to preferred stock or think about its implications.

On the same day, acting on Rivkin's recommendation, Choupak amended the Charter to authorize 70 million shares of common stock and 10 million shares of preferred stock. The amendment did not authorize any specific class or series of preferred stock. It merely authorized blank check preferred. The Intermedia board of directors never designated any particular series of preferred stock. The Company never issued any shares of preferred stock. No one ever received any shares of preferred stock.

D. The Capitalization Table

Beginning in November 2000, Rivkin worked with SVLG to create and maintain a capitalization table for Intermedia (the "Cap Table"). For each employee on the list, the Cap Table identified the individual's date of hire, salary, the number of shares that the employee owned or had an option to purchase, and the exercise price for the option.

Rivkin maintained the Cap Table from 2000 to 2002. The early versions listed Rivkin's date of hire as March 1, 2000, consistent with his Employment Agreement and historical events. In later versions, Rivkin moved his date of hire back to November 20, 1999, which brought forward the vesting of his options and lowered his exercise price.

Notwithstanding Rivkin's manipulation of his hire date, every version of the Cap Table listed Rivkin as owning an option to purchase 2,000,000 shares of common stock.

There is not one reference in any version of the Cap Table to Rivkin having an option to purchase preferred stock, much less an option to purchase 2,000,000 shares of preferred stock *in addition to* an option to purchase 2,000,000 shares of common stock.

E. Rivkin And Other Senior Employees Acquire Common Stock.

Early in 2001, Choupak decided to let his senior employees exercise all of their options. To facilitate the exercise, Choupak decided that the senior employees could pay the strike price by executing unsecured notes. On February 2, 2001, Rivkin informed SVLG of Choupak's decision and instructed the firm to prepare the necessary documents. Rivkin did not mention to SVLG that he had an option for preferred stock.

Rivkin did notice that Filin, who had started work in 1997, had an exercise price of $0.009 per share, the lowest of any employee. Rivkin told SVLG that he should have the same exercise price "due to [his] starting around that time, and not becoming 'full time' until [November 20, 1999]." JX 86. Every part of that statement was false: Rivkin did not start work in 1997, he did not start full-time in November 1999, and he should not have had an exercise price of $0.009 per share.

To document the exercise, each senior employee executed a Restricted Stock Purchase Agreement (the "RSPAs"), a promissory note for the exercise price, and a security agreement which provided that the shares would revert to Intermedia if the note was not timely paid. The notes required repayment on or before February 27, 2003.

The RSPAs were given effective dates of February 27, 2001. The recitals to each agreement referenced the employee's original hiring date and an oral agreement to grant stock options as of that date. Except for Rivkin's RSPA, the recitals accurately reflected

the hiring dates on the Cap Table. Rivkin's RSPA referenced a fictitious hiring date of November 20, 1997. JX 92. That date was false: Rivkin was not an Intermedia employee in 1997. He picked that date to give himself the lowest possible exercise price. Thanks to the lower exercise price, Rivkin executed a note for $18,000, rather than a note for $300,000 at his actual exercise price of $0.15 per share.

On February 27, 2001, Rivkin received a certificate for 2,000,000 shares of Intermedia common stock. The shares represented 4.4% of Intermedia's outstanding equity, more than the 4% Choupak had promised him.

Even though Choupak permitted Intermedia's senior employees to exercise all of their options and pay with an unsecured note, Rivkin did not attempt to exercise an option for 2,000,000 shares of preferred stock. At trial, Rivkin could not explain why, assuming he also held the Preferred Stock Option for another 4% of the equity, he would not have exercised it at the same time on the favorable terms Choupak was offering.

F. Rivkin Loses Interest In Intermedia But Remains Friends With Choupak.

By late 2001, after the dot-com bubble burst, Rivkin lost interest in Intermedia. He had always worked from home, but he visited the office frequently to meet with Choupak and have him sign documents. With the prospect of equity-based riches receding, Rivkin's visits became rare. Eventually he stopped showing up, choosing to concentrate on the real estate business that he owned with his father.

Although Rivkin was no longer working for Intermedia, he and Choupak remained friends. They met for meals and vacationed together. Rivkin also continued to draw his

$1 per month salary. No one noticed that automated payment until 2009, when William Gomes, the Company's CFO, learned of it and stopped it.

G. Rivkin Sells His Common Stock To Choupak And Sofinski.

In 2008, the real estate crash put Rivkin under financial duress. His home was in foreclosure, and several of his real estate properties were underwater. To generate cash, Rivkin asked Choupak to consider buying his 2,000,000 shares of common stock. But Rivkin discovered a problem: he had not repaid his promissory note by February 27, 2003, so his shares had reverted to Intermedia. Rivkin explained the problem to Choupak and noted that Intermedia's other senior employees likely faced the same difficulty. To remedy the issue, Choupak signed new stock purchase agreements that superseded the RSPAs. The replacement agreements included substitute promissory notes that were not due until May 1, 2009. The new documents were backdated with an effective date of May 1, 2001, but Choupak signed them in July 2008.

Rivkin's new stock purchase agreement changed the date on which he purportedly started at Intermedia and received an oral promise of options. The original RSPA recited the date of that event as November 20, 1997. His replacement agreement said it occurred on December 15, 1997. The dates in the replacement agreements for the other employees matched their RSPAs. The discrepancy in Rivkin's agreements resulted from his practice of manufacturing fictitious dates for ahistorical events.

With the replacement agreement in place, Rivkin sold his Intermedia common stock to Choupak and Sofinski for $300,000. Choupak purchased 1,500,000 shares, and Sofinski purchased 500,000. The value Rivkin received was actually $318,000, because

Choupak never insisted that Rivkin pay off his $18,000 note. The value Rivkin received was arguably $600,000, because Rivkin's note should have been for $300,000.

The parties documented the transaction in a written stock transfer agreement. JX 132 (the "Stock Transfer Agreement"). Rivkin executed an affidavit of lost stock certificate. The affidavit was false: Rivkin still had his stock certificate, which he produced in this litigation.

H. The Oak Hill Merger

In 2010, Oak Hill and Choupak had preliminary discussions about Intermedia. In March 2011, the discussions resumed. On May 5, Intermedia and Oak Hill entered into a merger agreement. JX 149 (the "Merger Agreement").

The Merger Agreement reflected that Intermedia only issued common stock. In Section 4.5(a), Intermedia represented that as of the date of the Merger Agreement,

> (i) 45,002,972 shares of Common Stock are issued and outstanding and held by Company Stockholders as reflected in Section 4.5(a) of the Disclosure Schedule, (ii) 14,528 shares of Common Stock have been issued and are held in the treasury of the Company, and (iii) the Company has not issued any preferred stock . . . .

Id. § 4.5(a). Schedule 4.5(a) did not identify Rivkin as a stockholder and did not list anyone as holding preferred stock. *See id.* at Sched. 4.5(a).

The Merger Agreement likewise reflected that Intermedia had not issued any options to purchase preferred stock. In Section 4.5(c), Intermedia represented that

> [e]xcept pursuant to the Stock Option Plan or as listed in Section 4.5(c) of the Disclosure Schedule, neither the Company nor any Company Subsidiary nor Choupak is bound by or subject to any (i) preemptive or outstanding rights, subscriptions, options, warrants, conversion, put, call exchange or other rights, agreements, commitments, arrangements or

> understandings of any kind pursuant to which the Company or any Company Subsidiary, contingently or otherwise, is or may become obligated to offer, issue, sell, purchase, return or redeem, or cause to be offered, issued sold, purchased, returned or redeemed, any Company Securities . . . .

Id. § 4.5(c). The defined term "Stock Option Plan" did not refer to the 2000 Plan but to a later 2008 Equity Incentive Plan. *Id.* at 17. The defined term "Company Securities" meant "any interests in share capital or other ownership interests in, or securities of, the Company or any Company Subsidiary," encompassing preferred stock. *Id.* at 6. Schedule 4.5(c) did not list Rivkin as having any outstanding options, nor anyone as having options to purchase preferred stock. *See id.* at Sched. 4.5(c).

Consistent with these representations, the sections of the Merger Agreement that specified the treatment of outstanding shares and options at closing only addressed common stock and options for common stock. *Id.* § 2.8(a) & (b). They did not mention preferred stock or options to purchase preferred stock.

On May 31, 2011, the Oak Hill Merger closed. The total merger consideration was $127,500,000, subject to holdbacks to secure indemnification obligations. Choupak, Sofinski, Filin, Max Skibinsky, and Vladimir Tsirushkin, who were the Company's remaining stockholders, received cash for their shares.

I. Rivkin Purports To Exercise The Preferred Stock Option.

Rivkin heard about the Oak Hill Merger from another former Intermedia employee. He realized that if he had not sold his shares, he might have received as much as $5,100,000. He wanted more than the $300,000 he accepted in 2008. To help him get it, Rivkin hired his first attorney, Richard White.

By letter dated July 6, 2011, White informed Intermedia that Rivkin wished to exercise the Preferred Stock Option. The letter stated:

> Our firm represents Vladimir Rivkin, a long-time employee of Intermedia.NET, Inc. I enclose copies of Mr. Rivkin's Employment Agreement entered into as of March 1, 2000 ("Employment Agreement") and Mr. Rivkin's Intermedia.NET, Inc. Executive Stock Option Agreement ("Option Agreement") effective as of March 1, 2000. Now that it appears that Intermedia.NET, Inc. is about to be, or recently has been, acquired by Oak Hill Capital Partners, Mr. Rivkin wishes to exercise his options to acquire shares that represent a four percent (4%) undiluted ownership of Intermedia.NET, Inc., or its successor, as is appropriate, as set forth in paragraph 5(e) of the Employment Agreement and paragraph 3 of the Option Agreement. I propose meeting within the next two weeks to discuss implementation of the Method of Exercise under paragraph 8 of the Option Agreement.

JX 151.

On July 8, 2011, Rivkin sent a formal stock option exercise notice to Gomes. JX 153 (the "2011 Exercise Notice"). The 2011 Exercise Notice was identical to the form of exercise notice for the 2000 Plan, except that Rivkin revised it to refer to shares of preferred stock rather than common stock.

White sent a copy of the 2011 Exercise Notice, along with other documents and correspondence, to U.S Bank, which was the escrow agent for the Oak Hill Merger. White's cover letter stated: "As we understand your bank is holding $10,000,000 of the sales proceeds, by this letter we seek a hold on further distributions until Mr. Rivkin's shares are issued." JX 151. Given its text, White's letter was not just a figurative hold up, but a literal one as well.

By letter dated July 27, 2011, White provided Intermedia's counsel with additional information about Rivkin's position. He asserted that

> Vladimir does possess other claims. Vladimir contends that he was defrauded by Michael Choupak and Sergey Soffinsky [sic] when selling his 2,000,000 shares of common stock. Vladimir feels that the value, direction and overall available information were misrepresented to him and concealed from him in order to obtain his 2,000,000 shares for pennies on the dollar.

JX 156.

The fact that Rivkin had received 2,000,000 shares of common stock and sold them to Choupak and Sofinski presented a factual problem for Rivkin's attempt to exercise the Preferred Stock Option. Rivkin claimed Choupak had promised him at least 4% of Intermedia's equity, but he had received 4.4% of Intermedia's equity in the form of the 2,000,000 shares of common stock. The answer lay in claiming that he had two grants, one for common and one for preferred. But somehow he had to explain when and why he received two grants amounting to 8% of the equity.

By letter dated August 30, 2011, White provided "the relevant timeline":

- 11/20/97 – Vladimir enters into an oral agreement with Michael Choupak to work for Intermedia in exchange for options to purchase 2,000,000 shares of common stock at $.009 per share. Shares have a four-year vesting.

* * *

- 11/20/99 – Vladimir is issued 2,000,000 options for common stock under the Stock Option Agreement, copy previously provided.

- 3/01/2000 – Vladimir's stock will be fully vested on 11/20/01, four years after 11/20/97. Michael Choupak asks Vladimir to stay on in the same capacity. They negotiate and execute an Employment Agreement, copy previously provided. Vladimir is to receive options for four percent of the company's preferred stock to be purchased at $00.15 per share, with anti-dilution provision in effect. Vladimir's compensation is to be at $12.00 per year, for purposes of tracking his vesting.

* * *

- 02/27/01 – Vladimir executes a stock purchase agreement converting the options for the common stock to shares and receives 2,000,000 common shares, as compensation for his work between 1997 and 2000. He pays for the stock with a promissory note.

- 03/10/01 – Approximately around this time, Vladimir speaks with Michael about the other options. Michael gives him minutes of a Board of Directors meeting which shows additional common stock options authorized to others. Vladimir asks him about the preferred stock options, and Michael tells Vladimir that the documentation is forthcoming.

- 4/2001 – Approximately around this time, Vladimir executes the executive stock option agreement for 2 million preferred shares with anti-dilution, and he is provided a copy of the option plan. This is his compensation for work 2001 [sic] going forward.

JX 158 (the "2011 Timeline").

Virtually every element of the 2011 Timeline was false or misleading. Three aspects warrant emphasis. First, Rivkin did *not* claim to have executed the Preferred Stock Option before 2011. As White confirmed in a subsequent letter, Rivkin claimed to have exercised the Preferred Stock Option "on July 12, 2011." JX 159.

Second, Rivkin built the 2011 Timeline around documents that he had backdated, treating the backdated dates as if they were real. For example, he selected November 20, 1997, as the date of the original oral agreement on the theory that he started working at Intermedia then. That was the date that appeared in Rivkin's first RSPA. It conflicted with his actual date of hire of March 1, 2000, as reflected in his Employment Agreement. It conflicted with the date of hire of March 1, 2000, that appeared in the early versions of the Cap Table. It conflicted with the different backdated date of hire of December 15, 1997, that Rivkin used in his replacement RSPA.

Rivkin made up his story about working at Intermedia from 1997 to 2000. From 1995 to 1999, Rivkin was a student in the night program at the Lincoln Law School of San Jose, California. In 1997, when Choupak supposedly hired him, he was only half-way through his degree. When asked about his duties during this period, Rivkin described his activities in 2000 and 2001. Rivkin also claimed to have negotiated a lease for the Company's new office space, but Intermedia occupied the same office space from 1995 to 2002, and the annual lease renewed automatically during that time. There are no contemporaneous documents reflecting work by Rivkin from 1997 to 1999, only the agreements he backdated. Rivkin did not begin working at Intermedia until 2000.

Third, Rivkin indeed claimed that Choupak promised him a total of 8% of the equity in the form of two grants, not one. He supposedly received 4% for his work between 1997 and 2000, conveyed through an oral promise in 1997, then memorialized in a written agreement in 1999. He supposedly received another 4% of the Company for his for work from 2001 going forward, memorialized in the Preferred Stock Option.

As noted, Rivkin did not start working at Intermedia until 2000, and he did not receive any promise of equity before then. He did not have any formal agreement for his options until 2000, and he did not receive shares until 2001. The claimed written stock option agreement from 1999 did not exist. White had not "previously provided" a copy to Intermedia, as he claimed in his letter. JX 158. Nor did Rivkin produce a copy in discovery, eventually taking the position that he turned in the agreement in 2001 when he received his shares of common stock.

Rivkin's marital records bore out the absence of any separate grant of common stock in 1997. Rivkin was married on November 4, 2000, separated on September 24, 2003, and obtained a decree of divorce effective April 9, 2004. Before getting married, Rivkin and his bride entered into a pre-nuptial agreement dated October 30, 2000. Exhibits to the pre-nuptial agreement listed their separate and marital property, including Rivkin's equity ownership in a number of entities. Rivkin listed "options to purchase 2% common stock, and 2% preferred stock" in Intermedia. JX 196. Although it is unclear why Rivkin thought Choupak's promise of a 4% of the equity was divvied up in this manner, the listing demonstrated that Rivkin believed he was entitled to 4%, not 8%.

After the marriage, Rivkin and his bride entered into a marital agreement with an effective date of October 17, 2002. Exhibits to the marital agreement listed their separate property. Rivkin identified the following asset as his separate property: "Intermedia.Net, a Minnesota Corporation. Husband's interest includes 2% preferred stock, 2% common stock over a 4 year vesting period." *Id.* By this time, Rivkin had been issued 2,000,000 shares of common stock, so the description was inaccurate, but it again demonstrated his belief that he was entitled to 4%, not 8%.

In one of the stranger moments at trial, Rivkin was impeached about whether the woman referenced in the agreements was his first or second wife. Rivkin had not produced his divorce records during discovery. Suspecting what they might show, Choupak's counsel questioned Rivkin about his marriages during his deposition. Rivkin testified he married for the first time in 2000 and for a second time in 2010. When Choupak's counsel obtained Rivkin's divorce records, they discovered an earlier divorce.

When asked about it during trial, Rivkin testified that "it wasn't like an actual divorce," that he and his first wife "didn't even live together but for more than two or three months," and that he "really, in [his] mind, didn't consider this a real marriage." Tr. 61, 64. The public records show that Rivkin married his first wife on December 3, 1994 (it was a real marriage). They separated on December 14, 1996 (two years later, not two or three months later). They entered into a marital settlement agreement on July 15, 1997, and they obtained "an actual divorce" in the form of a judicial decree on July 29, 1998.

The earlier divorce decree confirmed that Rivkin did not receive a grant of options in 1997. In the stipulation for the July 1998 divorce decree, Rivkin and his first wife acknowledged that they "were both fully aware of the extent of all of the assets and debts during marriage and are sure that everything has been disclosed and distributed in the stipulated Judgment Of Dissolution Of Marriage . . . ." JX 195. If Rivkin possessed an option to purchase shares of Intermedia common stock in 1997, then he should have disclosed it. He did not. Rivkin listed his separate property from before and during the marriage, and he identified equity ownership interests, but he did not list an option to purchase Intermedia common stock.

J. Choupak And Sofinski File Suit.

Faced with Rivkin's allegations and threats of litigation, Choupak and Sofinski filed their complaint on October 31, 2011. In Count I, they sought declarations that (i) no options to purchase preferred stock of Intermedia existed, (ii) no preferred stock of Intermedia existed, (iii) Rivkin was not entitled to any equity, and (iv) they did not defraud Rivkin. Count II alleged that Rivkin was not entitled to purchase preferred stock

because it did not exist. Count III sought a declaration that, to the extent Rivkin did have options to purchase preferred stock, those options had expired.

Rather than confront the complaint on its merits, Rivkin removed the action to federal court. Rivkin argued that diversity jurisdiction existed because Choupak resided in London, Sofinski resided in California, and he resided in Washington. Choupak and Sofinski responded that Rivkin resided in California, defeating complete diversity. Rivkin filed three declarations in which he averred that he lived in Washington, and he attached supporting documents. The district court found that Rivkin resided in California, not Washington. The district court observed that contrary to Rivkin's sworn statements about his Washington residency, Rivkin had recently filed a motion in California litigation in which he stated that he "lived in California." JX198 at 6. Rivkin also had recently filed a petition to change his daughter's name in which he identified himself as living at a home he owned in San Mateo, California. *Id.* In addition, the account Rivkin gave about changing his residence to Washington in his first and second declarations conflicted with the account he gave in his third declaration, leaving the district court with "little confidence in the reliability of Rivkin's assertion that . . . he had changed his domicile." *Id.* at 14. The court concluded that Rivkin maintained a physical presence in California from 2000 onward, that the apartment listed on Rivkin's Washington voter registration form did not exist, and that Rivkin lived with his wife, step-daughter, son, and father in the San Mateo home. The district court remanded the case.

K. Rivkin's Counterclaims

After remand, Rivkin moved to dismiss the complaint, arguing that (i) the claims had to be arbitrated, (ii) this court lacked personal jurisdiction over him, and (iii) the action somehow should be transferred to California. A month later, instead of briefing the motion, Rivkin abandoned his positions. He withdrew the motion to dismiss, filed an answer, asserted counterclaims against Choupak, and brought third party claims against Intermedia (together, the "Counterclaims").

In Counts I-III, Rivkin contended that Choupak defrauded him when buying his shares of common stock in 2008. In Count IV, Rivkin contended that Choupak breached his fiduciary duties as the controlling stockholder of Intermedia by failing to disclose valuation information to Rivkin when negotiating over the shares. In Counts V and VI, Rivkin asserted claims for breach of contract and sought specific performance in an attempt to enforce his right to the shares of preferred stock promised him in the Employment Agreement and the Preferred Stock Option.

Rivkin's Counterclaims told a different story about exercising the Preferred Stock Option than what was described in the 2011 Timeline. According to the new account, "[o]n May 23, 2008, Rivkin exercised his Preferred Stock Option with a promissory note for $300,000 . . . . He met with Choupak, who signed indicating his acceptance." Dkt. 17 ¶ 40 (the "Counterclaim Story"). Rivkin attached to his verified Counterclaims two different versions of a stock option exercise notice, each dated May 23, 2008. *Id.* Ex. B (the "2008 Exercise Notices"). The first version bore only Rivkin's signature, so this opinion refers to it as the "One Signature Version." The second version bore Rikvin's and Choupak's signatures, so this opinion refers to it as the "Two Signature Version."

The idea that Rivkin had exercised the Preferred Stock Option in 2008 was new. White's letters omitted any mention of a 2008 Exercise Notice. White said Rivkin wanted to exercise his options in 2011. Rivkin then sent the 2011 Exercise Notice to Gomes. Rivkin did not mention an attempted exercise in 2008.

L. Choupak And Intermedia Move To Dismiss.

Choupak and Intermedia moved to dismiss the Counterclaims. To obtain dismissal of Counts I-IV, they relied on the Stock Transfer Agreement. In the following sections of that agreement, Rivkin represented that he had not been misled about the value of his shares, was releasing any claims relating to the sale, and recognized that he was foregoing the potential for greater upside by choosing to sell:

> 4.7 . . . (b) Seller [Rivkin] acknowledges that the Company has informed Seller that the Company believes the value of the Shares is currently substantially higher than the Purchase Price and that the Company believes the value of its stock may increase substantially in the future.
>
> **(c)** ***Release of Claims By Seller****. Seller hereby releases the Company, the Purchasers, the Purchasers' Related Parties and any future holder of the Shares and waives any and all rights, actions, claims, liabilities, obligations, damages and causes of action whether known, suspected or unknown, whether in law or in equity which Seller may have or may claim to have against the Company, the Purchasers, the Purchasers' Related Parties or any future holder of the Shares arising from or relating to the sale of the Shares to Purchaser under this Agreement, including without limitation, any claims that full disclosure regarding the Company and/or its prospects and/or the value of the Shares was not made to Seller at any time (excluding, however, claims for breach of any of any Purchaser's express representations set forth in Section 3).*
>
> **4.8 No Continuing Rights of Seller**. Seller hereby acknowledges that he shall have no rights with respect to the Shares, as a stockholder of the Company or otherwise, with respect to any future sale, acquisition, merger, liquidation, dissolution or other corporate event regarding the Company or its assets (any of the foregoing, a "Corporate Event"). Seller further

> expressly acknowledges that any such Corporate Event may result in the payment by the Company or a third party of assets, funds or other proceeds to the Company's stockholders including Purchasers, in a manner such that the value attributed to the Company's capital stock in such Corporate Event (either in an aggregate amount or on a per share basis) may be substantially greater than the Purchase Price hereunder. Seller hereby acknowledges and agrees that he shall have no right to or interest in any such assets, funds or proceeds, and he further agrees that he will not make any claim or assert any right or interest, against any Purchaser, the Company or such third party with respect to any such assets, funds or proceeds (or with respect to the Corporate Event to which such assets, funds or proceeds relate).

JX 132 (emphasis in original). The Stock Transfer Agreement was an integrated agreement. *Id.* § 7.2.6. The court enforced the plain language of the agreement and dismissed Counts I-IV. Dkt. 43.

In response to Counts V and VI, Choupak and Intermedia argued that Rivkin's exercise of the Preferred Stock Option in 2011 was time barred. The 2000 Plan provided that any option granted under its terms could be exercised at any time specified in the option "[e]xcept as necessary to satisfy section 422 of the [Internal Revenue] Code." JX 151, Ex. C § 6.1.3. Section 422 of the Internal Revenue Code provides that an incentive stock option "is not exercisable after the expiration of 10 years from the date such option is granted." 26 U.S.C. § 422(b)(3). The 2011 Exercise Notice recited that March 1, 2000, was the date of grant. According to the 2011 Exercise Notice, Rivkin exercised the option on July 8, 2011, eleven years later.

The timeliness defense explained why Rivkin shifted gears from relying on the 2011 Exercise Notice, which was the subject of White's letters and the 2011 Timeline, to relying on the 2008 Exercise Notices, which were the focus of the Counterclaim Story. Choupak denied meeting with Rivkin to discuss the 2008 Exercise Notices, denied

signing the Two Signature Version, and denied that he or Intermedia received either version of the notice. Choupak and Intermedia contended that Rivkin fabricated the 2008 Exercise Notices and made up the Counterclaim Story to sidestep the timeliness issue.

Although there was something fishy about the 2008 Exercise Notices, the court denied the motion to dismiss Count V because of obvious factual disputes surrounding the exercise of the Preferred Stock Option. The court dismissed Count VI, which sought an order of specific performance compelling the issuance of preferred stock, because (i) specific performance was a remedy, not a cause of action, (ii) the Charter showed that the preferred stock never existed and thus ordering Intermedia to issue it would be to require an impossible act, and (iii) Rivkin could recover damages as an adequate remedy.

The ruling on the motion to dismiss left Rivkin's claim for breach of contract as his sole counterclaim. Rivkin later filed a motion for leave to file amended counterclaims, which the court granted in part. The court permitted Rivkin to add claims for unjust enrichment and tortious interference with contract. Dkt. 100.

M. The Restaurant Story and the 2012 Timeline

As noted, paragraph 40 of the Counterclaims alleged that "[o]n May 23, 2008, Rivkin exercised his Preferred Stock Option with a promissory note for $300,000 . . . . He met with Choupak, who signed indicating his acceptance." Dkt. 17 ¶ 40. This allegation implied that everything happened on May 23: Rivkin signed, he met with Choupak, and Choupak countersigned indicating his acceptance.

In discovery, Choupak sought information about the meeting. In his responses to Choupak's first set of interrogatories, Rivkin offered the following:

Interrogatory: "Identify where You claim to have met with Choupak in person on or about May 23, 2008, and Identify who was present."

Response: "Rivkin objects to the word 'present' as vague in connection with a restaurant meeting. Rivkin objects as incorrect to the characterization that he claimed to have met with Choupak in person on May 23, 2008.

"Without waiver of and subject to the foregoing general and specific objections, Rivkin responds as follows: Rivkin refers to paragraph 40 of his Counterclaims. Rivkin signed the exercise notice for his preferred stock options on May 23, 2008. Rivkin met in person with Choupak and gave him the exercise notice within approximately three months. It may have been at Pasta Pomodora [sic] in Santana Row. Choupak and Rivkin were present at their table."

JX 174 at 2. In contrast to the Counterclaim Story, where everything seemed to happen on the same day, Rivkin's interrogatory response identified a temporal gap between Rivkin's signing on May 23, and Choupak's countersigning "within approximately three months." Because the response introduced the idea of a meeting at a restaurant, this decision refers to this version of events as the "Restaurant Story."

In a second set of interrogatories, Choupak sought information about the temporal gap. Rivkin provided the following responses:

Interrogatory: "Identify the date on which You claim to have met Choupak when You claim he countersigned the exercise notice for the preferred stock options (the 'Exercise Notice') . . . ."

Response: "Rivkin signed the exercise notice for his preferred stock option on May 23, 2008. Rivkin met in person with Choupak and gave him the exercise notice within some months thereafter. Rivkin does not recall from memory, and is not aware of any source of information documentary or otherwise that identifies, the precise

	date on which Rivkin met with Choupak as referenced in the preceding sentence."
Interrogatory:	"Identify the place on which You claim to have met Choupak when You claim he countersigned the Exercise Notice."
Response:	"Rivkin does not recall the location he met with Choupak. It was not at the offices of Intermedia. He generally met with Choupak at a location on Santana Row in San Jose, California. It may have been at Pasta Pomodoro in Santana Row."

JX 174 at 2.

Intermedia had no record of either the One Signature Version or the Two Signature Version. After Rivkin offered the Restaurant Story, Choupak inferred (fairly) that Rivkin must be contending that he obtained Choupak's signature at the restaurant and kept the Two Signature Version. Choupak's counsel sought production of the original Two Signature Version to test the authenticity of Choupak's signature. Rivkin's counsel "object[ed] to this Request as threatening to compromise the safety of a document important to Rivkin's prosecution of this case." Dkt. 138, Ex. C at 7; *see also* JX 176 ¶ 3. Rivkin's counsel only would "make the referenced document available for inspection by plaintiffs' counsel and experts upon terms agreeable to Rivkin to protect the safety of and preserve this document." Dkt. 138, Ex. C at 7.

After much effort, the parties appeared to have worked out agreeable terms. At Choupak's expense, Rivkin's counsel would send the document by overnight courier, insured, to Choupak's expert. Choupak agreed that "if anything happens to materially affect the original document while it is in the possession of plaintiffs' expert," then

Rivkin would be entitled to a "conclusive inference that the document is authentic." Dkt. 138, Ex. D at 2.

Then Rivkin changed his tune. He declared that he no longer had the original Two Signature Version. Choupak did. His counsel elaborated on the Restaurant Story to explain how this came about.

> After Rivkin signed the [One Signature Version], he later gave the signed document to Choupak at a restaurant or coffee shop. Choupak signed as well and they had the restaurant or coffee shop copy the document. Choupak took the signed document while Rivkin took the copy. *Intermedia and Choupak should still have custody of that original signed document unless it was destroyed since then.*

Dkt. 138, Ex. F at 2 (emphasis added).

Choupak's lawyers did not appreciate being told that Intermedia possessed all along the document that they sought to examine, negotiated detailed protections to obtain, and hired an expert to test. Throughout discovery, they pushed for additional information about the Two Signature Version. After the close of discovery, to bolster his version of events, Rivkin produced a redacted memorandum that he drafted for his second lawyer, Eileen Rohan. The memorandum contained a timeline and was sent to Rohan on March 24, 2012, so this decision refers to it as the "2012 Timeline."

According to the 2012 Timeline, the original Two Signature Version with Choupak's inked signature showed up in an envelope on Rivkin's desk:

> After more conversations with Choupak, I start feeling uneasy about my preferred options. I decide that I need to exercise them and on May 23, 2008 based on the date on the notice to exercise, I do just that. I meet with Choupak[.] I don't recall if it was during lunch, and he again wants to buy out my preferred options. I notify him that I am choosing to exercise them and he was clearly displeased and gets angry at me. *He takes the documents*

> *form [sic] me and I receive them in my office couple of months later. I am not sure if he dropped them off or mailed them back, but they are on my desk in an envelope*. . . . Choupak claims that I never had any preferred shares or that I never exercised them. *I have copies of the notice of exercise with Choupak [sic] original signature excepting [sic: accepting] them.*

JX 164 (emphasis added).

Rivkin also produced an email exchange with his Delaware counsel that attached a redacted draft of the Counterclaims. Under the section entitled "Rivkin Exercises His Option For Preferred Stock On May 23, 2008," Rivkin's Delaware counsel made a comment to Rivkin: "[I]f possible get copy with Choupak's signature as well." JX 197. Rivkin emailed back the same day with this additional information: "[N]ot sure of the exact date when we meet [sic]. I executed the documents on May 23 *but we could have meet [sic] a week or two later*. . . . probably we meet [sic] in Santana Row. . . . *I found a copy with his acceptance* . . . . " JX 198 (emphasis added). In a later email to his counsel, Rivkin attached a file that he described as "the acceptance of the preferred shares exercise page scanned." Dkt. 138, Ex. M.

N. Rivkin's Pre-Trial Accounts

Before trial, Rivkin offered four different versions of his story about the 2008 Exercise Notices: the 2011 Timeline, the Counterclaim Story, the Restaurant Story, and the 2012 Timeline. He added a variation on the 2012 Timeline in his email exchange with his Delaware counsel. Except for the 2011 Timeline, all of the accounts started with Rivkin signing the document and making a copy, which became the One Signature Version. That contention was odd in itself.

First, for reasons Rivkin never explained, he did not send the One Signature Version to Intermedia. No one from Intermedia had to countersign an exercise notice for it to be effective. When Rivkin tried to exercise his options in 2011, he sent the 2011 Exercise Notice to Gomes. He did not have Choupak or anyone else countersign it.

Second, for reasons Rivkin never explained, he did not have Choupak sign the same document Rivkin signed, which would have resulted in a single page with two inked signatures. Rivkin instead made a copy of the One Signature Version, kept that document separate, and attached it to his Counterclaims after Intermedia's counsel told White that the 2011 Exercise Notice was untimley. Rivkin failed to produce numerous other documents that he lost, that were destroyed, or that he returned to Intermedia without keeping copies. But he made and kept a copy of the One Signature Version.

Third, for reasons Rivkin never explained, the One Signature Version had two sets of initials on it. Based on my own lay comparisons with other documents that Choupak and Rivkin signed, one set of the initials appeared to be Choupak's, and the other appeared to be Rivkin's. Rivkin never explained how a document that he signed by himself and copied before meeting with Choupak bore Choupak's initials.

Once events moved beyond the creation of the One Signature Version, Rivkin's accounts diverged. In the Counterclaim Story, Rivkin promptly met with Choupak, seemingly the same day. The meeting occurred over lunch and Choupak countersigned the notice, resulting in the Two Signature Version. Rivkin kept the original. The Counterclaim Story did not refer to any copies.

In the Restaurant Story, the meeting did not happen on the same day, but approximately two months later. The meeting occurred over lunch and Choupak countersigned the notice, resulting in the Two Signature Version. The restaurant made a copy. Rivkin kept the copy, not the original. Choupak took the original.

In the 2012 Timeline, the meeting seemingly happened promptly after May 23, as in the Counterclaim Story. The meeting might have occurred over lunch, but Rivkin was not sure. The meeting did not end with Choupak signing and the restaurant making a copy. Instead, Choupak became enraged, took the documents, and stormed out. An envelope then showed up on Rivkin's desk a "couple of months later" containing versions "with Choupak [sic] original signature." JX 164. Choupak thus initially took the original and Rivkin took nothing, but Rivkin later ended up with the original.

Finally, in the variation on the 2012 Timeline in the email exchange with Delaware counsel, the meeting happened "a week or two" after May 23. JX 198. Rivkin ended up with "a copy with [Choupak's] acceptance." *Id.*

O. Rivkin's Trial Accounts

Given Rivkin's varying descriptions of the 2008 Exercise Notices, the trial focused on them. On direct examination, Rivkin tried to stick to the Restaurant Story. He testified that on May 23, 2008, he signed the exercise notice and made a copy of it, resulting in the One Signature Version. Several months later, he met with Choupak at a restaurant where Choupak countersigned it, resulting in the Two Signature Version. But at this point, Rivkin blended the "helpful waiter" plot device from the Restaurant Story with the "angry Choupak" vignette from the 2012 Timeline. As Rivkin described the

meeting on direct examination, Choupak became angry and upset, but serendipitously, the waiter showed up with the check and a pen. Rivkin "signed the check, and [Choupak] used the pen to sign the document. And then I [Rivkin] asked the waiter to go make us a copy." Tr. 50. The restaurant had a copy machine, and the waiter obliged. It must have been awkward for Choupak and Rivkin to sit together, with Choupak steaming, while the waiter performed this task. Once the waiter returned, Choupak "grabbed the original and stormed off," leaving Rivkin with the copy. Tr. 49-50.

On direct examination, Rivkin stopped there. He did not claim that several months later, a copy of the Two Signature Version with Choupak's original signature showed up in an envelope on his desk. On cross examination, he was asked about this development, and he maintained that it happened.

Rivkin then had to explain why he could not produce the Two Signature Version in discovery. His answer was that he lost it: "I had a number of disruptive events and I moved a number of times, so I can't locate that document." Tr. 131. He elaborated: "I moved my office *in 2010* and at that point started working out of my house." *Id.* (emphasis added). Of course, Rivkin claimed to have the Two Signature Version when he sent the 2012 Timeline to Rohan. His Counterclaims (verified and filed in 2012) and his interrogatory responses (verified and served in 2012) implied that Rivkin possessed the Two Signature Version. If the office-move story was correct, Rivkin lost the document in 2010. He should not have had it in 2012.

Rivkin was then cross-examined about his email exchange with his Delaware counsel. Rivkin's second email attached a scanned copy of the Two Signature Version.

At this point, Rivkin added a new embellishment. There were two versions of the Two Signature Version! First, there was a Two Signature Version that only bore Rivkin's and Choupak's signatures, which was what Rivkin scanned and emailed to his Delaware counsel. Second, there was a different Two Signature Version where the blanks under Choupak's signature were filled out in original ink, and this other version was what showed up on Rivkin's desk several months later. To attempt clarity where none exists, this decision refers to the two versions, respectively, as the "Signatures-Only Version" and the "Completed Version." Although Rivkin once had both, by the time of the litigation, he only had the Signatures-Only Version.

Regardless of the account, the meeting with Choupak happened on May 23, 2008, or relatively soon thereafter. Choupak established that he was in France with his family during May, June, and July 2008. Choupak's second son was born in France on June 1. Rivkin never incorporated the French connection into any of his accounts. Undaunted, Rivkin claimed at trial that he "might have went to France" to meet with Choupak and that "[i]t wasn't uncommon" for him to travel. Tr. 121. With admirable thoroughness, Choupak's counsel had obtained a copy of Rivkin's passport during discovery, had placed the document on the trial exhibit list, and pointed to its contents to establish that Rivkin in fact had not visited France in 2008.

P. Rivkin's Documentary Support

By the end of trial, there were at least five conflicting versions of Rivkin's tale:

- **The 2011 Timeline:** Rivkin did not exercise any options in 2008. He first exercised the Preferred Stock Option in 2011.

- **The Counterclaim Story:** Rivkin signed the exercise notice on May 23, 2008, and seemingly met with Choupak the same day. Despite the proximity of the meeting, he made a copy of the notice with only his signature (but with Choupak's initials), resulting in the One Signature Version. Choupak countersigned at the meeting. Rivkin kept the original and had it for purposes of drafting the Counterclaims and his interrogatory responses. The Counterclaim Story did not incorporate the helpful waiter plot device, the enraged Choupak vignette, or the appearance of the Two Signature Version months later in an envelope on Rivkin's desk. Nor did it distinguish between the Signatures-Only Version and the Completed Version.

- **The Restaurant Story:** Rivkin signed the exercise notice on May 23, 2008. He made a copy of the notice with only his signature (but with Choupak's initials), resulting in the One Signature Version. Two to three months later, he met with Choupak at a restaurant. Choupak countersigned, resulting in the Two Signature Version. The restaurant made a copy, which Rivkin kept. Choupak took the original. Rivkin never had the original and could not send it to Choupak's expert. The Restaurant Story did not incorporate the enraged Choupak vignette or the unexplained appearance of the Two Signature Version months later in an envelope on Rivkin's desk. Nor did it distinguish between the Signatures-Only Version and the Completed Version.

- **The 2012 Timeline:** Rivkin signed the exercise notice on May 23, 2008. He made a copy with only his signature (but with Choupak's initials), resulting in the One Signature Version. As in the Restaurant Story, Rivkin met with Choupak at a restaurant, but as in the Counterclaim Story, the meeting happened promptly after May 23. As in the Restaurant Story, Choupak countersigned, resulting in the Two Signature Version. But the meeting did not end with the restaurant making a copy for Rivkin. After signing, Choupak became enraged and stormed out, taking the original. An envelope then showed up on Rivkin's desk a "couple of months later" containing a version "with Choupak [sic] original signature excepting [sic] them." JX 164. Rivkin had the original Two Signature Version for purposes of the litigation, at least until it was time to send it to Choupak's expert. The 2012 Timeline did not distinguish between the Signatures-Only Version and the Completed Version. In a variant on the 2012 Timeline found in his email exchange with Delaware counsel, Rivkin said the meeting with Choupak happened within a

week or two after May 23. In that variation, Rivkin did not receive the original, only a copy with Choupak's acceptance.

- **The trial testimony:** Rivkin signed the exercise notice on May 23, 2008. He made a copy with only his signature (but with Choupak's initials), resulting in the One Signature Version. He then met with Choupak at a restaurant where Choupak countersigned, resulting in the Two Signature Version. As in the Restaurant Story, Choupak became furious. But in this version, the waiter arrived with the check and a pen. Choupak used the pen to sign, and Rivkin asked the waiter to make a copy. Rivkin waited with the enraged Choupak while the waiter made use of the restaurant's copier. Choupak then stormed out with the original, leaving Rivkin with a copy. Rivkin's copy became the Signatures-Only Version. An envelope showed up on Rivkin's desk two or three months later containing the Completed Version. Rivkin lost both versions when moving his office in 2010, so he was unable to provide either to White in 2011. He then found the Signatures-Only Version, which he sent to Rohan in 2012 and provided to his Delaware counsel.

Other than the 2008 Exercise Notices, the only contemporaneous documents Rivkin had to corroborate his various stories were cell phone records from 2008 and a cryptic email exchange from 2011. Neither provided credible support.

The phone records were not probative. Rivkin did not produce them until after his deposition, and he earlier provided a misleading interrogatory response in which he averred that "Rivkin does not recall from memory, *and is not aware of any source of information documentary or otherwise that identifies*, the precise date on which Rivkin met with Choupak . . . ." JX 174 at 2 (emphasis added). Rivkin gave the phone records to Rohan as evidence of the date of the meeting with Choupak, so he had the records and knew it, making his interrogatory response false. Ignoring these problems and taking the records at face value, they at most showed a call, but the presence of a call did not suggest a meeting. In 2008, and indeed until White sent Rivkin's demand in 2011, Rivkin

and Choupak were friends. Plus, Choupak was in France. Rivkin might have called, but that did not mean they talked about preferred stock options, or that they met.

This left the cryptic email exchange. On February 11, 2011, Choupak forwarded to Rivkin an email from a private exchange for unlisted stock called SecondMarket. JX 147 (the "SecondMarket Email"). Choupak followed the email with an explanatory note: "Vladi—This is the securities market for private stock I was talking about. Happy belated birthday to your son!" *Id.* Rivkin responded, "Thanks. This is actually a great idea. I think a way to provide a company valuation is key. Can you give me the contact info Of [sic] the guys that do the annual evaluation for Intermedia." *Id.*

According to Rivkin, Choupak sent the SecondMarket Email to strong-arm Rivkin into selling his preferred stock. As one of the few exchanges for unlisted company stock, SecondMarket charged a substantial transaction fee. According to Rivkin, Choupak's friendly message and birthday greetings to his son were, in substance, an effort to pressure Rivkin by telling him that if he did not sell his equity to Choupak or Intermedia, he would have to take a haircut from SecondMarket. According to Rivkin, Choupak had been telling him that Intermedia was doing poorly, which is why Rivkin asked for "the contact info Of [sic] the guys that do the annual evaluation of Intermedia" to obtain an independent valuation of the Company. JX 147.

This was not a credible explanation. In Rivkin's story, they were having a tense negotiation over Rivkin's common stock and preferred stock, yet the email never mentioned them. Choupak did not seem to be negotiating at all; he seemed to be offering

a helpful suggestion. Rivkin seemed to appreciate it, and he began his response with "Thanks. This is actually a great idea." *Id.*

Choupak explained that during this time, he and Rivkin socialized regularly. Rivkin was trying to start an internet firm called IOUBid.com that would operate a market for uncollected judgments. During one of their get-togethers, Rivkin talked about IOUBid.com, and Choupak suggested he look at other online secondary markets. Choupak forwarded the SecondMarket Email to Rivkin as a follow up.

Rivkin did not have a single, credible, contemporaneous document to support his option exercise in 2008. Rivkin's inconsistent accounts about these events, and the questionable nature of the 2008 Exercise Notices, contrasted with the absence of any debate over what occurred weeks later, when Rivkin sold his shares of common stock to Choupak and Sofinski. For the stock sale, there were numerous contemporaneous communications, the parties exchanged drafts of an agreement by FedEx, and the transaction was governed by a formal contract. No one had any trouble finding the Stock Transfer Agreement, and no one disputed its authenticity.

Having heard the testimony, evaluated the witnesses' credibility, and considered the evidence, I find that Rivkin did not exercise any options in 2008. He did not come up with the idea of claiming an additional 4% of the Company until 2011, after learning of the Oak Hill Merger. He never tried to exercise the Preferred Stock Option before then. Regrettably, I am forced to conclude that Rivkin forged the 2008 Exercise Notices, lied about exercising his options in 2008, verified pleadings and interrogatory responses that he knew contained falsehoods, and testified falsely in deposition and at trial.

II. LEGAL ANALYSIS

The disputes in this case were predominantly factual. In light of the foregoing factual findings, the legal analysis is relatively straightforward. In the complaint, Choupak and Sofinksi sought declaratory judgments that would negate the claims that Rivkin subsequently asserted. For simplicity, this decision analyzes the legal issues using the framework of Rivkin's remaining counterclaims.

A. The Counterclaim For Breach Of Contract

Rivkin's principal counterclaim was for breach of the Employment Agreement. He contended that the Employment Agreement granted him an option to purchase shares of preferred stock representing 4% of the company's equity. He asserted that the Preferred Stock Option memorialized that grant. He claimed that he exercised the Preferred Stock Option and that Intermedia breached its contractual obligations by failing to issue the shares to which he was entitled.

When interpreting a contract, "the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). "If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent." *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993). "Contract language is not ambiguous merely because the parties dispute what it means. To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (footnotes omitted). "Ambiguity does not exist where the court can determine the

meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends." *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (internal quotation marks omitted). However, "[i]f there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended." *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008) (internal quotation omitted). "As long as the court is aware that doubts and uncertainty lurk in the meaning and application of agreed language, it will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the issue." *Klair v. Reese*, 531 A.2d 219, 223 (Del. 1987).

As discussed in the Factual Background, the lack of detail in the Employment Agreement and Preferred Stock Option rendered the terms "preferred stock" and "anti-dilution" ambiguous. By using these terms, Rivkin tried to document the basic concept that he would receive at least 4% of Intermedia's equity. As he saw it, the term "preferred stock" meant a stock that had a preference in the form of anti-dilution protection. Choupak signed both the Employment Agreement and Preferred Stock Option, evidencing his agreement.

Rivkin received the benefit of his bargain. In 2001, Intermedia issued him 2,000,000 shares of common stock. The shares represented 4.4% of Intermedia's equity, more than the consideration he bargained for. Rivkin's also received better terms than he bargained for because his agreements called for his options to vest over four years and set the exercise price at $0.15 per share. One year later, Choupak allowed Rivkin to exercise

all of his options and pay with an unsecured note. Rivkin also obtained a lower exercise price of $0.009 per share by making misrepresentations to SVLG. That lie ended up being immaterial, because Choupak never asked Rivkin to pay off his note, so Rivkin never had to pay the exercise price. He received more than his bargain, and he had no claim for breach.

Deeming the term "preferred stock" to be unambiguous leads to the same result. "At common law and in the absence of an agreement to the contrary all shares of stock are equal." *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 593 (Del. Ch. 1986). Under Sections 102(a)(4) and 151(a) of the Delaware General Corporation Law, any special rights, powers, preferences, or limitations must be set forth in the certificate of incorporation. Section 102(a)(4) states:

> If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class. The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation.

8 *Del. C.* § 102(a)(4). Section 151(a) similarly states:

> Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series

> may have such voting powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation.

8 *Del. C.* § 151(a). "The mere word 'preferred' unless it is supplemented by a definition of its significance conveys no special meaning." *Gaskill v. Gladys Belle Oil Co.*, 146 A. 337, 339 (Del. Ch. 1929) (Wolcott, C.). "[U]nless preferences are clearly spelled out in the certificate of incorporation (or by a separate resolution authorized by the corporate charter) they do not exist." *Shanghai Power Co. v. Del. Trust Co.*, 316 A.2d 589, 593 (Del. Ch. 1974), *aff'd in pertinent part sub nom. Judah v. Del. Trust Co.*, 378 A.2d 624 (Del. 1977).[3]

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[3] The language in Sections 102(a)(4) and 151(a) requiring that any "qualifications, limitations or restrictions" on the rights of shares be set forth in the certificate of incorporation explains why, when originally suggesting that corporations could respond to the problems of multi-forum litigation by adopting exclusive forum-selection provisions, I referred to corporations being "free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." *In re Revlon, Inc. S'holder Litig.*, 990 A.2d 940, 961 (Del. Ch. 2010). It was widely accepted then, and this court subsequently has noted, that stockholders possess three fundamental rights: the rights to vote, sell, and sue. *Strougo v. Hollander*, ___ A.3d ___, 2015 WL 1189610, at *4 n.21 (Del. Ch. Mar. 16, 2015). It was unclear to me at the time whether a forum-selection provision constituted a qualification, limitation, or restriction on the right to sue that had to appear in the charter. Although Section 109(b) of the DGCL permits bylaws "relating to" a wide range of subjects, including "the rights or powers of stockholders," that section also recognizes that a bylaw cannot be "inconsistent with law or with the certificate of incorporation." 8 *Del. C.* § 109(b). "For purposes of a evaluating the statutory validity of a bylaw, therefore, it is not enough to measure it only against the 'relating to' language of Section 109(b). It is also necessary to consider what other sections of the DGCL say about the matter." *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *7 (Del. Ch. Jan. 22, 2015) (citing *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 n.16 (Del.

Despite the reference to preferred stock that Rivkin added to his Employment Agreement, and notwithstanding his creation of the Preferred Stock Option, the Charter never designated any shares of preferred stock with rights, powers, or preferences different than common stock. The Charter authorized blank check preferred stock, but the board of directors never exercised its blank check authority. The only preference Rivkin could identify for his shares was anti-dilution protection. By issuing Rivkin sufficient shares of common stock to ensure that he received at least 4% of Intermedia's equity, the Company satisfied its contractual obligation.

Intermedia did not breach the Employment Agreement or the Preferred Stock Option. Judgment is entered in favor of Intermedia on this claim.

B. The Counterclaim For Tortious Interference

2014)). To avoid hazarding a view on the viability of including a forum-selection provision in a bylaw, I only referred to charter provisions, where I thought the statutory answer was clear.

Subsequent decisions have established that a bylaw adopting an exclusive forum-selection provision is statutorily valid. *See City of Providence v. First Citizen BancShares, Inc.*, 99 A.3d 229, 233-34 (Del. Ch. 2014); *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 951-56 (Del. Ch. 2014) (Strine, C.). In my view, these decisions correctly apply the framework established in Sections 102(a)(4) and 151 of the DGCL. The Delaware Supreme Court has distinguished between bylaws that validly establish procedures to regulate the exercise of corporate rights or authority, on the one hand, and those that impose substantive limitations on the exercise of corporate rights or authority, on the other. *See CA. Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 234-37 (Del. 2008). As I see it, a forum-selection bylaw easily falls on the procedural side of the divide, and it therefore does not constitute a substantive "qualification, limitation, or restriction" on the right to sue that would need to be included in the charter.

Rivkin sought to impose secondary liability on Choupak by asserting a claim for tortious interference with contract. Such a claim requires an underlying breach. *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987) (Allen, C.). Because there was no underlying breach, there was no tortious interference. Judgment is entered in favor of Choupak on this claim.

C. The Counterclaim For Unjust Enrichment

As an alternative to a contractual recovery, Rivkin asserted a claim for unjust enrichment. "Unjust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (internal quotation marks omitted). "Courts developed unjust enrichment, or quasi-contract, as a theory of recovery to remedy the absence of a formal contract." *ID Biomedical Corp. v. TM Techs., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995). "A party cannot seek recovery under an unjust enrichment theory if a contract 'is the measure of [the] plaintiff's right.'" *Id.* (quoting *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979)).

The Employment Agreement and Preferred Stock Option established the measure of Rivkin's rights. Intermedia did not breach those agreements. Intermedia fulfilled its obligations and gave Rivkin consideration that exceeded his bargain. If anyone was unjustly enriched, it was Rivkin, because he never paid the exercise price for his shares. Judgment is entered in favor of Intermedia and Choupak on this claim.

D. Contractual Fee Shifting

"Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs." *Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007). "An exception to this rule is found in contract litigation that involves a fee shifting provision." *Id.* "In these cases, a trial judge may award the prevailing party all of the costs it incurred during litigation." *Id.* "Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009). "Courts focus principally on enforcing the parties' agreement to make the prevailing party whole." *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010).

Choupak and Intermedia seek fees based on the fee shifting provision in Rivkin's Employment Agreement. Paragraph 15 of the Employment Agreement provides that

> [i]n the event of any litigation or other proceedings between the parties *arising from or relating to* any dispute under this Agreement, the prevailing party shall be entitled to recover, in addition to any other relief granted or awarded, its reasonable costs and expenses (including attorneys' fees) incurred in the proceeding.

JX 43 (emphasis added). Rivkin's Counterclaims alleged that Intermedia breached the Employment Agreement. The Counterclaims also alleged that Choupak tortiously interfered with the Employment Agreement, and that Choupak was unjustly enriched because Intermedia did not comply with the Employment Agreement. Those claims arose out of and related to the Employment Agreement. Having prevailed in this litigation,

Intermedia is entitled to recover its costs and expenses under the contractual fee-shifting provision.

E. Bad Faith Fee Shifting

Contractual fee shifting is not the only exception to the American Rule. "Our courts have . . . recognized bad faith litigation conduct as a valid exception to that rule." *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1222 (Del. 2012). "The bad faith exception is applied in extraordinary circumstances as a tool to deter abusive litigation and to protect the integrity of the judicial process." *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) (internal quotation marks omitted). "There is no single standard of bad faith that warrants an award of attorneys' fees in such situations; rather, bad faith is assessed on the basis of the facts presented in the case." *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).

Choupak first seeks fees based on Rivkin's pre-litigation conduct. "With respect to pre-litigation conduct, not every case of intentional fiduciary wrongdoing justifies fee-shifting." *Hardy v. Hardy*, 2014 WL 3736331, at *17 (Del. Ch. July 29, 2014) (internal quotation marks omitted). The bad faith exception applies "where the pre-litigation conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages." *Id.* The evidence shows that Rivkin altered the Employment Agreement and the Preferred Stock Option to reflect options to purchase non-existent preferred stock. Rivkin obtained Choupak's signature on those documents without telling him about the references to preferred stock. At the time, Rivkin was an Intermedia employee and acting as the Company's in-house lawyer. Although dubious and

unprofessional, Rivkin's conduct was not sufficiently egregious to support bad faith fee shifting. This decision has held that the reference to preferred stock was part of an unsophisticated effort to memorialize an agreement regarding 4% of the equity and anti-dilution protection. Rivkin should have called Choupak's attention to the changes he made to the documents, but this aspect of his conduct does not warrant shifting fees. Rivkin's deceptive lowering of his exercise price in his RSPA might have warranted fee-shifting in some amount, but that change proved immaterial because Choupak did not make Rivkin repay his note.

Rivkin crossed the Rubicon when he manufactured the 2008 Exercise Notices. "[C]ourts have found bad faith where parties . . . falsified records." *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998). Helpful guidance for evaluating the seriousness of Rivkin's conduct can be found in the requirements for analogous criminal offenses. The Court of Chancery is a civil court that does not hear criminal matters, and the decision to prosecute a crime falls exclusively within the Attorney General's "broad discretion as to whom to prosecute." *Albury v. State*, 551 A.2d 53, 61 (Del. 1988). Nevertheless, the fact that a party engaged in conduct which, on its face, would establish a *prima facie* case for violating a criminal statute provides powerful evidence that the party acted in bad faith.

The Two Signature Version was a forgery. Under Delaware law,

> [a] person is guilty of forgery when, intending to defraud, deceive or injure another person . . . the person . . . [m]akes, completes, executes, authenticates, issues or transfers any written instrument which purports to be the act of another person, whether real or fictitious, who did not authorize that act, or to have been executed at a time or place or in a

> numbered sequence other than was in fact the case or to be a copy of an original when no original existed . . . .

11 *Del. C.* § 861(a)(2). "Forgery is forgery in the first degree if the written instrument is or purports to be . . . [p]art of an issue of stock, bonds or other instruments representing interests in or claims against a corporation, business enterprise or other organization or its property." *Id.* § 861(b)(1). Forgery in the first degree is a Class F felony punishable by up to three years of incarceration and the imposition of such fines and penalties as the court deems appropriate. *Id.* § 4205. This court has held, albeit using a preponderance-of-the-evidence standard rather than the higher burden of proof applicable in criminal cases, that Rivkin manufactured the Two Signature Version. He then used it in an effort to obtain a share of the Oak Hill Merger consideration to which he was not entitled. In doing so, Rivkin engaged in conduct which, on its face, satisfies the elements of the offense of forgery in the first degree.

Courts also have found bad faith where parties have "knowingly asserted frivolous claims." *Johnston*, 720 A.2d at 546. The Counterclaim Story, which was premised on the manufactured 2008 Exercise Notices, was baseless. The Counterclaims were frivolous because they depended on outright falsehoods.

After filing the Counterclaims, Rivkin engaged in bad faith conduct during the litigation. "The bad faith exception is not limited to the circumstances where the action is brought in bad faith or where the defendants' bad faith forces the filing of the action. It also includes cases where the litigation process itself is conducted in bad faith." *Arbitrium*, 705 A.2d at 231-32 (citations omitted). Rivkin forced the plaintiffs to take a

costly detour into federal court over a removal motion that relied on an address that the district court determined did not exist and statements about Rivkin's residence that the district court did not credit. Rivkin then abused the discovery process. He lied about possessing the original Two Signature Version and sought to extract concessions from the plaintiffs before admitting that he did not have it. He failed to produce a privilege log despite being ordered by the court to do so. Dkt. 130. When the plaintiffs moved for sanctions, he attempted to moot the motion by providing a representation that he had given the original Two Signature Version to Rohan in 2012. That representation was shown to be false.

Rivken provided verified interrogatory responses about the Counterclaim Story that were false and misleading. He verified two sets of interrogatory responses in which he claimed to have met with Choupak within two to three months of executing the 2008 Exercise Notice, while Choupak was in France. JX 173 at 8, 174 at 2. He also claimed to have reviewed the Two Signature Version when crafting his Counterclaims, only later to assert that he did not have it. JX 173 at 13-14. He denied knowing about anyone else's stock ownership by stating in a verified interrogatory response that "Choupak kept compensation of persons associated with Intermedia secret from others associated with Intermedia." JX 173 at 6. In reality, from 2000 until 2002, Rivkin maintained the Cap Table, which contained salary and equity compensation data for Intermedia employees.

Other "behavior that has been found to constitute bad faith in litigation includes misleading the court, altering testimony, or changing position on an issue." *Beck*, 868 A.2d at 851. Substantial grounds exist to believe that Rivkin committed perjury. Under

Delaware law, "[a] person is guilty of perjury in the third degree when the person swears falsely." 11 *Del. C.* § 1221. Perjury in the third degree is a Class A misdemeanor, punishable by up to one year of incarceration, a fine of up to $2,300, and restitution or such other conditions as the court deems appropriate. *Id.* § 4206(a). "A person is guilty of perjury in the second degree when the person swears falsely and when the false statement is: (1) [m]ade in a written instrument for which an oath is required by law; and (2) [m]ade with intent to mislead a public servant in the performance of official functions; and (3) [m]aterial to the action, proceeding or matter involved." *Id.* § 1222. Perjury in the second degree is a Class F felony, punishable by up to three years of incarceration and the imposition of such fines and penalties as the court deems appropriate. *Id.* § 4205. "A person is guilty of perjury in the first degree when the person swears falsely and when the false statement consists of testimony and is material to the action, proceeding or matter in which it is made." *Id.* § 1223. Perjury in the first degree is a Class D felony, punishable by up to eight years of incarceration and the imposition of such fines and penalties as the court deems appropriate. *Id.* § 4205. "A statement is 'material' when, regardless of its admissibility under the rules of evidence, it could have affected the course or outcome of the proceeding." *Id.* § 1235.

Using the preponderance-of-the-evidence standard, this decision has found that Rivkin testified falsely. Some of Rivkin's testimony was false but immaterial, such as denying the existence of his first wife. Many of his false statements were intended to and could have affected the outcome of this litigation, such as his testimony about the 2008 Exercise Notices. During the course of the litigation, Rivkin advanced no fewer than five

inconsistent accounts about exercising the Preferred Stock Option. He testified about these false accounts in deposition and at trial, and he swore that he lost the Two Signature Version two years before sending it to his attorney. He seemed to ad lib the distinction between the Signatures-Only Version and the Completed Version on the stand.

Rivkin's litigation conduct was sufficiently egregious to justify shifting fees under the bad faith exception to the American Rule. The pervasive nature of Rivkin's conduct warrants shifting all of the attorneys' fees and expenses that Choupak, Sofinski, and Intermedia incurred.

III. CONCLUSION

Judgment is entered against Rivkin and in favor of Choupak, Sofinski, and Intermedia. Rivkin is liable under the Employment Agreement for Intermedia's expenses, including attorneys' fees. Rivkin is also liable under the bad faith exception to the American Rule for all of Choupak, Sofinski, and Intermedia's expenses, including attorneys' fees. Choupak, Sofinski, and Intermedia are separately entitled to costs as prevailing parties. Counsel shall submit a Rule 88 affidavit and a bill of costs. Once the amount of expenses, including attorneys' fees, and costs has been determined, the plaintiffs will submit a form of Final Order and Judgment.