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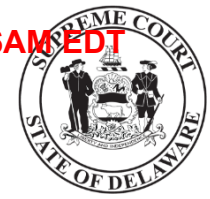

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON FRIED, Appellant, v. INTERSECT LABORATORIES INC. and ANKIT GORDHANDAS, Appellee.	:	No. 84, 2021 Trial Court Below: Chancery Court Vice Chancellor J. Travis Laster C.A. No. 2020-0408-JTL

APPELLANT'S OPENING BRIEF

COLE SCHOTZ P.C.

Andrew L Cole (No. 5712)
500 Delaware Ave, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 651-2002
Facsimile: (302) 574-2102
acole@coleschotz.com

Attorneys for Plaintiff Below/Appellant, Aaron Fried

OF COUNSEL:

Keith N. Biebelberg
BIEBELBERG & MARTIN
374 Millburn Avenue
Millburn, New Jersey 07041
Telephone: (973) 912-9888
Facsimile: (973-376-6142)
keithnbiebelberg@yahoo.com

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NATURE OF PROCEEDINGS

Plaintiff Aaron Fried ("Fried") appeals from an order[1] (the "Order") granting Defendants' motion to dismiss under Court of Chancery Rule 12(b)(6) (the "Motion to Dismiss") filed by Defendants Intersect Laboratories, Inc. (the "Company") and Ankit Gordhandas ("Gordhandas" and collectively with the Company the "Defendants").

This case concerns the interpretation of an accelerated stock vesting provision set forth in a Restricted Stock Purchase Agreement (the "RSPA") entered into between Fried and the Company. The operative clause (the "Provision") states:

> [I]f [Fried] is terminated without Cause (as defined below) by the Company (or a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below), then the vesting of the Unvested Shares shall accelerate . . . . (A0016 ¶ 29).

The RSPA provides a repurchase option for the Company with respect to unvested shares under certain circumstances.

The Company terminated Fried's employment without Cause (as defined in the RSPA) on March 25, 2019. Following Fried's termination, Defendants caused the Company to repurchase, and effectuated transfers of Fried's shares of stock that were unvested prior to his termination (the "Disputed Shares"). Fried contends that

[1] A copy of the order appealed from is appended to the end of this opening brief as Exhibit A.

the Disputed Shares vested upon his termination pursuant to the Provision, and therefore the Company was not permitted to repurchase the Disputed Shares.

Fried brought this action seeking to compel the return of his Disputed Shares, or in the alternative, for damages. Counts I through III of Fried's Verified Complaint (the "Complaint") sought a declaration that Fried's interpretation of the Provision is correct together with injunctive relief and/or damages based upon Defendants' improper exercise of the repurchase option.

The remaining claims, Counts IV through VII, pled in the alternative, seek damages in the event this Court were to determine that the Company's interpretation of the Provision is correct based on fraudulent and/or negligent misrepresentations and/or purposeful omissions made to Fried.

Defendants moved to dismiss Counts I-III and V-VII[2] pursuant to Court of Chancery Rule 12(b)(6). The Court of Chancery granted their motion. Fried appeals from that ruling.

[2] Although Defendants Motion to Dismiss sought "an order dismissing Plaintiff's Complaint," and Defendants requested in the Conclusion of their Opening Brief below that the Court of Chancery "enter judgment in its favor on each and every count of Plaintiff's Complaint," the Opening Brief below contained no argument in support of dismissal of Count IV, which states a claim for Equitable Fraud. (A0118 & A0122).

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law in dismissing Counts I through III based upon its holding that the Provision is unambiguous and that the reading urged by the Defendants (the "Double-Trigger Reading") is the only reasonable reading. *See* Order at 7(b) and (c). A contract is not ambiguous when a reasonable person in the position of either party would have no expectations inconsistent with the contract language. A reasonable person reading the Provision would have no expectations inconsistent with the Single-Trigger Reading.

A contract provision is ambiguous when the provisions in controversy are reasonably or fairly susceptible to different interpretations. To the extent a reasonable person reading the Provision noted the unquestionably missing closing parenthesis, as noted in the Order, the meaning of the Provision changes depending upon where the missing parenthesis is inserted. To the extent a reasonable person reading the Provision noticed the missing parenthesis, and noticed that the location of insertion of the missing parenthesis changed the meaning of the Provision, that would render the Provision ambiguous.

The Court of Chancery's determination that the Provision should unambiguously be interpreted per the Defendants' Double-Trigger Reading, assumes that a reasonable person reading the Provision would first recognize it as ambiguous, and then, based upon a different clause, on a different page of the RSPA,

resolve that ambiguity by assuming that the Provision was intended to mirror certain language in that other provision in the RSPA that addresses mutually exclusive factual circumstances, and then incorporate the triggering events from that other provision into the Provision (in which case the second provision could have been combined with the Provision into a single contract clause). This assumption is not anywhere evident from a plain reading of the Provision or from the face of the RSPA, and therefore the Provision cannot be unambiguously read pursuant to Defendants' Double-Trigger Reading.

2. The Court of Chancery also erred as a matter of law in holding that the remaining claims (Counts IV, V, VI and VII) fail to state claims for fraud, fraudulent misrepresentation, equitable fraud and negligent misrepresentation. These claims are based upon allegations that the Defendants knowingly presented a misleading agreement with an ambiguous provision (the RSPA missing the parenthesis in the Provision) to Fried in order to induce him to work for the Company for substantially below market (sometimes no) compensation, and/or the Defendants' omission to present Fried with an attachment to a corporate resolution that clearly reflected that vesting was on a "double-trigger" and instead presenting him with a substantially similar and contemporaneous document which notably omitted the "double-trigger" reference.

The Court of Chancery erred in holding that these allegations neither identify a misrepresentation nor permit an inference of a misrepresentation or actionable omission.

STATEMENT OF FACTS

Fried was a founder of Intersect Laboratories, becoming a stockholder on November 8, 2018 shortly after its formation. (A0008 ¶ 2). Fried purchased 4,600,000 shares of common stock representing 46 per cent of the equity in Intersect Laboratories pursuant to a Restricted Stock Purchase Agreement ("RSPA"). (A0008 ¶ 2). Fried had been one of two directors of Intersect Laboratories since acquiring his stock pursuant to the RSPA, and was employed by the Company until he was terminated without cause on or about March 25, 2020. (A0008 ¶ 2).

Gordhandas formed the Company, and holds approximately 5,400,000 shares of its sole class of stock. (A0008-A0010 ¶ 4, 9). During the salient time period, Gordhandas served as one of two directors of the Company (along with Fried), and was also CEO and President. (A0008 ¶ 4). He had formed the Company on October 19, 2018, less than three weeks before Fried became a director, shareholder and employee. (A0008-A0009 ¶ 3, 8).

On November 7, 2018 - - one day before Fried became a director, shareholder and employee, defendant Gordhandas as then-sole director of the Company signed an action by "unanimous" consent of the Board of Directors of the Company authorizing the sale and issuance of the aforesaid 4,600,000 shares of common stock to plaintiff on certain terms set forth on Exhibit A to that "November 7, 2018 Consent" document ("Exhibit A to the Consent"). (A0010 ¶ 10).

Exhibit A to Consent was not provided to Fried until after his November 8, 2018 purchase of the stock. (A0010 ¶ 11).

Defendants presented Fried with the RSPA together with other documents including a "MAP Summary" on November 8, 2018. (A0010-A0011 ¶ 12). While the MAP Summary resembles Exhibit A to the Consent, containing many of the same terms, it differs in one significant way: the Common Stock Vesting Provision on the MAP Summary omits the final sentence about the vesting of stock on a "double-trigger" basis. (A0011 ¶ 13).

Fried executed the RSPA on November 8, 2018 and paid the consideration due for his shares of stock. (A0011 ¶ 14). Only after Fried signed the RSPA was he provided access to Exhibit A to the Consent. (A0011 ¶ 15).

After Fried's execution of the RSPA, he became employed by, and was elected a director of, the Company. (A0011 ¶ 16). From November, 2018 through the end of 2019, Fried and Gordhandas worked together to build the business of Intersect Laboratories. During that time, Intersect Laboratories took on outside investment, and built sales and revenue, largely through Fried's efforts. (A0011 17).

From May, 2019 through August, 2019, Intersect Laboratories was able to attract investor capital, raising approximately $1.7 million in convertible notes, with the most recent investor (October 1, 2019) valuing the company at $16 million, largely due to Fried's sales and marketing efforts, which had led the company's

revenue to double each month during the summer of 2019. (A0011-A0012 ¶¶ 17 and 18). Throughout that period of time, plaintiff was paid drastically below fair market compensation. (A0025 ¶ 64).

During this period of time, defendant Gordhandas issued one or more investor reports touting Fried's extraordinary work. Through Fried's efforts, revenue was growing at 30 per cent month over month. (A0012-A0013 ¶ 21). The Company began to develop a business relationship with MongoDB, a publicly traded database company. (A0013-A0014 ¶ 24). MongoDB, in fact, discussed opportunities with Fried to use Intersect Laboratories' data analysis software in conjunction with MongoDB's database. *Id.* They discussed a tentative plan to integrate the Company's software into MongoDB's platform. (A0014 ¶ 26). This included the specific design of how the two applications could be combined, as MongoDB emphasized its lack of internal expertise in machine learning (the Company's core strength). (A0014 ¶ 26). While not explicitly dialogued, implicit in the discussions was the possibility that MongoDB would purchase the Company. (A0013-A0014 ¶¶ 24 to 26).

The RSPA contains a repurchase option, set forth in Section 3(a), authorizing the Company to repurchase a portion of Fried's shares of stock under specified circumstances for the original purchase price of $0.00001 per share. (A0015-A0016

¶ 28). This would be equivalent to $46.00 if *all* of Fried's shares (whether vested or unvested) were repurchased pursuant to the option. *Id.*

Section 3(a)(i) of the RSPA provides that "[i]n the event of the voluntary or involuntary termination of [Mr. Fried's] Continuous Service Status[3] . . . for any reason . . ., with or without cause, [Intersect Laboratories] shall upon the date of such termination . . . have an irrevocable exclusive option . . . for a period of two months from such date to repurchase all or any portion of the Unvested Shares . . . held by [Fried] . . . . As used in this Agreement, "Unvested Shares" means Shares, if any, that have not yet been released from the Repurchase Option." That repurchase option is subject to the qualifications in §§ 3(a)(iii) and (iv), which provide in relevant part:

> 3(a)(iii):
>
> > 4,600,000 of the Shares shall initially be subject to the Repurchase Option (the "Vesting Shares") . . . . [and] shall be released from the Repurchase Option as described in Section 3(a)(iv) below . . . .
>
> and
>
> 3(a)(iv):
>
> > Subject to Section 3(a)(iii) above, 1/4th of the Vesting Shares shall be released from the Repurchase Option on the 12-month anniversary of the Vesting Commencement Date, and an additional 1/48th of the Vesting Shares shall

[3] Continuous Service Status is defined in § 9(c) of the RSPA as the "absence of any interruption or termination of service as an Employee or Consultant."

> be released from the Repurchase Option on the corresponding day of each month thereafter (and if there is no corresponding day, the last day of the month), until all Vesting Shares are released from the Repurchase Option. *Notwithstanding the foregoing, if Purchaser is terminated without Cause (as defined below) by the Company (or a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below), then the vesting of the Unvested Shares shall accelerate such that the Repurchase Option in Section 3(a) shall lapse as to 100% of the Unvested Shares.*

(emphasis added).

Section 3(a)(iv) of the RSPA defines "Cause" as follows:

> "Cause" for the Company (or a successor, if appropriate) to terminate [Mr. Fried's] employment shall exist under the following conditions (I) [Mr. Fried]'s willful and continued failure to substantially perform [Mr. Fried]'s duties to the Company after there has been delivered to [Mr. Fried] by the Company's Board of Directors a written demand for substantial performance and opportunity to cure which sets forth in detail the specific respects in which the Company's Board of Directors believes that [Mr. Fried] has not substantially performed Purchaser's duties; (II) [Mr. Fried] having committed willful fraud, willful misconduct, dishonesty or other intentional action in any such case which is materially injurious to the Company; (III) [Mr. Fried]'s having been convicted of, or having plead guilty or *nolo contendere* to, any crime that results in, or is reasonably expected to result in material harm to the business or reputation of the Company; or (IV) [Mr. Fried]'s material breach of any material written agreement between [Mr. Fried] and the Company (including without limitation [Mr. Fried]'s Confidential Information and Invention Assignment Agreement with the Company) and [Mr. Fried]'s failure to cure such

> breach within 30 days after receiving written notice thereof.

(A0014-A0017 ¶¶ 28, 29 & 30).

After Fried returned from meetings in New York with MongoDB (and presumably Gordhandas became aware of the potential for a deal with MongoDB), Gordhandas approached plaintiff and urged that plaintiff agree to shift the ownership of stock in the company from 46 per cent - 54 per cent in favor of Gordhandas to 30 per cent - 70 per cent in favor of Gordhandas. (A0017-A0018 ¶ 33). After Fried declined, Gordhandas followed up and insisted on a split of 40 per cent/60 per cent in his favor. Fried declined again. *Id*.

On March 25, 2020, defendant Gordhandas terminated plaintiff's employment, with an effective termination date of April 1, 2020. (A0018 ¶ 34). Such termination was without "cause" as that term is defined in the RSPA. (A0018¶ 35).

The foregoing factual underpinnings of this case were followed by the Company's unilateral act of transferring plaintiff's disputed shares back to the Company via use of a blank stock power previously signed by Fried and previously held in escrow by the Company. (A0018-A0020 ¶¶ 37-40).

With respect to Fried's alternative claims in Counts IV through VII of the Complaint, Fried alleged that the Defendants furtively intended that the RSPA contain a Double Trigger (A0026 ¶ 67), but concealed that fact by presenting the

RSPA missing a closing parenthesis rendering the RSPA misleading as to the fact that it contained a Double Trigger[4] (A0026 ¶ 68). Fried further alleged that the Defendants provided Fried with the MAP Summary from which Gordhandas and the Company purposefully omitted any mention of "double trigger" vesting, which was explicitly mentioned in the virtually identical Exhibit A to the Consent (A0026-A0027 ¶ 69). Fried alleges that the foregoing actions and omissions were designed to mislead and induce Fried to accept employment with the erroneous understanding that vesting of his shares was subject to Single Trigger vesting. *Id.* Fried relied on these misrepresentations (A0027 ¶ 70) and was damaged by accepting far below market compensation in reliance on his understanding that there was no Double Trigger in the RSPA. (A0027 ¶ 71). What Defendants gained was the services of Fried at below market rates (at times even unpaid) based on the misrepresentation to him that his shares would fully vest upon termination without Cause pursuant to a Single Trigger. *Id.*

[4] Count V is expressly plead in the alternative, *i.e.* predicated on a determination that the RSPA does indeed contain a Double Trigger. (A0026 ¶ 66).

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY INTERPRETED THE SALIENT PROVISIONS OF THE RESTRICTED STOCK PURCHASE AGREEMENT, AND THEREFORE, ERRED IN DISMISSING COUNTS I THROUGH III OF THE COMPLAINT

A. Question Presented

Whether the Court of Chancery erred in construing the Provision in the RSPA as unambiguously creating a "double-trigger" for the accelerated vesting of the Disputed Shares upon Fried's termination without cause.

This question was preserved in the Court of Chancery in Fried's answering brief. (A0266-A0277).

B. Standard and Scope of Review

De novo review applies to the Court of Chancery's grant of the Motion to Dismiss. *See State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013). This review extends to both "the facts and the law in order to determine whether or not the undisputed facts (as set forth in the Complaint and the contractual documents entitle the movant to judgment as a matter of law.) *Id. United Vanguard Fund Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) Moreover, *de novo* review applies to judicial interpretation of a contract. *Exelon Generation Acquisitions LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017).

C. Merits of Argument

(i) Application of Rules of Contract Construction

A court construing a contract "must review a contract for ambiguity through the lens of 'what a reasonable person in the position of the parties would have thought the contract meant.'" *Kuhn Construction, Inc. v. Diamond State Port Corporation*, 990 A.2d 393, 396 (Del. 2010) (internal citations omitted). "[T]he true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

"Ambiguity exists 'when the provisions in controversy are reasonably or fairly susceptible to different interpretations.'" *Kuhn* at 396. A contract should be read "as a whole [giving] each provision and term effect, so as not to render any part of the contract mere surplusage[, however if the Court] find[s] ambiguity, [it] will apply the doctrine of *contra proferentem* and construe ambiguous terms and provisions against the drafting party." *Id.* at 396-97.

The doctrine of *contra proferentem* applies even where the proponent of the agreement did not actually draft the agreement. *See Kaiser Aluminum*, at 398-99 ("We agree that 'while the debtor corporations are not the actual drafters of bond contracts, they are in a much better position to clarify the meaning of . . . contract terms than are investors generally.").

(ii) Fried's is the Reasonable Interpretation of the Provision as Written

> [I]f [Fried] is terminated without Cause (as defined below) by the Company (or a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below), then the vesting of the Unvested Shares shall accelerate . . . .

A reasonable person in the position of the parties would read the foregoing Provision as the Single Trigger Reading. The Provision states that if Fried "is terminated without Cause . . . by the Company . . ., then the vesting . . . shall accelerate." The accelerated vesting in the Provision applies, alternatively, where Fried is terminated without Cause by a "successor, if appropriate in connection with or following the consummation of a Change of Control." This reading is both grammatically correct, and reflects the way in which a reasonable person would interpret the Provision.

The unmatched parenthesis in the Provision does not render the Provision ambiguous insofar as the Provision makes sense to a reasonable person as written, and is only susceptible to Fried's Single-Trigger Reading. To the extent a reasonable

person reading the Provision noted the unmatched parenthesis at all, the reasonable interpretation would either be that the open parenthesis preceding "or a successor" should be deleted, or that a second closed parenthesis should be added following "as defined below." In either case, the Provision would still be interpreted as Fried interprets it, *i.e.* the Single Trigger Reading.

Defendants contend that a closed parenthesis should be added between "if appropriate" and "in connection with or following the consummation of a Change of Control," however, there is no indication in the text of the Provision that any punctuation belongs in that spot, and a reasonable person reading the Provision as written would not infer as such.

Defendants suggested to the Court of Chancery that the missing parenthesis constitutes a "scrivener's error," but failed to explain how the presence of a scrivener's error might impact interpretation of the Provision. While a scrivener's error might support reformation of a contract where there has been a mutual mistake (*see e.g. Bryant v. Way*, 2012 WL 1415529, * 12 (Del. Super. 2012), cited by Defendants in the Court of Chancery), there are no allegations in the Complaint alleging a mutual mistake.

Defendants also argued below that Fried's interpretation of the Provision "simply cannot be accurate because reading this language in that manner would obviate the need for the Change of Control language in Section 3(a)(iv) of the

RSPA." Defendants' argument was ironically contradicted by additional language that they quoted from the RSPA. The quoted language, also from Section 3(a)(iv) of the RSPA, provides that Fried is entitled to accelerated vesting in the event he is a director, but *not* an employee or consultant, at the time of a Change of Control, and is thereafter removed (or not re-elected) as a director. Additionally, the term "Change of Control" is used in the Provision itself to denote the types of successors to which the Provision applies, *i.e.* successors by virtue of:

> (1) a sale of all or substantially all of the Company's assets other than to an Excluded Entity, (2) a merger, consolidation or other capital reorganization or business combination transaction of the Company with or into another corporation, limited liability company or other entity other than an Excluded Entity, or (3) the consummation of a transaction, or series of related transactions, in which any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act) becomes the "beneficial owner" (as defined in Rule 13d-3 of the Exchange Act), directly or indirectly, of all of the Company's then outstanding voting securities.

This provision both clarifies what types of successors are intended to be included, and what types are intended to be excluded (by way of example, but not limitation, while a trustee in bankruptcy, receiver, or assignee for the benefit of creditors might be a "successor" for some purposes, he or she would not be a "successor" for purposes of the Provision).

It is evident from the RSPA that the "Change of Control" concept is not rendered superfluous by Fried's interpretation of the Provision pursuant to a Single-Trigger Reading.

In granting Defendants' Motion to Dismiss, the Court of Chancery developed an argument which, to our observation, the Defendants really did not develop although it was attributed to them at paragraph 5 of the Order. The Court of Chancery observed that the "Director Accelerated Vesting Provision" in the RSPA (Section III(a)(iv)) contains matching closing parenthesis and makes clear that a director would receive accelerated vesting if removed "to the same extent as if Purchaser had been terminated without Cause as described above." The Court of Chancery went on to hold that therefore "[i]t is not reasonably conceivable that those two provisions were intended to operate differently, both because of their proximity to each other and their parallel language, and because the Director Accelerated Vesting Provision states that the two provisions contemplate accelerated vesting 'to the same extent.' Only the Double-Trigger Reading of the [Provision] accomplishes that result."

First, the relative proximity of the Provision and the Director Accelerated Vesting Provision (which appear on different pages of the agreement) and the fact that both contain similar verbiage does not indicate that the provisions are intended to operate in parallel. In fact, the two provisions address two distinct and mutually

exclusive situations. If the two provisions were indeed intended to operate in parallel, as the Court of Chancery suggested, there would be no need to have separate provisions, both provisions could have been incorporated in a single provision applicable to both the removal of a director (if not an employee) and/or termination as an employee. The Director Accelerated Vesting Provision addresses a situation where the individual "is a Director but *not* an Employee" (emphasis added) whereas the Provision in dispute addresses the situation where the individual is an employee. The fact that the two provisions are set forth separately, and operate on mutually exclusive fact scenarios, suggests that if anything the provisions are not necessarily intended to apply only after a "Change of Control."

Second, the statement in the Director Accelerated Vesting Provision that accelerated vesting would apply "to the same extent as if Purchaser had been terminated without Cause as described above," does not indicate that the provisions "are intended to operate in parallel." The "to the same extent" language in the Director Accelerated Vesting Provision does not refer to pre-conditions to acceleration, but rather to the acceleration itself, *i.e.* the immediacy of acceleration, and that the acceleration applies to 100% of the then unvested shares.

Here, the plaintiff was both a Director and an Employee, therefore Section III(a)(iv), the Director Accelerated Vesting Provision unambiguously and clearly does not apply to Fried, who was both a director and an employee (A0008 ¶ 2).

Furthermore, Section III(a)(iv) distinguishes between an employee and a director in at least two ways: it states, by its plain introduction, that it applies to a situation where the Purchaser "is a Director but not an Employee". It undoubtedly takes into account that someone who is a director but not an Employee has served the Company in a far less intensive, less productive manner than an employee. Therefore, the RSPA favors someone who is only director to a lesser extent than someone who is an employee (again, if the parties had intended directors and employees to be treated the same, there would be no reason for separate vesting provisions; one provision could be made to apply in both circumstances).

In this light, someone who is a "Director but not an Employee" would benefit from the automatic vesting of unvested shares only if he is not re-elected to the Board of Directors following a Change of Control. As to a Director, who is less involved than an Employee-Director working day and night for the Company, the "Change of Control" is a prerequisite for heretofore unvested shares to become vested. By contrast, an employee, by the very implication of the Provision (Section III(a)(iv)) will have his shares vest if he "had been terminated without cause as described above". The language does *not* say this will apply to the same extent as if the employee had been terminated without cause *and* there were to be a Change of

Control. As noted above, at a minimum, there is an ambiguity[5] that has created the competing interpretations submitted to the Court of Chancery.

The Court of Chancery erroneously placed reliance on the quote that the two Accelerated Vesting Provisions contemplate accelerated vesting "to the same extent". (Para. 7 of Order of Dismissal). There is an important distinction between saying that the *accelerated vesting* is the same, i.e., that the number of unvested shares that shall vest with immediacy is the same, vis-à-vis saying that the *pre-conditions* for vesting are the same.[6]

(iii) The Doctrine of *Contra Proferentem* Requires that Ambiguous Terms and Provisions be Construed Against the Drafting Party, and Extrinsic Evidence Should Not be Considered Where Fried had No Hand in Drafting the Agreement.

In the event this Court finds the Provision ambiguous due to the unmatched parenthesis, the Provision must be interpreted against the Company pursuant to the doctrine of *contra proferentem*. *See Kuhn* at 397. This is particularly so where Fried

[5] The Court of Chancery seems to acknowledge that at least the Provision itself is ambiguous in Paragraph 9 of the Order, recognizing "uncertainty resulting from the omitted parenthesis in the [Provision]."

[6] Fried recognizes that the sub-issue which the Court of Chancery focused on was the fact that the language included some verbiage that was nearly identical. However, that does not solve the legal issue; and as noted above, the terms of the "Director Accelerated Vesting Provision" do not control the interpretation of the Provision because it applies to someone who "is a Director but not an Employee", and as noted, the plaintiff was an employee (in addition to his role as a director).

had no hand in drafting the RSPA.[7] *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (citing *SI Management L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("If the contractual language at issue is ambiguous and if the limited partners did not negotiate for the agreement's terms, we apply the *contra proferentem* principle and construe the ambiguous terms against the drafter.) *See also SI Management*, at 44 ("Because the articulation of contract terms in this case appears to have been entirely within the control of *one party*-the General Partner- that party bears full responsibility for the effect of those terms. Accordingly, extrinsic evidence is irrelevant to the intent of *all* parties at the time they entered into the agreement.").

(iv) Dismissal of Counts I through III Must Be Reversed

The Court of Chancery's dismissal of Counts I through III of the Complaint was based exclusively upon the premise that the Provision is both unambiguous *and* that the Double-Trigger Reading is the only reasonable interpretation. (Order at ¶¶ 7-8) To the extent the Provision is *either* ambiguous, or the only reasonable interpretation is the Single-Trigger Reading, the Court of Chancery's dismissal of Counts I through III must be reversed.

[7] *See* Paragraph 12 of the Complaint: "Intersect Laboratories and Mr. Gordhandas presented Mr. Fried with the RSPA . . . ." (A0010-A0011).

II. THE COURT OF CHANCERY IMPROPERLY HELD THAT THE COMPLAINT FAILED TO PLEAD FALSE REPRESENTATIONS AND THEREFORE ERRED AS A MATTER OF LAW IN DISMISSING COUNTS IV THROUGH VII.

A. Question Presented

Whether the Court of Chancery erred in dismissing Fried's claims in Counts IV through VII for equitable fraud, fraudulent misrepresentation, negligent misrepresentation and common law fraud (the "Misrepresentation Claims") based on a finding that it is "not reasonably conceivable that the Company and Gordhandas committed fraud by presenting the agreement with a missing parenthesis and failing to provide Fried with a summary that expressly mentioned double-trigger vesting. The complaint does not identify a false representation, nor does it support a reasonable inference that any representation by the Company or Gordhandas was false."

This question was preserved in the Court of Chancery in Fried's opening and reply briefs. (A0279-A0285).

B. Standard and Scope of Review

De novo review applies to the Court of Chancery's grant of the Motion to Dismiss. *See State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013). This review extends to both "the facts and the law in order to determine whether or not the undisputed facts (as set forth in the Complaint and the contractual

documents) entitle the movant to judgment as a matter of law. *Id. United Vanguard Fund Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

C. Merits of Argument

Fried's allegations must be considered truthful on a motion to dismiss. *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs., LLC*, 27 A. 3d 531, 535 (Del. 2011). Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id*.

In the Order, The Court of Chancery held that Fried failed to allege a misrepresentation or support a reasonable inference that any representation made by either of the Defendants was false.

Fried alleges that Defendants intended that the RSPA contain a "double trigger" (A0026 ¶ 67), but concealed that fact by presenting the RSPA missing a closing parenthesis rendering the RSPA misleading as to the fact that it contained a Double Trigger[8] (A0026 ¶ 68), and further provided Fried with the MAP Summary from which Gordhandas and the Company purposefully omitted the mention of "double trigger" vesting, which was explicitly mentioned in the virtually identical Exhibit A to the Consent (which was withheld from Fried at the time) (A0026-A0027 ¶ 69). Fried alleges these statements were all made to mislead and induce

[8] Count V is expressly plead in the alternative, *i.e.* predicated on a determination that the RSPA does indeed contain a Double Trigger. (A0026 ¶ 66).

Fried to accept employment with the erroneous understanding that vesting of his shares was subject to Single Trigger vesting. *Id.* Fried relied on these misrepresentations (A0027 ¶ 70) and was damaged by accepting far below market compensation in reliance on his understanding that there was no "double trigger" in the RSPA (A0027 ¶ 71). What Defendants gained was the services of Fried at below market rates (at times even unpaid) based on the misrepresentation to him that his shares would fully vest upon termination without Cause pursuant to a Single Trigger *Id*.

Fried alleged that the Defendants made at least one misrepresentation and one material omission: (a) failing to apprise Fried of the "Double Trigger" by issuing the RSPA missing a closing parenthesis that rendered the RSPA misleading, and (b) failing to include the explicit reference to a double trigger from Exhibit A to the Consent (which was withheld from Fried) in the MAP Summary (that was actually provided to Fried prior to execution of the RSPA) or alternatively failing to disclose Exhibit A to the Consent.

To the extent it may be ultimately determined that the RSPA should be interpreted pursuant to the Double-Trigger Reading, the RSPA itself, as presented to Fried, was misleading due to the omitted parenthesis which led Fried to reasonably believe that the RSPA should be interpreted pursuant to the Single-Trigger Reading, and as a result acting to his detriment. Furthermore, the presentation to Fried of the

MAP Summary, which was substantially similar to Exhibit A to the Consent, but for the omission of the reference to a "double trigger" is alleged by Fried to have been designed to mislead him into believing that the RSPA contained a "single trigger," and thus inducing him to act to his detriment.

A representation that is misleading can support a claim for negligent misrepresentation. *See Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 765 (Del. Ch. 2014) (recognizing that the provision of misleading information by a defendant who expected to profit from the course of conduct in which he provided the information supports a claim for negligent misrepresentation).

Similarly, "fraud does not consist merely of overt misrepresentations. It may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak. Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading." *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983). While a party to an arms' length transaction has no duty to speak, once that party does speak, "it cannot lie . . . and once the party speaks, it also cannot do so partially or obliquely such that what the party conveys becomes misleading." *Prairie Capital III, L.P. v. Double E. Holding Corp.*, 132 A.3d 35 (Del. Ch. 2015). Here, where Defendants chose to provide the MAP Summary purporting to summarize the terms of the RSPA in addition to the (misleading) RSPA itself,

they had a duty provide complete information. Defendants had complete information, in the form of Exhibit A to the Consent, which was created the day before the MAP Summary was presented to Fried, but withheld it from Fried and instead presented the misleading MAP Summary from which the "double trigger" language was omitted.

CONCLUSION

For the foregoing reasons, Plaintiff Aaron Fried respectfully requests that this Court reverse the Court of Chancery's Order and reinstate the matter with a remand for further proceedings.

COLE SCHOTZ P.C.

/s/ Andrew L. Cole
Michael F. Bonkowski (No. 2219)
Andrew L. Cole (No. 5712)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(302) 652-3131 (Phone)
(302) 652-3117 (Fax)
mbonkowski@coleschotz.com
acole@coleschotz.com

Counsel for Plaintiff, Aaron Fried

Of Counsel:

Keith N. Biebelberg, Esq.
Biebelberg & Martin
374 Millburn Ave.
Millburn, NJ 07041
(973) 912-9888

Dated: May 18, 2021

EXHIBIT A

EFiled: Feb 18 2021 11:00AM EST
Transaction ID 66341727
Case No. 2020-0408-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AARON FRIED, Plaintiff, v. INTERSECT LABORATORIES INC. and ANKIT GORDHANDAS, Defendants.	)	C.A. No. 2020-0408-JTL

ORDER GRANTING MOTION TO DISMISS

1. Defendant Intersect Laboratories Inc. (the "Company") issued shares to plaintiff Aaron Fried under a Restricted Stock Purchase Agreement (the "Agreement"). Section 3(a) of the Agreement granted the Company the right to repurchase any unvested shares under specified circumstances. Section 3(a)(iv) of the Agreement governs the vesting of shares.

2. Section 3(a)(iv) initially provides for time-based vesting of the shares over a four-year period. The next sentence states

> Notwithstanding the foregoing, if Purchaser is terminated without Cause (as defined below) by the Company (or a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below), then the vesting of the Unvested Shares shall accelerate such that the Repurchase Option in Section 3(a) shall lapse as to 100% of the Unvested Shares.

Agr. § 3(a)(iv) (the "Employee Accelerated Vesting Provision"). This sentence notably contains four opening parentheses but only three closing parentheses. The claims in this case turn on the absence of the fourth closing parenthesis.

3. Fried argues that under the plain language of the Employee Accelerated Vesting Provision, all of his unvested shares vest if he is terminated without cause (the "Single-Trigger Reading"). Under Fried's interpretation, acceleration takes place upon termination either by the Company or "a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below)." He implicitly argues that the absent closing parenthesis should appear after the second instance of the phrase "as defined below," such that the sentence would read as follows:

> Notwithstanding the foregoing, if Purchaser is terminated without Cause (as defined below) by the Company (or a successor, if appropriate in connection with or following the consummation of a Change of Control (as defined below)**)**, then the vesting of the Unvested Shares shall accelerate such that the Repurchase Option in Section 3(a) shall lapse as to 100% of the Unvested Shares.

Under the Single-Trigger Reading, the role of the quoted phrase about a Change in Control defines when a successor entity will be deemed an appropriate successor for purposes of the vesting provision.

4. The Company disputes this reading, arguing that due to a scrivener's error, the Employee Accelerated Vesting Provision is missing a closing parenthesis after the phrase "(or successor, if appropriate," such that the sentence would read as follows:

> Notwithstanding the foregoing, if Purchaser is terminated without Cause (as defined below) by the Company (or a successor, if appropriate**)** in connection with or following the consummation of a Change of Control (as defined below), then the vesting of the Unvested Shares shall accelerate such that the Repurchase Option in Section 3(a) shall lapse as to 100% of the Unvested Shares.

Under this reading, all of Fried's unvested shares will vest if his is terminated without cause after a Change in Control (the "Double-Trigger Reading"). Put another way, under the

Double-Trigger Reading, both (i) termination without Cause and (ii) a Change of Control are required for Fried's unvested shares to vest, whereas under the Single-Trigger Reading, only a "termination without Cause" is necessary.

5. In support of the Double-Trigger Reading, the Company observes that the same section of the Agreement addresses accelerated vesting for a director in the event of removal. That language states,

> If Purchaser is a Director but not an Employee or Consultant of the Company (or a successor, if appropriate) at the time of consummation of the Change of Control and Purchaser is removed from, or is not reelected to, the Board of Directors of the Company (or a successor, as appropriate) in connection with or following the consummation of a Change of Control, if appropriate in connection with or following the consummation of a Change of Control, the vesting of the Unvested Shares shall accelerate such that the Repurchase Option shall lapse to the same extent as if Purchaser had been terminated without Cause as described above.

Agr. § 3(a)(iv) (the "Director Accelerated Vesting Provision"). In this sentence, the closing parenthesis twice appears after the phrase "(or a successor, if appropriate)." The Director Accelerated Vesting Provision also makes clear that a director would receive accelerated vesting in the event of removal "to the same extent as if Purchaser had been terminated without Cause as described above." The Employee Accelerated Vesting Provision and the Director Accelerated Vesting Provision thus are intended to operate in parallel. Under the Company's reading, the plain language of the Director Accelerated Vesting Provision (like the Double-Trigger Reading of the Employee Accelerated Vesting Provision) requires both (i) termination without Cause and (ii) a Change of Control.

6. The defendants have moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. When considering a Rule 12(b)(6)

motion, this court (i) accepts as true all well-pleaded factual allegations in the complaint, (ii) credits vague allegations if they give the opposing party notice of the claim, and (iii) draws all reasonable inferences in favor of the plaintiffs. *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011). Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.*

7. Counts I and III of the complaint assert claims for declaratory judgment and breach of contract based on the Single-Trigger Reading. "Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language." *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006). 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). Absent ambiguity, the court "will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (internal quotation marks omitted). "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." *Id.* (footnote omitted). If "the plain language of a contract is unambiguous i.e., fairly or reasonably susceptible to only one interpretation," then the court "construe[s] the contract in accordance with that plain meaning and will not resort to

extrinsic evidence to determine the parties' intentions." *BLGH Hldgs. LLC v. enXco LFG Hldg., LLC*, 41 A.3d 410, 414 (Del. 2012).

a. The Company has cited extrinsic evidence in support of the Double-Trigger Reading, but this court has not considered that evidence because the Agreement is unambiguous. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").

b. The Single-Trigger Reading is not a reasonable reading of the Employee Accelerated Vesting Provision. The same subsection of the Agreement contains both the Employee Accelerated Vesting Provision and the Director Accelerated Vesting Provision. It is not reasonably conceivable that those two provisions were intended to operate differently, both because of their proximity to each other and their parallel language, and because the Director Accelerated Vesting Provision states that the two provisions contemplate accelerated vesting "to the same extent." Only the Double-Trigger Reading of the Employee Accelerated Vesting Provision accomplishes that result.

c. When the contract is read as a whole, only the Double-Trigger Reading is reasonable. The Director Accelerated Vesting Provision twice uses the phrase "(or a successor, if appropriate)," with the closing parenthesis following the phrase "if appropriate." By doing so, it establishes two conditions for accelerated vesting: (i) termination without Cause and (ii) a Change of Control. Under the Double-Trigger Reading, the omitted parenthesis also would follow the phrase "if appropriate," mirroring the Director Accelerated Vesting Provision and establishing two conditions (i.e.,

termination without Cause and a Change of Control) for accelerated vesting. By contrast, the Single-Trigger Reading would establish only one condition (i.e., termination without Cause) for accelerated vesting. Accordingly, the plain language of the Director Accelerated Vesting Provision supports only the Double-Trigger Reading.

8. Count II asserts a claim for breach of fiduciary duty against Ankit Gordhandas for breach of his duties as escrow agent. To that end, the complaint alleges that Gordhandas breached his fiduciary duties by wrongfully transferring shares, which Fried contends had vested under the Employee Accelerated Vesting Provision, to the Company. But if the shares had not vested, then they did not belong to Fried, meaning that Gordhandas did not act in a fiduciary capacity with respect to Fried when he transferred them. The success of that claim thus depends on the viability of the Single-Trigger Reading. Because the Single-Trigger Reading is not reasonably conceivable, Gordhandas did not breach his duties as escrow agent by acting contrary to that interpretation.

9. Count V and VII assert claims for fraudulent misrepresentation and fraud based on the uncertainty resulting from the omitted parenthesis in the Employee Accelerated Vesting Provision. Under Delaware law, fraud and fraudulent misrepresentation have the same elements. *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLP*, 2018 WL 6311829, at *31 (Del. Ch. Dec. 3, 2018). To establish a claim for fraud, a plaintiff must prove (i) a false representation, (ii) a defendant's knowledge or belief of its falsity or his reckless indifference to its truth, (iii) a defendant's intention to induce action, (iv) reasonable reliance, and (v) causally related damages. See *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). It is not reasonably

conceivable that the Company and Gordhandas committed fraud by presenting the Agreement with a missing parenthesis and failing to provide Fried with a summary that expressly mentioned double-trigger vesting. The complaint does not identify a false representation, nor does it support a reasonable inference that any representation by the Company or Gordhandas was false.

10. Counts IV and VI assert claims for equitable fraud and negligent misrepresentation, which are different names for the same theory. *See Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch. Jan. 30, 2015). "A claim of negligent misrepresentation, or equitable fraud, requires proof of all of the elements of common law fraud except 'that plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly.'" *Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *7 (Del. Ch. June 6, 2006) (citation omitted). As this decision already has concluded, the complaint does not identify a misrepresentation, nor does it support a reasonable inference that either the Company or Gordhandas made an inaccurate representation. On that basis, the complaint fails to state a claim for equitable fraud.

11. A claim for equitable fraud also requires "(i) a special relationship between the parties over which equity takes jurisdiction (like a fiduciary relationship) or (ii) justification for a remedy that only equity can afford." *Envo, Inc. v. Walters*, 2009 WL 5173807, at *6 (Del. Ch. Dec. 30, 2009). The Agreement resulted from arm's-length bargaining between two equally sophisticated parties, and money damages would be a sufficient remedy. There thus are no grounds for involving equitable fraud or negligent misrepresentation. *See Fortis Advisors*, 2015 WL 401371, at *9.

12. The defendants' motion to dismiss the complaint under Rule 12(b)(6) is GRANTED.

/s/ J. Travis Laster
Vice Chancellor Laster
February 18, 2021

CERTIFICATE OF SERVICE

I, Andrew L. Cole, Esquire, hereby certify that on the 17th day of May, 2021, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent to the following, in the manner indicated below:

VIA FILE AND SERVEXPRESS

Elizabeth S. Fenton (#5563)
Chad E. Davis (#6402)
SAUL EWING ARNSTEIN & LEHR LLP
1201 N. Market Street, Suite 2300
Wilmington, DE 19801

COLE SCHOTZ P.C.

/s/ Andrew L. Cole
Andrew L. Cole (No. 5712)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(302) 652-3131 (Phone)
(302) 652-3117 (Fax)
acole@coleschotz.com

Attorney for Below-Appellant, Aaron Fried