IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAVID CHRIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 20587
	)	
IBRIX INCORPORATED and STEVEN ORSZAG,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: October 4, 2005
Decided: October 19, 2005

David Chrin, *pro se*.

Peter B. Ladig, Esquire, THE BAYARD FIRM, Wilmington, Delaware, *Attorney for the Defendants.*

LAMB, Vice Chancellor.

The plaintiff executed a contract to purchase 1.5 million newly-issued shares of common stock of the defendant corporation for a total purchase price of $1,500. The opportunity to purchase shares at these bargain terms was offered to him since he was a founding employee of the corporation. Eighteen months later, the board of directors terminated the plaintiff's employment and asserted the right, under the stock purchase agreement, to repurchase a portion of his shares at a similarly discounted price. Under that contract, the company's right to repurchase those shares depended upon the board having made a good faith determination to terminate his employment for "good cause" as narrowly defined in that agreement.

The plaintiff brings this suit against the corporation and others alleging a wide variety of causes of action relating to both the execution of the stock purchase agreement and the events surrounding his termination and the purported share repurchase. First, the plaintiff alleges that the defendants duped him into signing the stock purchase agreement for a smaller percentage equity interest than he was entitled to receive. Second, the plaintiff claims that he was not terminated for "good cause." From this he argues both that none of his shares were validly repurchased and that his employment continued until the end of the three-year vesting period found in the stock purchase agreement.

The defendants now move to dismiss the complaint. The court finds that the well pleaded allegations of fact found in the complaint, if true, cannot support any

claim for relief relating to the plaintiff's initial share purchase. Thus, the counts relating to those matters will be dismissed. Nevertheless, the court concludes that the complaint adequately alleges a claim that the board of directors did not make a good faith determination to terminate the plaintiff's employment for "good cause" within the meaning of the contract and, thus, the company was not entitled to repurchase his shares. The motion to dismiss as to those counts will be denied.

I.[1]

A. The Parties

The plaintiff, David Chrin, is a resident of New Jersey. The defendant, Ibrix, Inc., is a Delaware corporation organized for the purpose of developing software for computer storage devices. Chrin is a stockholder and former employee of Ibrix. The defendant, Steven Orszag, a renowned university professor of mathematics, was a co-founder and chairman of the board of directors of Ibrix. At the time in question, Orszag was a senior faculty member at Princeton University in the Department of Applied Mathematics and director of that university's Computational Fluids Lab.

[1] The facts recited herein are taken from the well pleaded allegations of the second amended complaint, filed June 7, 2005.

B. The Stock Purchase Agreement

In the fall of 1999, while working at Cambridge Hydrodynamics, Inc., a small consulting firm near Princeton, New Jersey owned by Orszag's wife, Chrin and Eric Jackson approached Orszag about forming a company to develop and sell a network storage device. The three are co-inventors in a patent (No. 7,782,389) (eventually assigned to Ibrix) that covered the original product idea. The parties reached an oral agreement in which Chrin and Jackson would develop the product while Orszag would incorporate the company, provide all the initial funding, and find outside investors. Orszag agreed to fund the company until outside investors could be found.

Initially, the parties decided that they would be equal partners in major decisions affecting the company and would each be given a one-third equity interest in the company. However, they agreed that "Mr. Orszag's equity in the Company would increase over time as the pair's [Chrin and Jackson] stock decreased equally by half of Mr. Orszag's increase."[2] Allegedly, the part of the agreement relating to the equity split was put in writing, although the plaintiff does not possess a copy. The complaint further alleges that the three parties orally agreed that "they would be equal partners in major decisions affecting the Company and about creating the Company."[3]

[2] Pl.'s Second Am. Compl. ("Compl.") ¶ 7.
[3] *Id.*

By early 2000, "it became apparent it would take longer than anticipated to attract outside funding."[4] Due to Orszag's funding of expenses up to that point, Chrin's and Jackson's equity share was rapidly approaching zero. Orszag said that he would "make a fair adjustment, because it was never his intent to have all the equity of the Company after [Chrin's and Jackson's] intellectual" efforts on behalf of the enterprise.[5]

By late summer 2000, outside funding prospects were more promising. Thus, Orszag proceeded to have the necessary documents prepared to incorporate Ibrix. On August 7, 2000, the parties initialed a founders' equity distribution agreement ("FED"), providing that Chrin and Jackson were each to receive 18.8% of the common stock, Orszag was to receive 47.7% of the common stock, and the remaining common stock was to be distributed to outside investors.[6]

At about this time, Orszag also explained to Chrin and Jackson the dilutive effect on their percentage interest that would occur as a result of additional issuances of stock to outside investors. The complaint alleges that Chrin was

[4] *Id.* at ¶ 9.
[5] *Id.*
[6] Compl. ¶ 9. The parties also discussed that Chrin and Jackson would have to buy the stock at a sufficiently high enough price so that there would not be a windfall capital gains tax due on the difference in the true value and the price actually paid. Jackson and Chrin agreed to pay a maximum of $2,000 for the shares.

aware that the number of shares to be issued increased from one million to two million, and then to four or five million, and finally to eight to ten million.[7]

In or around September 2000, "Steven Orszag told David Chrin that his equity interest in the Company was being reduced and given to Eric Jackson because Orszag felt Mr. Chrin was not putting in sufficient effort into the project."[8] According to the complaint, Orszag told Chrin to "take it or leave it."[9] Chrin believed the amount of the reduction was about 2% of the total equity of the company. Chrin alleges he felt coerced and compelled to acquiesce to Orszag, who at the time was his supervisor at Cambridge, so he agreed to this reduction without discussing the matter with Jackson.[10]

The company was incorporated on October 3, 2000. The following day, Orszag gave Chrin a Founders Stock Purchase Agreement ("SPA") for 1.5 million shares of common stock at a price of $.001 per share. According to the complaint, "Orszag gave Chrin the agreement without making any statements other than suggesting it be reviewed before signing it."[11] Chrin read the agreement, signed it, and gave it back to Orszag. Chrin alleges that he thought the 1.5 million shares in

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[7] *Id*. "Orszag had said the number of shares in the company would be one million; then later increased it to two million; then about the time the distribution agreement was initialed, four or five million . . . . The last word in September, 2000 was that the initial number of shares would be 8 to 10 million."
[8] Compl. ¶ 10.
[9] *Id*.
[10] *Id*.
[11] Compl. ¶ 16.

the SPA amounted to 18.8% of the company's issued stock, as stated in the FED, minus the 2% reduction given to Jackson.[12] Despite the fact that Chrin knew that the issuance of additional shares to outside investors would dilute his percentage equity interest, Chrin did not ask Orszag or anyone else what percentage interest was represented by the 1.5 million shares.[13] According to the complaint, the 1.5 million shares purchased by Chrin were approximately 7.6% of the company's issued common stock.[14] Chrin claims that he was duped into buying a smaller percentage of Ibrix equity than he had a right to acquire.

B. The Termination Of Chrin's Employment

In 2001, Chrin was employed as a Product Manager at Ibrix, providing systems support, researching competition, and managing equipment purchases.[15] In the fall of that year, Orszag asked Chrin to report directly to Mark Dennis, the director of Testing and Quality Assurance, and to assist him in testing the product. Chrin understood this to be a temporary extension of his job responsibilities. In early 2002, Dennis conducted an employee review of Chrin and told Chrin that his

[12] *Id*.
[13] At oral argument, the plaintiff stated that, during the period from October 2000 until his termination in May 2002, he never inquired into what percentage of the company he owned.
[14] *Id*. It is disputed how many shares the company issued on the date of the SPA. Chrin asserts that 19,710,000 shares were issued on the date of the SPA, which would give him approximately 7.6% of the company's issued stock. The defendants assert that 11.2 million shares were issued on the date of the SPA, which gave Chrin approximately 13.4% of the company's issued stock. The Ibrix certificate of incorporation authorized the issuance of up to 25 million shares.
[15] Compl. ¶ 29. Beginning in May 2001, Chrin worked at Cambridge, but "was compensated at a two-thirds time rate by Ibrix." Chrin became a full-time employee of Ibrix on June 1, 2001.

work was satisfactory. The review was not put in writing. According to the complaint:

> Subsequently, at no time did Mr. Dennis indicate to Mr. Chrin that his work was less than satisfactory, or that Mr. Chrin was negligent in his duties, or had committed any misconduct. Likewise, at no point did Mr. Orszag, Mr. John, or any other board member indicate to Mr. Chrin that there was any dissatisfaction with Mr. Chrin's work, or that he was negligent with his duties or was acting in a manner to constitute misconduct.[16]

On May 3, 2002, Dennis told Chrin he was terminated. Chrin alleges that when he asked Dennis why he was terminated, Dennis replied that his work was unsatisfactory.[17] Chrin repeatedly asked Dennis for specific examples of his unsatisfactory work but "Dennis refused to cite specific examples, stating he did not have to."[18] Chrin then approached Orszag and asked him for specific reasons why he was fired. Orszag allegedly stated that the board had accepted Dennis's recommendation to terminate Chrin.[19] Shortly thereafter, Chrin and his counsel met with Orszag to discuss Chrin's termination and severance package.[20] "At this meeting Mr. Orszag described the reason for termination only as unsatisfactory or insufficient quality of work, and refused to state more."[21]

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[16] Compl. ¶ 36.
[17] Compl. ¶ 37.
[18] *Id*.
[19] *Id.* Chrin sent Orszag an e-mail asking him to confirm that the reason for his termination was insufficient quality of work. Orszag replied to the e-mail merely saying that he had set up a meeting with the company's attorney.
[20] Compl. ¶ 38. Bruce Lubitz, attorney for Chrin, and Tom Lewis, attorney for Ibrix, attended this meeting.
[21] *Id.*

Thereafter, the company sent notices to Chrin of its intention to exercise its option to repurchase a portion of his shares pursuant to the SPA. The SPA permitted the company to repurchase a portion of Chrin's shares in the event he was terminated for cause. According to Section 6 of the SPA:

> In the event of the termination by the Company of Purchaser's employment relationship with the Company for cause (as defined below), the Company shall upon the date of such termination (the "Termination Date") have an irrevocable, assignable option (the "Repurchase Option") for a period of sixty (60) days from such date to repurchase all or any portion of the stock held by Purchaser as of the Termination Date which has not yet been released from the Company's Repurchase Option in accordance with the terms of this Section 6 at the purchase price per share of stock specified in section I (adjusted for any stock splits, stock dividends and the like).

The SPA defines cause to mean:

> (i) Purchaser's commission of any dishonest or fraudulent act relating to his employment; (ii) misappropriation of funds or embezzlement by Purchaser of the Company funds; (iii) commission of any felony or crime involving moral turpitude; or (iv) repeated misconduct or negligence in the performance of Purchaser's duties relating to his employment as determined in good faith by the Board of Directors of the Company.

On May 8, 2002, Orszag sent Chrin a check in the amount of $477.22 for the share repurchase. Then, on May 28, 2002, Orszag sent Chrin a letter and enclosed a second check for $27.58, explaining that he had incorrectly calculated the number of shares held by Chrin, and that Ibrix was entitled to repurchase additional shares. Chrin refused the payments, alleging that the

company did not have the right to repurchase his shares under the SPA since he was not fired for cause. According to the complaint, prior to Chrin's termination, no Ibrix board member sought expert legal advice as to whether Chrin's unsatisfactory work fell within the SPA's definition of termination for cause.[22]

On October 3, 2003, Chrin filed this *pro se* action against Ibrix, Orszag, and others.[23] The defendants twice moved to dismiss. On both occasions, the plaintiff filed an amended complaint that both dropped parties and added factual allegations in an effort to meet the thrust of the motions to dismiss. On July 1, 2005, the defendants filed a motion to dismiss the second amended complaint. This is the court's decision on that motion.

II.

The standard for dismissal pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted is well established. A motion to dismiss will be granted if it appears with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading.[24] That determination is generally limited to the factual allegations

[22] Compl. ¶ 38.
[23] The plaintiff's original complaint also contained defendants Reba Orszag, Shaji John, and Thomas Thekkethala, but the claims against these defendants were dismissed by the plaintiff in the amended complaint.
[24] *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).

contained in the complaint. In considering this motion, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[25] All facts of the pleadings and inferences that can reasonably be drawn therefrom are accepted as true.[26] However, with that said, a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences.[27]

III.

A. Claims Arising Out Of The October 4, 2000 SPA

The plaintiff alleges in the second amended complaint that: (1) Ibrix breached the SPA, or, in the alternative, the FED; (2) Orszag breached the FED and committed fraud; (3) Orszag breached his duties in regard to an agency relationship he had with Chrin in matters relating to the incorporation of the company; (4) Orszag breached the implied covenant of good faith and fair dealing; and (5) Chrin relied to his detriment on promises made by Orszag in the FED and is entitled to relief based on promissory estoppel.

1. Breach Of The SPA, Or, In The Alternative, The FED

The plaintiff alleges that Ibrix breached the SPA by not tendering to him an 18.8% equity interest in the company. In effect, the plaintiff contends that the SPA

[25] *Grobow v. Perot*, 539 A.2d 180, 188 n.6 (Del. 1988).
[26] *Id.*
[27] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).

should be read to incorporate the FED into its terms. The plaintiff alleges that, while the SPA made no specific reference to what percentage of the company the 1.5 million shares represented, he was entitled to rely on the FED to fill in this blank. The defendants argue that the SPA contained an integration clause, which prohibits the plaintiff from claiming the FED was part of the SPA. Section 8(f) of the SPA states:

> This Agreement, *including the Exhibits hereto,* contains all of the understandings and agreements arrived at between the parties with respect to the subject matter hereof. This Agreement cannot be changed, altered or amended except in an instrument in writing signed by the party against whom enforcement is sought.[28]

The plaintiff contends that "including the Exhibits hereto" means that the SPA "includes any agreements and understandings in any exhibit."[29] Additionally, the plaintiff claims that the SPA was a short agreement and could not possibly comprise all the understandings and negotiations between the parties.[30] Therefore, the plaintiff argues, the SPA should be read to incorporate information external to the four corners of the contract, such as the FED.

Moreover, the plaintiff claims that the buyer warranty section, Section 4 of the SPA, also makes references to external documents which permit the plaintiff to rely on information outside of the SPA. Section 4 states:

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[28] Compl. Ex. F § 8(f) (emphasis added).
[29] Pl. Br. in Supp. of Opp'n. to Defs. Mot. to Dismiss 8.
[30] *Id.* at 10.

> I represent and warrant that I am familiar with the Company's plans, operations and financial condition and that I have heretofore received all such information as I deem necessary and appropriate to enable me to evaluate the financial risk inherent in making an investment in the Stock of the Company.[31]

The plaintiff reasons that this section states that he has received information from the company that is outside of the SPA and has used this information in making his decision as to whether or not to purchase the stock. Accordingly, he argues that the SPA permits him to rely on information outside of the contract, such as the FED.[32]

The court cannot reasonably infer from the plain language of the SPA that the SPA incorporated the FED into its terms. "Where the [contract] language is clear and unambiguous, this court will accord the language its ordinary meaning."[33] First, the court cannot reasonably construe the phrase "including the Exhibits hereto" to impliedly include the FED because the FED was not an exhibit to the SPA. Based on the unambiguous terms of the clause, the court cannot reasonably agree with the plaintiff's interpretation that the language includes all agreements or understandings in "any" exhibit. Second, it would be unreasonable for the court to read the buyer warranty clause to impliedly incorporate the FED into the SPA.

[31] Compl. Ex. F § 4.

[32] Pl. Br. in Supp. of Opp'n. to Defs. Mot. to Dismiss 12. The plaintiff argues that if Ibrix wanted to limit his reliance on external information, the warranty statement should have stated: "I warrant I have relied only on the information contained within this agreement concerning the Company's plans, operations, and financial information in making my decision to purchase the Company's stock."

[33] *Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 5 (Del. 2002).

The plaintiff is using a warranty he gave to the defendants assuring that he was familiar with the financial risks in making an investment in the company to try to circumvent the integration clause. Allowing the plaintiff to do this would undermine the SPA's integration clause.

Stated briefly, after entering into an agreement that contained an unambiguous integration clause, the plaintiff cannot now rely on external documents to allege a breach of an undertaking not contained in the integrated agreement.[34] As a final point, "parol evidence cannot be used to interpret a contract that facially is unambiguous."[35] Thus, the court cannot reasonably allow the FED, an antecedent preliminary understanding, to vary or contradict the facially unambiguous SPA.[36]

Alternatively, the plaintiff alleges that the FED was a legally enforceable contract which Ibrix implicitly assumed when the company was formed. The plaintiff claims that Ibrix breached this contract by not giving him an 18.8% equity

[34] *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 141 (Del. Ch. 2003).
[35] *Highlands Insurance Group, Inc. v. Halliburton Co.*, 2001 Del. Ch. LEXIS 32 at *26 (Del. Ch. Mar. 21, 2001).
[36] *See Burgess v. Manufactured Housing Concepts, L.L.C.*, 1997 Del. Super. LEXIS 162 at * 2 (Del. Super. Ct. June 17, 1997) ("where two parties have executed a written contract to which they both have assented as the complete integration of the agreement, all other evidence of antecedent understanding and negotiation will be inadmissible for the purpose of varying or contradicting the writing").

interest in the company and not forming the company so that Jackson, Orszag, and Chrin "shared equally in the process on major decisions affecting the company."[37]

Taking the plaintiff's allegations as true, the court cannot reasonably infer that the plaintiff had a rational basis to conclude that the FED entitled him to 18.8% of the equity in the company as it was ultimately incorporated. Indeed, the plaintiff himself alleges in the complaint that he did not reasonably expect to receive the 18.8% equity interest stated in the FED. The plaintiff alleges that under the original equity distribution agreement, his equity stake was rapidly approaching zero by mid-2000. Several months later, Orszag decided to adjust the equity distribution so that he did not have all the equity in the company. Chrin acknowledges that Orszag presented the FED to him with the understanding that Chrin's equity interest would be diluted by outside investors. It is reasonable to assume, and the complaint does not allege to the contrary, that there were outside investors who diluted the plaintiff's equity stake. In addition, Orszag told the plaintiff that his equity interest would be further reduced and given to Jackson because Orszag felt that the plaintiff was not putting in sufficient effort. The plaintiff assented to this reduction, which he believed amounted to a decrease of approximately 2% of his equity interest.

[37] Compl. ¶ 25; *See Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 350-51 (Del. Ch. 2003) (stating that, generally, "if the subsequently formed corporation expressly adopts a pre-incorporation agreement or implicitly adopts it by accepting its benefits with knowledge of its terms, the corporation is bound by it." *Id.* at 350).

For these reasons, the plaintiff could not have reasonably relied on the FED as a promise to allot to him 18.8% of the company's equity when the facts alleged by him conclusively demonstrate that he knew his 18.8% equity interest would be diluted. Moreover, because the plaintiff's claims are based on prior representations that are not memorialized within the text of the SPA, the court cannot reasonably infer that the plaintiff justifiably relied on those representations. At best, the plaintiff's factual allegations suggest that the FED was a preliminary agreement about the potential equity interest in Ibrix that was subject to change.

Finally, the FED does not mention that the plaintiff is entitled to an equal controlling interest in the company. Allegedly, in the fall of 1999, there was an oral understanding between the plaintiff, Jackson, and Orszag in which they were to participate equally in managing the affairs of the company. However, this agreement came about when the parties were to have equal shares in the company. The plaintiff could not have reasonably expected, and the court could not reasonably infer, that this original agreement implicitly carried over after the plaintiff's equity interest was greatly reduced. Moreover, the facts alleged in the complaint clearly show that Chrin never "participated equally" in managing the affairs of Ibrix and never objected to his exclusion.[38]

[38] For example, paragraphs 13 and 14 allege that Orszag and Ted Tussing, Orszag's daughter-in-law's brother, were appointed as the two directors of Ibrix and that they appointed Orszag's wife as president. Chrin played no role in either action. Nor does he allege that he played any role in management once Ibrix was incorporated.

2. Breach Of The FED By Orszag

The plaintiff claims that Orszag was bound by agency or contract principles to form Ibrix in a manner specified by the FED and that Orszag breached either or both of these duties when he did not give the plaintiff an 18.8% equity interest in the company or an equal vote on important corporate decisions. As to the breach of contract claim, the court has already concluded that the plaintiff does not allege sufficient facts to suggest either that the plaintiff was entitled to an equal vote on important corporate decisions or that Orszag was in any way bound to incorporate Ibrix in a particular manner. The conclusory allegation in paragraph 7 of the complaint that changes in stock interest "would not affect their ability to have an equal voice in important matters affecting the Company or its creation" notwithstanding, the course of dealing alleged in the complaint is entirely inconsistent with Chrin having any contractually enforceable right to participate equally with Orszag in the creation or management of Ibrix. Similarly, even if there was an interim understanding that Chrin would be entitled to an 18.8% equity stake in Ibrix, that understanding was obviously subject to modification or dilution. Indeed, the complaint alleges Chrin's understanding to that effect.

Next, the court addresses the allegation that "an agency relationship existed between Mr. Chrin and Mr. Orszag whereby Mr. Orszag acted as Mr. Chrin's agent

in matters relating to the incorporation of the Company."[39] Agency is a fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.[40] "The burden rests upon the party asserting the existence of an agency relationship to prove it."[41] Here, the plaintiff does not allege that the parties had a mutual understanding that Orszag would act on his behalf or that Orszag was subject to his control.[42] Indeed, the allegations of the complaint clearly show that Chrin both lacked any control over Orszag and was aware of that fact. Therefore, the court cannot reasonably infer that Orszag ever agreed to act as Chrin's agent for any purpose.

3. The Duty Of Good Faith And Fair Dealing

The plaintiff claims that Orszag breached the implied covenant of good faith and fair dealing by coercing Chrin to modify the FED and accept a lower percentage of equity in Ibrix. According to *Dunlap v. State Farm Fire & Cas. Co.*:

> Stated in its most general terms, the implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of

[39] Compl. ¶ 28.
[40] RESTATEMENT (SECOND) OF AGENCY, § 1 ("The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts.").
[41] *Abex Inc. v. Koll Real Estate Group,* 1994 Del. Ch. LEXIS 213 at*40 (Del. Ch. Dec. 22, 1994).
[42] *Id*. ("Critical to an agency relationship is the power of the principal to direct and control the agent.").

> the bargain. Thus, parties are liable for breaching the covenant when their conduct frustrates the "overarching purpose" of the contract by taking advantage of their position to control implementation of the agreement's terms.[43]

Chrin claims that Orszag, who at the time was his supervisor at Cambridge, told him that his equity interest in Ibrix would be reduced by about 2% and given to Jackson because he felt Chrin was not putting sufficient effort into the project. Allegedly, "Orszag told Mr. Chrin to take it or leave it."[44] Chrin claims that he felt compelled to acquiesce because Orszag was his supervisor who exercised significant control over his activities at Cambridge.

It is perplexing that the plaintiff alleges that Orszag was his agent and was subject to his control on matters affecting the incorporation of Ibrix, while concurrently alleging that Orszag controlled him and coerced the plaintiff to take a lower equity percentage of the company. Furthermore, the plaintiff does not allege any facts to suggest that Orszag threatened to take retaliatory action against him at Cambridge if he did not agree to a reduction in his equity interest in Ibrix.[45] Nor

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[43] 878 A.2d 434, 442 (Del. 2005); *see also Aspen Advisors LLC v. UA Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004) ("The implied covenant is only breached when the defendant [has] engaged in arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract.").

[44] Compl. ¶ 10.

[45] RESTATEMENT (SECOND) OF CONTRACTS, § 175; *Singh v. Batta Envtl. Assocs.*, 2003 Del. Ch. LEXIS 59 at *17 (Del. Ch. May 21, 2003) (holding that the party claiming duress must show a wrongful act that overcame the will of the aggrieved party who was without adequate means to protect himself); *Cianci v. JEM Enter.*, 2000 Del. Ch. LEXIS 125 at * 31 (Del. Ch. 2000) (holding that there are three basic elements of a claim that coercion or duress taints the enforceability of a contract: (1) a wrongful act, (2) which overcomes the will of the aggrieved party, (3) who has no adequate legal remedy to protect himself).

does the complaint allege that Orszag said or did anything to imply that he would improperly use his supervisory powers at Cambridge if Chrin did not agree to a modification of the FED. In fact, the plaintiff acknowledges that he agreed to this reduction when he signed the SPA.[46] Thus, the plaintiff does not allege sufficient facts for the court to infer that Orszag acted in bad faith and coerced him into agreeing to a lower equity percentage in Ibrix.

4. Promissory Estoppel

The plaintiff pleads in the alternative that, assuming the FED was not an enforceable contract, Orszag promised to give Chrin an 18.8% equity interest when Orszag incorporated the company. Chrin alleges that he relied on this promise and reasonably believed he was receiving 18.8% of the company's equity when he signed the SPA.

Promissory estoppel involves "informal promises for which there was no bargained-for exchange but which may be enforceable because of antecedent factors that caused them to be made or because of subsequent action that they caused to be taken in reliance."[47] To succeed on a claim for promissory estoppel, the plaintiff must plead sufficient facts to suggest that the defendant made a

[46] Compl. ¶ 16. *See Cianci*, 2000 Del. Ch. LEXIS 125 at * 42 ("Ratification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it.").

[47] 3 Eric Holmes Mills, et al., CORBIN ON CONTRACTS, § 8.1, at 5 (Rev. ed. 1996).

promise with the intent to induce action or forbearance, that the plaintiff actually relied on the promise, and that the plaintiff suffered an injury as a result.[48]

Here, whether or not the FED was an enforceable contract subject to modification or a mere promise, Chrin does not allege facts to suggest that he had a reasonable expectation that he would receive 18.8% of the equity interest in Ibrix. Orszag's promise was not that the plaintiff would receive 18.8% of the equity interest in Ibrix, but, as the plaintiff acknowledges in his complaint, that he *might* receive 18.8% of the company's equity, subject to dilution by outside investors. Knowing that there had to be outside investors, Chrin could not have reasonably anticipated to get the full 18.8% of the company's equity. Moreover, since Chrin signed the SPA and agreed to its integration clause, Chrin cannot now claim reliance on a prior promise that varies its terms.

5. Fraud

The plaintiff alleges that Orszag committed fraud both in his capacity as a director of the company and as an agent on behalf of the plaintiff. It is alleged that Orszag misrepresented to Chrin that the SPA gave Chrin an 18.8% equity interest in the company when in fact Chrin only purchased approximately 7.6% of the equity. In addition, Chrin alleges that Orszag acted as his agent when he

[48] *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 87 (Del. 1998).

incorporated the company, and thus owed Chrin a duty to disclose what percentage of the company Chrin was buying under the SPA.

The elements of a fraud claim are well settled. The plaintiff must plead with sufficient particularity: (1) a material false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or his reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's actions or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.[49] "But fraud does not consist merely of an overt misrepresentation. It may also occur . . . by silence in the face of a duty to speak."[50]

The plaintiff does not sufficiently allege that Orszag committed fraud by misrepresentation or, in the alternative, fraud based on nondisclosure. First, the plaintiff does not allege that Orszag made a material misrepresentation. Chrin does not allege that Orszag, or anyone else, misrepresented to him that the 1.5 million shares in the SPA equated to 18.8% of the company. Indeed, just the opposite is alleged. According to the complaint:

> Mr. Orszag gave Mr. Chrin the agreement without making any statements other than suggesting it be reviewed before signing it . . . .

[49] *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. Super. 1983).
[50] *Id.*; *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 Del. Ch. LEXIS 119 at * 31 (Del. Ch. 2004) ("There are three types of common law fraud: 1) representing false statements as true; 2) actively concealing facts which prevents the plaintiff from discovering them; or 3) remaining silent in the face of a duty to speak.").

> David Chrin was not provided with a written or verbal disclosure statement by Mr. Orszag indicating the distribution of shares under Paragraph 15, was not as had been stated in the distribution agreement . . . , nor subsequently did Mr. Orszag or the Company disclose this information to Mr. Chrin.[51]

Second, when the plaintiff signed the SPA, he could not have justifiably operated under the assumption that he was purchasing an 18.8% equity stake in the company. As discussed *supra*, the plaintiff knew his equity interest would be diluted and was uncertain as to the equity interest he was getting in the company. Therefore, the plaintiff could not have reasonably relied on the FED. Indeed, neither before nor after signing the SPA, did the plaintiff ever even inquire into what percentage equity interest he owned in the company. This conduct is entirely inconsistent with the claim that he had a contractual right to receive a set percentage of the equity.

Lastly, the plaintiff does not allege any basis for imposing on Orszag a duty to disclose. "Generally, there is no duty to disclose a material fact or opinion, unless the defendant had a duty to speak"[52] stemming from a relationship of trust and confidence.[53] Here, the plaintiff alleges that Orszag was Chrin's agent when he formed the corporation. As discussed above, the complaint does not support an inference that an agency relationship existed

[51] Compl. ¶¶ 16, 17.
[52] *Matthews Office Designs v. Taub Invs.*, 1994 Del. LEXIS 182 at * 4 (Del. 1994)
[53] RESTATEMENT (SECOND) OF TORTS, § 551.

between Chrin and Orszag. Accordingly, Orszag had no duty to inform Chrin of his equity percentage in the company. Based on the foregoing analysis, the complaint does not properly allege fraud.

B. Claims Arising Out Of Chrin's Employment Termination

On May 3, 2001, Chrin was terminated from his position as a product manager at Ibrix. Chrin alleges that (1) Ibrix breached the SPA by repurchasing a portion of his Ibrix shares when he was not terminated for cause, (2) Ibrix breached the implied covenant of fair dealing by not disclosing to him why he was terminated for cause, and (3) Ibrix breached an implied three-year employment contract.

1. The Share Repurchase

Section 6 of the SPA gives the company the right to repurchase a portion of an employee's shares of stock in Ibrix if the employee is terminated for cause. The SPA defines cause as:

> (i) Purchaser's commission of any dishonest or fraudulent act relating to his employment; (ii) misappropriation of funds or embezzlement by Purchaser of the Company funds; (iii) commission of any felony or crime involving moral turpitude; or (iv) repeated misconduct or negligence in the performance of Purchaser's duties relating to his employment as determined in good faith by the Board of Directors of the Company.

The plaintiff claims that the company had no right to repurchase his shares because the board did not make a good faith determination that "cause" existed to

terminate his employment. Chrin alleges that he received positive reviews from his supervisor, and "at no point did Mr. Orszag, Mr. John, or any other board member indicate to Mr. Chrin there was any dissatisfaction with Mr. Chrin's work."[54] According to the complaint, when Chrin asked why he was terminated, his supervisor replied that his work was unsatisfactory.

The plaintiff's allegations, if true, support a reasonable inference that he was not fired "for cause" within the meaning of the SPA. Mere unsatisfactory or insufficient quality of work may not rise to the level of repeated misconduct or negligence. Additionally, the allegation that the defendants refused to disclose the grounds for his termination supports the claimed absence of cause.[55] If the plaintiff can show, at trial, that the board of directors did not make the necessary good faith determination, he will be entitled to a judgment invalidating Ibrix's attempted repurchase of his shares.

[54] Compl. ¶ 36.

[55] The plaintiff also claims that the defendants are barred by equitable estoppel from asserting a defense that the plaintiff was terminated for cause under the SPA. The plaintiff argues that because the company refused to provide details of his termination they should be estopped from now claiming he was fired for cause. *See Dep't of Natural Res. & Envtl. Control v. Front St. Props.*, 808 A.2d 1204 (Del. 2002). The doctrine of equitable estoppel may be invoked "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." The plaintiff does not plead sufficient facts to establish equitable estoppel. The fact that the defendants failed to disclose the reasons for Chrin's termination does not estop the defendants from later proving that they terminated him for cause.

2. The Implied Covenant Of Fair Dealing

The plaintiff alleges that the company breached an implied covenant of fair dealing in the SPA by refusing to disclose to him why he was terminated for cause. This claim is intertwined with the previous one relating to the validity of the share repurchase. It will be sustained for similar reasons.

3. Is The SPA An Implied Employment Contract?

Finally, Chrin claims that the SPA's vesting schedule of the repurchase option gives rise to an implied three-year employment contract that was breached when he was terminated. He bases this claim on paragraph 6 of the SPA, which states:

> One-third of the shares subject to vesting shall be released from the repurchase option on the first anniversary of the date of this agreement and 1/36 of the shares subject to vesting shall be released from the repurchase option on the last day of each month thereafter, until all such shares subject to vesting are released from the repurchase option (provided in each case that purchaser's employment relationship with the company has not been terminated prior to the date of any such release).

Based on the unambiguous contract language, the court cannot reasonably infer a three-year employment contract. "If the contract is clear on its face, the court will rely solely on the clear, literal meaning of those words."[56] The paragraph on which the plaintiff relies is merely a vesting schedule releasing Chrin's shares from the company's right to repurchase them upon certain events

[56] *Interactivecorp v. Vivendi Universal*, 2004 Del. Ch. LEXIS 90 at *30 (Del. Ch. June 30, 2004).

enumerated in the SPA. It is a mechanism to calculate how many shares the company can repurchase if Chrin leaves voluntarily or is terminated for cause. It is not an employment contract.

IV.

For the foregoing reasons, the defendants' motion to dismiss pursuant to Rule 12(b)(6) is GRANTED as to Counts I through VII, and XI, and DENIED as to Counts IX and X. IT IS SO ORDERED.