EFiled: Jun 16 2021 02:18PM EDT
Filing ID 66692665
Case Number 84,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON FRIED, Appellant, v. INTERSECT LABORATORIES, INC. and ANKIT GORDHANDAS, Appellees.	)	C.A. No. 84, 2021 Trial Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0408-JTL

APPELLEES' ANSWERING BRIEF

SAUL EWING ARNSTEIN & LEHR LLP

Elizabeth S. Fenton (#5563)
Charles E. Davis (#6402)
1201 N. Market Street, Suite 2300
Wilmington, Delaware 19801
Tel.: (302) 421-6800
Fax: (302) 421-6833
elizabeth.fenton@saul.com
chad.davis@saul.com

Attorneys for Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

NATURE OF THE PROCEEDINGS

This dispute arises from form legal contracts furnished by Clerky, Inc., a legal-tech start up, that all parties signed using Clerky, Inc.'s online platform. This appeal by Aaron Fried ("Fried") seeks to overturn a Court of Chancery Rule 12(b)(6) dismissal based on the plain language construction of these form contracts by the Vice Chancellor that thwarted the off-market windfall sought by Fried through his tortured contract construction. Fried only raised his strained construction after his termination from Defendant Intersect Laboratories, Inc., (the "Company" and together with Ankit Gordhandas, "Defendants"), despite previously serving as a director (during which he worked on capital raises) and despite having access to corporate records that directly undermine his claimed reading. There are no grounds to disturb the well-reasoned decision below.

The Restricted Stock Purchase Agreement (the "RSPA") at issue and its surrounding documents are form contracts created and signed through Clerky, Inc. Unfortunately, an unpaired parenthesis exists in a portion of Section 3.4(a)(iv) of the RSPA form signed through the Clerky, Inc. portal here, spawning this seven-count action. Despite the missing parenthesis, the Vice Chancellor found there was only one reasonable interpretation of the RSPA: the accelerated vesting of Fried's shares occurred on a double trigger basis. *Fried v. Intersect Laboratories Inc.*, 2021 WL 653076, at *3 (Del. Ch. Feb. 18, 2021) (hereinafter "Opinion").

Specifically, both termination without Cause ***and*** a Change in Control were required to accelerate vesting and terminate the Company's Repurchase Option.[1] Mere termination – a single trigger reading – was insufficient to void the Company's Repurchase Option. This plain reading was bolstered by both the use of identical punctuation conventions in the same contractual subsection in other locations, together with a clear intent shown by a parallel provision that *all* lapsing of the Repurchase Option, be it for employees or non-employee directors, was to occur on a double trigger basis. *Id.* This reading harmonizes Section 3.4(a)(iv) of the RSPA and avoids rendering any of its chosen words mere surplusage. Because the Court of Chancery correctly interpreted the RSPA, no basis exists to disturb this well-reasoned conclusion as to Counts I-III.

With respect to Counts IV-VII, which allege various species of misrepresentations (including fraud, fraudulent misrepresentation, negligent misrepresentation, and equitable fraud), the Vice Chancellor properly found there was no actionable misrepresentation made by Defendants. This case, at best, involves "uncertainty resulting from the omitted parenthesis" and there is no actionable misrepresentation that is well-pled in the Complaint. *Id.* at *3-4. Plaintiff is left to hang his hat on an alleged omission in a courtesy summary

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the RSPA. (*See* A0075-95).

document, stamped prominently with Clerky's watermark and a clear statement on each page that "[t]his summary is provided only for convenience and has no legal effect." (*See* A0097-100). Plaintiff claims this courtesy document, which was silent on the key issue here – acceleration triggers to lapse the Repurchase Option – should have clarified that issue to correct his misunderstanding originating from his strained reading of the RSPA. This is not actionable. Nor can Plaintiff meet his burden to show justifiable reliance or that Defendants acted with the required state of mind. Finally, Plaintiff failed to even mention in his Opening Brief an alternative ground for dismissal of Counts IV and VI provided by the Court of Chancery, meaning those Counts cannot be revived. For these reasons, there is no basis to reverse the well-reasoned Opinion of the Vice Chancellor on Counts IV through VII and the Court should affirm.

SUMMARY OF THE ARGUMENT

1. **Denied.** The Court of Chancery did not err in dismissing Counts I through III because the double trigger reading is the only reasonable construction of Section 3.4(a)(iv) when the contract is read as a whole in light of the parties' business relationship. The operative portion of Section 3.4(a)(iv) is not ambiguous, even though it contains unpaired punctuation. The Court below did not deviate from accepted principles of contract interpretation when it concluded the only reasonable interpretation of the RSPA is that it provides for double trigger acceleration. Because the RSPA is unambiguous, there is no basis for invoking the doctrine of *contra proferentem*, which would not apply in any event given the nature of, and parties to, this particular agreement. Thus, dismissal of Counts I-III was proper.

2. **Denied.** The Court of Chancery did not err in dismissing Counts IV through VII because there was no actionable misrepresentation, either fraudulent or negligent, as required to support each of these claims. The Court correctly found that neither the unpaired punctuation in the RSPA nor any ancillary documents Plaintiff claims created an alleged ambiguity supports any fraud or misrepresentation theory. In the alternative, the Complaint lacks sufficient well-pled facts to support justifiable reliance, or that Defendants acted with the required mental state. Finally, Plaintiff failed to raise or discuss in his Opening Brief an

alternative ground for dismissal of Counts IV and VI relied upon by the Court of Chancery.

STATEMENT OF FACTS[2]

On October 19, 2018, Gordhandas formed Intersect, a small data technology startup, as its founder and sole director and continues to serve as its CEO and President. (*See* A0008-9 ¶¶ 4, 8). At inception, Intersect was authorized to issue 10,000,000 shares of a single class of capital stock. (*Id.*). Intersect then issued Gordhandas 5,400,000 shares of capital stock, making him Intersect's sole stockholder. (*Id.*). Fried later became a stockholder on November 8, 2018 by e-signing the RSPA using Clerky, Inc. (A0008 ¶ 2; A0090). Fried was a Company employee who was terminated without Cause on March 25, 2020. (A0008 ¶ 2).[3]

All of the important documents at issue in this dispute are connected to Clerky Inc., an online legal paperwork service, and were "E-signed using Clerky" by *both* Gordhandas and Fried, as the context required. (*See* A0038 at signature line of Company's Certificate of Incorporation; A0063 at signature lines of Company's Bylaws; A0068 at signature line of Company's Unanimous Written

---

[2] Plaintiff initially styled the action seeking interlocutory injunctive relief, but the Motion to Expedite and Motion for a Preliminary Injunction were never heard. (*See* A0001 at D.I. 2-3).

[3] Fried discusses in his Opening Brief on appeal the circumstances surrounding his termination from Intersect, which are not relevant. *See* Appellant's Opening Brief at 7-8, 11 (hereinafter "AOB"). There is no dispute he was terminated without Cause, and all of the claims in this action relate to a prior-executed contract and alleged representations made in November 2018. The only post-November 2018 development that is relevant is Fried's apparent failure to familiarize himself with the Company's capital structure and board documents upon becoming a director.

Consent authorizing Fried's shares; A0089-90 at signature lines of RSPA; A0092 at signature line of form Stock Power; A0094 at signature line of Fried's IRS Section 83(b) Election; A0097-100 at footer). Like many start-up companies, Intersect relied on an online provider of "form" legal documents. (*See id.*). Though Fried tries to dodge this fact at times, the documents he attached to his Complaint make this crystal clear. *Id.*[4]

In connection with the RSPA transaction, on November 7, 2018 Gordhandas "E-signed using Clerky" a unanimous written consent of the Company board to authorize a stock issuance to Fried. (A0065-68; *see* A0010 ¶¶ 10-11).[5] That unanimous written consent included "Exhibit A," setting the precise authorization by the Company on which terms and conditions the stock could be issued. (A0065 (providing that the Company could issue stock "subject to the vesting provisions specified" in Exhibit A); A0069-72). Exhibit A makes clear that the shares' release from the Repurchase Option is accelerated on a double trigger basis. (A0072). Shares with the terms and conditions Fried seeks (a single trigger for accelerated vesting) simply do not exist as a corporate matter. (*See* A0065; A0072).

---

[4] *See also* B0019 at Tr. 19:16-19:19 (observing on behalf of Fried that the relevant documents are form contracts).

[5] Note the unanimous written consent authorizing the issuance of Fried's shares is dated both November 8th and November 7th. *Compare* A0065, *with* A0068.

Though the Company engaged in subsequent capital raises after Fried became a stockholder and director, and took action to prepare to issue additional shares of stock while Fried was a director, Fried apparently claims to have never reviewed this board-level document setting the precise terms of his shares. (*See* A0011-12 ¶¶ 15-19; A0065-72). Exhibit A to the Company's unanimous written consent of the Board was not sent to Fried before signing the RSPA, but he plainly had access to it shortly thereafter as a director of the Company, and arguably had a duty as a director to understand the Company's capital structure when the Company solicited investments from third-parties. *See id.* Fried touts his marketing efforts, apparently with no knowledge of the details of the Company's actual capital structure, in securing additional Company investments. *Id.*; *see also* AOB at 7-8.

Based on his apparent failure to read Exhibit A (despite his fiduciary duties to be informed), Fried seizes on a punctuation issue in the form-RSPA to offer a self-serving contract construction that contradicts the Company instrument authorizing and creating his stock. Specifically, a "Repurchase Option" in the RSPA permits the Company to repurchase all Fried's "Unvested Shares" upon his separation from employment at their initial cost of $46.00. (*See* A0076 § 3(a)(i)).[6]

[6] Unvested Shares "means shares, if any, that have not yet been released from the Repurchase Option." (A0076 § 3(a)(i)).

Fried's shares were released from the Repurchase Option (i.e. vested) on a schedule set out in the RSPA. (A0077 §§ 3(a)(iii)-(iv)). That schedule generally provided, so long as Fried remained employed with Intersect, 1/4th of the shares were released from the Repurchase Option on the first anniversary of the RSPA, and 1/48th of the shares were released each month thereafter. (A0077 § 3(a)(iv)).

Through the time of his termination, a portion of the initial 4,600,000 shares covered by the RSPA were released from the Repurchase Option on the RSPA's schedule, but 3,066,667 remained "Unvested Shares." (*See* A0019 ¶ 38; A0102). The right to these 3,066,667 shares turns on whether Fried's termination alone accelerated the vesting of his Unvested Shares such that the baseline Repurchase Option under Sections 3(a)(i) and (iv) lapsed. (*See* A0076-77 §§ 3(a)(i), (iv)). Section 3(a)(iv) provides in relevant part, notwithstanding the specified schedule of release of shares from the Company's Repurchase Option:

> 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.

(A0077 § 3(a)(iv) (hereinafter the "Employee Accelerated Vesting Provision" or "Disputed Provision")). The Employee Accelerated Vesting Provision plainly contains an unpaired parenthesis. Critically, in the same contract section as the Disputed Provision, the RSPA also provides:

> 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, the vesting of any 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***.

(A0078-79 § 3(a)(iv) (emphasis added) (hereinafter the "Director Accelerated Vesting Provision")).

Of particular note, in the Director Accelerated Vesting Provision, the phrase "or a successor, if appropriate" has open and closing parenthesis enclosing this phrase each time it is used. (*See id.*). Moreover, the Director Accelerated Vesting Provision cross references a "lapse" of the Repurchase Option "to the same extent" "as described above." (*Id.*). The only "lapse" of Repurchase Option described above is the Disputed Provision. (*Id.*). After Fried was terminated without Cause (and there being no Change of Control), Fried's Unvested Shares were repurchased by Intersect at cost pursuant to a blank stock power Fried executed with the RSPA. (*See* A0019-20 ¶ 40).

Tellingly, on the same day Fried signed the RSPA, Fried also executed via Clerky tax related documents that stated in an attachment "Repurchase option at cost [here $46.00 in total] in favor of the Company upon termination of taxpayer's employment or consulting relationship." (A0095; *see* A0093-94). The tax

documents in no way suggest upon termination that the Repurchase Option would lapse. (*See id.*). By signing Exhibit B to the RSPA (which contains a representation that Fried "carefully reviewed" the RSPA) and not checking the box in item 3 to Exhibit B (A0094), Fried agreed to furnish to the Company Exhibit C to the RSPA which contains the clear language the stock was subject to a Repurchase Option at cost on a simple termination of employment. (A0084-85 § 8; A0093-95).

The Court of Chancery found below that the claims in this case "turn on the absence" of a closing parenthesis. *Opinion*, 2021 WL 653076, at *1. Reading the RSPA and Section 3(a)(iv) as a whole, the Court of Chancery held Plaintiff's proffered single trigger interpretation "is not a reasonable reading of the Employee Accelerated Vesting Provision" *Id.* at *3. The Court pointed to the Director Accelerated Vesting Provision, and its clear intention to operate in tandem "to the same extent" as the Employee Vesting Provision. *Id.* at *2-3. The Court also relied on the fact that the RSPA uses the phrase "or a successor or appropriate" in other locations and each time closes the parenthesis after "(or a successor, if appropriate)." *Id.* at *3. Based on a complete reading of the RSPA, the Court concluded the Disputed Provision had one only reasonable interpretation: the one that read it in harmony with other clear contractual provisions, that is, double trigger acceleration. *See id.* Applying the only reasonable interpretation of

Section 3(a)(iv) required dismissal of Counts I-III. *Id.* at *2-3.

The Court of Chancery found the remaining counts each asserted various theories of misrepresentation "based on the uncertainty resulting from the omitted parenthesis in the Employee Accelerated Vesting Provision." *Id.* at *3. The Court held none of the alleged misrepresentations were actionable because 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" or "inaccurate." *Id.* at *3-4. Further, for the claims of equitable fraud and negligent misrepresentation, the Court held additional *prima facie* elements of those claims were not well-pled given the absence of the required special relationship or relief necessary to state a claim under either theory. *Id.* at *4. Therefore, the Court granted in full Defendants' motion to dismiss.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THE RSPA UNAMBIGUOUSLY PROVIDES FOR DOUBLE TRIGGER ACCELERATION, REQUIRING DISMISSAL OF COUNTS I-III.

Question Presented

Did the Court of Chancery correctly conclude that the double trigger reading was the only reasonable interpretation of the RSPA given the agreement's plain text, requiring dismissal of Counts I-III? *See Opinion*, 2021 WL 653076, at *1-3; A0129-138; A0294-303.

Standard and Scope of Review

Defendants agree *de novo* review applies to the Court of Chancery's dismissal pursuant to Rule 12(b)(6). *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167 (Del. 2006). Defendants further agree that *de novo* review applies to the Court's interpretation of this contract because it is a question of law. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

Merits of the Argument

1. Delaware contract law principles support the decision below.

The Vice Chancellor correctly interpreted the RSPA to conclude that the double trigger reading is the only reasonable interpretation. "In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract." *Chicago Bridge & Iron Co. N.V. v. Westinghouse*

Elec. Co. LLC, 166 A.3d 912, 913–14 (Del. 2017*), as revised* (June 28, 2017).[7] In determining whether a contract is unambiguous, it should be "read in full and situated in the commercial context between the parties." *Id.* at 926-27.[8] "The basic business relationship between parties must be understood to give sensible life to any contract." *Id.* at 927. Through this lens of analyzing the entire agreement and the commercial context of the parties, the Court interprets the text of the disputed provisions to determine if there is only one reasonable interpretation. *See id.*

Fried's claimed subjective reading of the RSPA is not relevant. "To determine what contractual parties intended, Delaware courts start with the text." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp*., 206 A.3d 836, 846 (Del. 2019). "To aid in the interpretation of the text's meaning, 'Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party.'" *Id.* (citation

---

[7] *See also Heartland Payment Sys., LLC v. Inteam Associates, LLC*, 171 A.3d 544, 557 (Del. 2017) (applying *Chicago Bridge & Iron* and explaining it is "helpful to look at the transaction from a distance" before "stepping through the specific contractual provisions").

[8] Though extrinsic evidence is not needed to resolve this dispute, market terms for employees in start-ups (i.e. the underlying business context) is double trigger acceleration, not single trigger, which is uncommon. *See, e.g.*, A0132 (citing Clerky, Inc. summary of vesting provisions, including Clerky, Inc. website which makes clear in various FAQ's on "Post-Incorporation Setup" that its forms contain double trigger provisions).

omitted). "The contract must also be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'" *Id.* (citation omitted). Moreover, "[a] meaning inferred from a particular provision cannot control the agreement if that inference conflicts with the agreement's overall scheme." *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1129 (Del. 2020) (citation omitted). "If, after applying these canons of contract interpretation, the contract is nonetheless 'reasonably susceptible [to] two or more interpretations or may have two or more different meanings,' then the contract is ambiguous and courts must resort to extrinsic evidence to determine the parties' contractual intent." *Sunline Commercial Carriers, Inc.*, 206 A.3d at 847 (citation omitted).

Under the canons of contract interpretation, contract "language is not ambiguous merely because the parties dispute what it means." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). "To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning." *Id.* As explained below, these well-settled principles show the Court of Chancery's plain reading of the RSPA was correct, and that the only reasonable interpretation is double trigger acceleration.

2. The Court of Chancery correctly applied accepted principles to conclude the double trigger reading is the only reasonable interpretation.

Fried argues that the Employee Accelerated Vesting Provision is not ambiguous. AOB at 15. Fried is correct that the provision is unambiguous, but is incorrect that it provides for single trigger acceleration. Reading the contract as a whole shows the only reasonable interpretation is double trigger acceleration, particularly in light of the parallel language used in the *same contract section*. For these reasons the Court of Chancery's decision dismissing Counts I-III should be affirmed.

When read as a whole, Section 3(a)(iv) is unambiguous because the only reasonable interpretation is double trigger. The Employee Accelerated Vesting Provision is nested in Section 3(a)(iv) and provides:

> 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.

(A0077 § 3(a)(iv)). As the Court of Chancery correctly observed, this provision is missing a closing parenthesis but nonetheless the only reasonable interpretation is that it provides double trigger acceleration, particularly when read with the remainder of Section 3(a)(iv). Section 3(a)(iv) also provides with respect to the Director Accelerated Vesting Provision:

> 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, the vesting of any 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***.

(A0078-79 § 3(a)(iv)) (emphasis added).

Reading the plain language of these two provisions together, the Court of Chancery correctly concluded it is not reasonably conceivable that these provisions would do anything other than operate the same way, particularly given their proximity to each other, and the use of parallel language. *See Opinion*, 2021 WL 653076, at *1-3. The Director Accelerated Vesting Provision makes clear it operates to "lapse" the Repurchase Option via acceleration "***to the same extent*** as if Purchaser had been terminated without Cause ***as described above***." *Id.*; (A0077-79 § 3(a)(iv)) (emphasis added). There is no dispute the Director Accelerated Vesting Provision is double trigger requiring the loss of a board seat *and* Change of Control, via closing the parenthesis after "(or a successor, if appropriate)." The only "lapse" of a Repurchase Option "described above" is the Employee Accelerated Vesting Provision. *Id.* Because these provisions operate "to the same extent," a double trigger reading is the only interpretation that gives meaning to the

final clause of the Director Accelerated Vesting Provision and does not improperly render it mere surplusage. *See id.*

Moreover, Section 3(a)(iv) uses the phrase "or a successor, if appropriate" in four locations.[9] Once in the Employee Accelerated Vesting Provision, twice in the Director Accelerated Vesting Provision, and once in the definition of Cause. (A0077-79 § 3(a)(iv)). Other than the Disputed Provision, which clearly contains punctuation that does not close, every other instance in the RSPA that uses "or a successor, if appropriate" contains an opening and closing parenthesis on either side of the clause reading "(or a successor, if appropriate)." (*See id.*). The Court below correctly gave due weight to harmonizing the provisions regarding directors and employees given the clear intent for them to operate in parallel. *See Opinion*, 2021 WL 653076, at *2-3. Defendant's attacks on appeal that these provisions should not be harmonized or read in parallel given the text and their proximity in the same section are unpersuasive. *See* AOB 18-21. The meaning Fried attempts to infer to the missing closing parenthesis cannot be adopted because it would conflict with the "overall scheme" of acceleration and lapsing of the Repurchase Option made clear by reading section 3(a)(iv) as a whole. *See Sanofi-Aventis U.S. LLC*, 226 A.3d at 1129. Fried's proposed construction is unreasonable, thus the RSPA is unambiguous.

---

[9] The phrase is not used anywhere else in the RSPA outside of Section 3.4(a)(iv).

Plaintiff offers two primary rebuttals to the Court of Chancery's reasoning regarding the Director Accelerated Vesting Provision. Neither is persuasive.

First, he contends that if the Director Accelerated Vesting Provision was meant to operate in parallel with the Disputed Provision then they should have been combined into a "single provision." AOB 18-19. He claims that because they were not, they "operate on mutually exclusive fact scenarios." *See id*. This is a non-starter. The Director Accelerated Vesting Provision is separately delineated because directors cannot be "terminated" by the Company or removed by fellow directors, but can only be removed by stockholder action. *See, e.g.*, *Nevins v. Bryan,* 885 A.2d 233, 251-52 (Del. Ch.)*, aff'd,* 884 A.2d 512 (Del. 2005). Losing a directorship is a separate and distinct factual scenario because stockholders select directors at the ballot box, whereas directors unilaterally hire and terminate employees. Therefore, it is logical that there are separate provisions.

Second, Fried stretches the "to the same extent" phrase in the Director Accelerated Vesting Provision to try to suggest the "immediacy" and number of shares accelerating are the same, but that "pre-conditions for vesting" are not necessarily the same. *See* AOB 19-21. Again, there is no dispute the Director Accelerated Vesting Provision is double trigger. *See* AOB 20. The problem with Fried's argument is that it omits the key surrounding language that the "Repurchase Option ***shall lapse*** ***to the same extent*** as if [Fried] had been

terminated without Cause ***as described above***." (*Compare id., with* A0078-79 § 3(a)(iv)) (emphasis added). The only other lapse of the Repurchase Option "described above" is the Disputed Provision, and the uncontested double trigger of the Director Accelerated Vesting Provision lapses the Repurchase Option "to the same extent" as the Disputed Provision. (A0077-79 § 3(a)(iv)). Thus, the Court of Chancery correctly found that the Director Accelerated Vesting Provision shows the Disputed Provision also provides double trigger acceleration to lapse the Company's Repurchase Option.[10]

Finally, Fried continues to overlook that his proposed reading renders the "Change of Control" concept in the Employee Accelerated Vesting Provision superfluous. Though Change of Control is concededly present in both the Employee Accelerated Vesting Provision and the Director Accelerated Vesting Provision, under Fried's proffered reading, the Change of Control clause serves no purpose in the Employee Accelerated Vesting Provision. As best Defendants can

---

[10] Additionally, the same day Fried signed the RSPA, he signed an "Exhibit B" to the RSPA which is the IRS Section 83(B) Election. (A0094-95). "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." *Chicago Bridge & Iron Co. N.V.*, 166 A.3d at 927 n.61 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981)). Through this document attached as Exhibit B to the RSPA, Fried represented that he "carefully reviewed" the RSPA and under Section 3 of Exhibit B, agreed to manually sign and return the "attached" exhibit, which itself states "Repurchase option at cost in favor of the Company upon termination of taxpayer's employment or consulting relationship." (A0094-95).

tell, Plaintiff attempts to give meaning to Change of Control in the Disputed Provision by asserting it merely clarifies "what types of successors are intended to be included, and what types are intended to be excluded." AOB 17. This strained attempt to supply meaning to the Change of Control concept in the Employee Accelerated Vesting Provision fails. As a threshold matter, the Change of Control definition is silent to "successor" and if it meant to provide the meaning ascribed by Fried, presumably it would at least mention "successor." (A0078 § 3(a)(iv)). The logic of Plaintiff's argument is that Change of Control simply means if you are terminated by one of these apparent qualifying successors, then acceleration would be triggered (consistent with his single-trigger reading). But this interpretation does not square with the use of Change in Control in the Director Accelerated Vesting Provision that actually contains a matching number of parenthesis and makes clear that Change of Control operates as a second condition, not to define qualifying successors.[11] Had Change in Control merely meant to define qualifying successors for purposes of Section 3(a)(iv), rather than set out the qualifying events that would satisfy the second condition required for the accelerated lapse of the

[11] Note, the final sentence in the definition of Continuous Service Status and the RSPA's use of this defined term in Sections 3(a)(i) and 3(a)(iv) further undermine Plaintiff's reading by showing that transferred employment to all successors is considered for the purposes of analyzing whether Continuous Service Status has ended sufficient to trigger the Repurchase Option. (*See* A0076-78, A0085; §§ 3(a)(i), 3(a)(iv), 9(c)).

Repurchase Option (again each "lapse" was intended to be the "same"), surely it would simply use a defined term such as Qualified Successor given the numerous defined terms already in Section 3(a)(iv).

When read as a whole in the context of the parties' business relationship, only a double trigger reading of the RSPA is reasonable.

3. *Contra proferentem* has no role here.

As Fried's case law make clear, the doctrine of *contra proferentem* only becomes available *if* the contract is ambiguous. *See Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010). Because there is no ambiguity, the doctrine does not apply here.

Moreover there are no well-pled allegations that Defendants drafted the agreement – just that they presented the RSPA to Fried. *See* AOB at 22 n.7 (citing A0010-11). Indeed, the attachments to Fried's Complaint show he, just like Gordhandas, e-signed the RSPA (and various other documents) "using Clerky." (*See*, *e.g.*, A0090). No well-pled allegations support the notion that Defendants, who from the face of the document signing portal were using a legal form generator, were the same type of sophisticated counterparty that *contra proferentem* is typically invoked against. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (involving dispersed limited partners who could not bargain with the general partner for terms).

Further, even if the RSPA were ambiguous (and it is not), the doctrine would be used as a "last resort" only if other interpretive approaches failed. *See, e.g.*, *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) (explaining "the rule of *contra proferentem* is one of last resort, such that a court will not apply it if a problem in construction can be resolved by applying more favored rules of construction); *Emerging Europe Growth Fund, L.P. v. Figlus,* 2013 WL 1250836, at *4 (Del. Ch. Mar. 28, 2013) ("The *contra proferentem* doctrine should not be used as a short cut for interpreting an ambiguous contractual provision. Nevertheless, it can be used to protect the reasonable expectations of investors but only as a 'last resort' when other interpretive approaches fail to resolve an ambiguity") (citation omitted). Fried seeks this "shortcut" because other canons of contract construction, together with extrinsic evidence, would definitively show Clerky's simple punctuation error and no misconduct or alternative contractual intent by the parties.

Finally, Fried omits from its presentation to the Court that Section 11(g) of the Clerky-generated RSPA plainly disclaims *contra proferentem*. (A0087, § 11(g)). It provides:

> **Construction**. This Agreement is the result of negotiations and has been reviewed by each of the parties hereto and their respective counsel, if any; accordingly, ***this Agreement shall be deemed to be the product of all of the parties hereto, and no ambiguity shall be construed in favor of or against any one of the parties hereto***.

(*Id.*) (emphasis added). By representing that he "carefully reviewed" the RSPA and signing it via Clerky, without requesting any revisions to 11(g) or Section 3.4(a)(iv), Fried agreed and represented that he equally bargained for the terms of the agreement. (*Id.*; *see* A0094 at Representation 1). Given this plain language and that the Complaint shows (and his counsel conceded) the parties were using a legal form generator, applying *contra proferentem* under these circumstances would be inappropriate. (*See* A0038; A0063; A0068; A0089-90; A0092; A0094; A0097-100; B0019 at Tr. 19:16-19:19).

In sum, because there is no ambiguity, *contra proferentem* fails at the outset. Moreover, even if the RSPA were ambiguous, the doctrine does not fit the facts here in light of the relative bargaining power of the parties and the clear terms of the RSPA disclaiming the doctrine. Finally, it is not to be used as a shortcut but only as a last resort if ambiguities cannot be resolved through other methods. That is not the case here.

4. Dismissal of Counts I through III should be affirmed.

Defendants agree with Fried that the dismissal below of Counts I-III turned on the Court's conclusion that the RSPA is unambiguous. AOB 22. Because that finding was correct, dismissal of Counts I-III should be affirmed.

To the extent the Court finds the RSPA was ambiguous, dismissal of Count II's breach of fiduciary duty claim remains appropriate for the reasons argued

below. *See Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 937 (Del. 2019) ("'This Court may affirm on the basis of a different rationale than that which was articulated by the trial court[ ] if the issue was fairly presented to the trial court.'") (alteration in original) (citation omitted); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (explaining "this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court"); (A0136-138) (arguing alternative ground for dismissal of fiduciary duty claims).

The fiduciary duty claim is truly one for breach of contract just bootstrapped as an equitable claim. But where a breach of fiduciary duty and contract claim are brought in parallel, "Courts will dismiss the breach of fiduciary claim where the two claims overlap completely and arise from the same underlying conduct or nucleus of operative facts." *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009). "Because of the primacy of contract law over fiduciary law, if the duty sought to be enforced arises from the parties' contractual relationship, a contractual claim will preclude a fiduciary claim." *Id.* at *6 (quoting *Solow v. Aspect Resources, LLC*, 2004 WL 2694916, at *4 (Del. Ch. Oct. 19, 2004). Gordhandas' actions were either a breach of contract or not based on section 3.4(a)(vi) of the RSPA. Only if there was a breach of contract did he breach his putative fiduciary duties in transferring the disputed shares. Though the Court below did not reach this issue because the lack of a contractual right defeated the

claim, this attempt to "bootstrap" a straightforward contract claim into a fiduciary claim should be rejected even if the RSPA is deemed ambiguous.

II. THE COURT OF CHANCERY PROPERLY DISMISSED COUNTS IV THROUGH VII.

Question Presented

Whether the Court of Chancery properly dismissed Counts IV through VII for failure to plead a *prima facie* case, including the lack of a well-pled allegation of an actionable misrepresentation or omission for each Count, and the absence of the special relationship or relief necessary to state a claim for negligent misrepresentation and equitable fraud? *Opinion*, 2021 WL 653076, at *3-4; A0118; A0138-142; A0303-305.[12]

Standard and Scope of Review

Defendants agree *de novo* review applies to the Court's dismissal of these Counts pursuant to Rule 12(b)(6). *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167 (Del. 2006).

[12] Defendants conceded there was no separate section or discussion in their Opening Brief below expressly addressing Count IV, though the underlying Motion sought a total dismissal of all counts (A0118), the Opening Brief sought dismissal of "each and every count" (A0142), the Reply Brief raised Count IV as falling under the same analysis as the other misrepresentation counts (A0304-305), and the Court correctly observed that Counts IV (equitable fraud) and VI (negligent misrepresentation) simply "are different names for the same theory." *Opinion*, 2021 WL 653076, at *4.

Merits of the Argument

1. The Court of Chancery correctly found there is no well-pled misrepresentation for any Counts and that negligent misrepresentation and equitable fraud are unavailable as a matter of law.

Fundamentally, Counts IV through VII depend on stretching a missing closing parenthesis in the RSPA, and a MAP Summary document stamped "Clerky" and affixed with a prominent disclaimer on each page stating "[t]his summary is provided only for convenience and has no legal effect," into actionable misrepresentations. (A0097-100). The Court of Chancery correctly found these items do not support the actionable misrepresentation element necessary to each of these four counts.[13] This conclusion should be affirmed.

First and independently, Counts IV and VI asserting equitable fraud and negligent misrepresentation were properly dismissed because the Court of Chancery found additional elements beyond an actionable misrepresentation were not well-pled. *Opinion*, 2021 WL 653076, at *4 (citing *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch. Jan. 30, 2015); *Envo, Inc. v. Walters*, 2009 WL 5173807, at *6 (Del. Ch. Dec. 30, 2009)). Claims for equitable fraud and negligent misrepresentation can only be brought where

[13] Again, these Counts assert claims for equitable fraud, fraudulent misrepresentation, negligent misrepresentation and common law fraud, respectively.

there is "(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." *Id.* (quoting *Envo, Inc.*, 2009 WL 5173807, at *6). Applying this test, the Court of Chancery properly held "[t]he 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." *Id.* Fried has not challenged this finding on appeal, thus waiving the issue. *See* AOB 4-5; 24-27.[14] Even if the Court found an actionable misrepresentation this distinct ground for dismissal of Counts IV and VI employed below, which has gone unchallenged, remains valid and should be affirmed.

This leaves on appeal only the fraudulent misrepresentation and common law fraud claims, which contain the same elements. *Opinion*, 2021 WL 653076 (citing *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

[14] As the Appellant, Fried's failure to address this issue in his Opening Brief constitutes a waiver. *See* Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

induce action, (iv) reasonable reliance, and (v) causally related damages." *Id.* (citation omitted). The Court of Chancery properly found the first element was not well pled. *Id.*

Turning to this primary holding below, there was no misrepresentation because the RSPA is unambiguous. Moreover, even if an ambiguity existed, that does not support the slew of claims brought because a mere ambiguity combined with the MAP Summary document is not actionable on any Count.

Tellingly, Fried's Opening Brief contains no case law support for the novel proposition that an arguably ambiguous contractual provision, coupled with opposing parties' divergent subjective intent, can support a litany of fraud and misrepresentation claims. Were that Delaware law, every single ambiguous contract where parties had differing subjective interpretations of the ambiguity in their contemporaneous documents would support counts for fraud, which they plainly do not. Plaintiff can only potentially get to an actionable misrepresentation via the MAP Summary.

Instructive to the MAP Summary issue, the RSPA contained a broad integration clause stating it was "the entire agreement and understanding of the parties relating to the subject matter herein and supersedes all prior or contemporaneous discussions, understandings and agreements, whether oral or written" between the parties. (A0087 §11(b)). While not an iron-clad anti-reliance

clause of the type that is regularly enforced by Delaware courts, it still countenances against any actionable misstatement or justifiable reliance given the prominent disclaimer on the courtesy MAP Summary documents which allegedly contains the misrepresentation via omission.

Again, each page of the MAP summary is stamped with a Clerky logo and states with an asterisk "[t]his summary is provided only for convenience and has no legal effect." (A0097-100). Critically, nothing in the MAP Summary ***even speaks to acceleration triggers***. (A0100 at "Common Stock Vesting Provision"). It only describes the standardized vesting schedule, of a one year vesting cliff followed by monthly releases, and is silent to the critical issue here: conditions precedent to accelerate vesting causing a lapse of the Repurchase Option and whether there is a single condition (termination without Cause) or a double condition (termination without Cause ***and*** Change of Control). (*See id*.). There is no suggestion or implication in the MAP Summary vesting would accelerate on a mere termination, and the ***only*** basis for this claimed understanding is Fried's alleged subjective reading of the RSPA. *Id*. But the documents he received and signed actually show that in the event of mere termination of employment there was a "[r]epurchase option at cost in favor of the Company," without any suggestion of accelerated release from the Repurchase Option on this single event. (*See* A0094-95; A0084-85 § 8). Under these facts, Plaintiff can offer no authority

for his contention that the Court erred in concluding that the allegations of the Complaint regarding Section 3.4(a)(vi) and the MAP Summary did not rise to the level of actionable misstatements or omissions. That is even more the case in light of the particularity requirements of Court of Chancery Rule 9(b). The Court of Chancery's finding that there was no actionable misrepresentation should be affirmed.

Plaintiff's new "duty to speak" or "partial disclosures" cases (*see* AOB 26) involved no document containing an express disclaimer on each page that it was merely a "summary … provided only for convenience and has no legal effect." (A0097-100). There was no partial disclosure about accelerated vesting conditions here, only silence in the MAP Summary, making that doctrine, and those cases, inapt. *See IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *14 (Del. Ch. Dec. 11, 2017) (finding partial disclosure doctrine "inapt" where there was no disclosure of the specific issue complained about because the disclosure document was silent to that issue).[15] Here none of the conditions of accelerated vesting were described in the MAP Summary (i.e. whether there was one condition or two), undercutting this argument. *See id.*

[15] Notably, many "duty to speak" cases involve whether a stockholder action was fully informed in a fiduciary duty context where a board makes partial or elliptical disclosures while requesting stockholder action, not whether an alleged omission in an arm's-length bargain (involving a form contract and a courtesy summary stamped with a prominent disclaimer) supports a fraud claim.

Plaintiff's new case law on appeal actually undermines his position. *See, e.g.*, *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015) ("Because a party in an arms' length contractual setting begins the process without any affirmative duty to speak, any claim of fraud in an arms' length setting ***necessarily depends on some form of representation***. ***A fraud claim in that setting cannot start from an omission***.") (emphasis added). It shows, among other things, that there must be actual "justifiable reliance" to make out a *prima facie* claim. The extra-contractual MAP Summary with a disclaimer is plainly insufficient, even more so in light of the RSPA's integration clause, to constitute well-pled justifiable reliance. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); (A0087 §11(b)). The MAP Summary document does not mislead anyone on acceleration conditions (since it is silent on that issue) and expressly disclaims any reasonable reader from relying on it, making any purported "justifiable reliance" not "reasonably conceivable."[16]

Further, even if for pleading purposes a misstatement was found, the Complaint lacks well-pled facts of Defendants' knowledge of the misrepresentation.[17] Fried's allegations of knowledge that a representation was

---

[16] Justifiable reliance was argued below, but not a basis of the Court's holding. (A0141-142; A304). The Opinion can be affirmed on this alternative basis. *See Tiger*, 214 A.3d at 937.

false are conclusory. (*See* A0025-27 ¶¶ 66-71).[18] It is not reasonably conceivable that a non-lawyer, using form contracts, acted with knowledge of falsity to exploit the alleged ambiguity of a missing parenthesis and by providing a summary document (another form) which was silent about the issue. *See id.*; *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 146-52 (Del. Ch. 2004) (rejecting conclusory allegations of knowledge as sufficient to plead fraud claim). Even if restyled as an active concealment theory, Fried falls well short of his duty to plead "an intentional deception." *Id.* at 150-52 (rejecting active concealment style claims based on conclusory allegations and plaintiff's invitation for court "to conclude that these facts show just how cunning and deceptive" the defendants were). The well-pled facts simply do not support a knowing misrepresentation or concealment by Defendants. At best, they show unpaired punctuation in a form contract recognized after the fact as a flimsy basis on which to attempt to state a claim.

* * *

---

[17] The knowledge element was argued below but is not a basis of the Court's holding. (*See* A0139-140). The Opinion can be affirmed on this alternative basis. *See Tiger*, 214 A.3d at 937. As noted above Counts IV and VI (which do not require knowledge) are subject to dismissal on a separate finding in the Opinion which Fried failed to appeal, in addition to the absence of any actionable misrepresentation.

[18] Other than swapping out the legal elements of the claims, the factual allegations of Counts IV-VII are essentially the same. (*See* A0025-32 ¶¶ 66-85).

In sum, because the MAP Summary is silent as to acceleration conditions (i.e. not suggesting in any way they were single trigger or double trigger), the only statement that could be "relied upon" is Section 3.4(a)(iv). Fried's Complaint amounts to a grievance that the MAP Summary, itself bespeaking caution with disclaimers prominently placed on each page, should not have been silent on the issue so that it would have corrected his subjective and tortured reading of Section 3.4(a)(iv). The Court of Chancery's dismissal of Counts IV-VII should be affirmed because Fried has offered no support for his novel proposition that an allegedly ambiguous contract term mixed with a partial, summary document that does not discuss the alleged ambiguous provision is an actionable misrepresentation to support various fraud theories. Further, Fried has not briefed on appeal the separate and independent legal grounds the Court of Chancery employed to dismiss Counts IV and VI. Finally, alternative grounds for dismissal exist in the lack of well-pled facts to support justifiable reliance or knowledge of falsity.

CONCLUSION

Defendants respectfully request that the Court affirm the Court of Chancery's February 18, 2021 Opinion dismissing this action in full.

SAUL EWING ARNSTEIN & LEHR LLP

/s/ Elizabeth S. Fenton
Elizabeth S. Fenton (#5563)
Charles E. Davis (#6402)
1201 Market Street, Suite 2300
Wilmington, DE 19801
(302) 421-6800
Fax: (302) 421-6833
elizabeth.fenton@saul.com
chad.davis@saul.com

Attorneys for Appellees

Date: June 16, 2021

38516078.7 06/16/2021

CERTIFICATE OF SERVICE

I, Elizabeth S. Fenton, do herby certify that on this 16th day of June 2021, I caused a true and correct copy of the foregoing **Appellees' Answering Brief** to be served on counsel of record as follows:

FILE AND SERVE XPRESS

COLE SCHOTZ P.C.
Michael F. Bonkowksi, Esquire
Andrew L. Cole, Esquire
500 Delaware Ave. Suite 1410
Wilmington, DE 19801

SAUL EWING ARNSTEIN & LEHR LLP

/s/ Elizabeth S. Fenton
Elizabeth S. Fenton (#5563)
Charles E. Davis (#6402)
1201 Market Street, Suite 2300
Wilmington, DE 19801
(302) 421-6800
Fax: (302) 421-6833
elizabeth.fenton@saul.com
chad.davis@saul.com

Attorneys for Appellees