SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RETROPHIN, INC.		
	Plaintiff,	
	v.	Index No. 651104/13
TIMOTHY PIEROTTI,		
	Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TIMOTHY PIEROTTI'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Defendant Timothy Pierotti, by and through the undersigned counsel, respectfully submits this memorandum of law in support of his motion to dismiss ("Motion"), pursuant to N.Y. C.P.L.R. 3211(a)(1) and (7), the amended complaint ("Amended Complaint") of Plaintiff Retrophin, Inc. ("Plaintiff"), as follows.

PRELIMINARY STATEMENT

Plaintiff's Amended Complaint fares no better than its original predecessor. In fact, Plaintiff's new pleadings further expose the futility of its theory of recovery. Indeed, Plaintiff is seeking to manufacture rights for itself in two fully integrated written agreements, one of which it is not even a party to. At its core, the Amended Complaint is a misguided attempt by Plaintiff to obtain the present value of stock that Mr. Pierotti obtained from a non-party through a valid sales contract.

In addition to directly contravening two written contracts, the Amended Complaint further suffers from core allegations that are hopelessly vague. In support of its fraud, promissory estoppel, and unjust enrichment claims, Plaintiff alleges that Mr. Pierotti promised that he would be "committed to [Plaintiff's] growth and development" and that he would "work collaboratively" with Plaintiff's CEO, Martin Shkreli. These allegations are so devoid of clarity and definition that they cannot serve as the factual foundation for any of these claims. Further undermining Plaintiff's fraud claim is its failure to sufficiently plead that Mr. Pierotti had any fraudulent intent when he made these alleged promises and that its reliance on them was reasonable.

Plaintiff's claims are also infirm because Plaintiff fails to allege any harm from Mr. Pierotti's alleged misrepresentations. In fact, Plaintiff admits that Mr. Pierotti's prior work performance was "unremarkable," "unimpressive," and "lackluster." (Am. Comp.¶¶ 12-13, 18). Surprisingly, Plaintiff asserts that, despite firing Mr. Pierotti and entering into a fully integrated

separation agreement, it was somehow harmed by Mr. Pierotti's alleged actions in an amount no less than $3 million. Again, the Amended Complaint necessitates ignoring a written agreement.

Plaintiff's second try to create a claim fails on its face and should be dismissed with prejudice.

STATEMENT OF FACTS[1]

A. THE PARTIES

Mr. Pierotti is a former employee of MSMB Healthcare Management LLC ("MSMB"), an entity affiliated with Plaintiff, and resides in Summit, New Jersey. (Am. Compl. ¶¶ 8, 10, 13, 17).[2] Plaintiff is located at 777 Third Avenue, 22nd Floor, New York, NY 10017. (*Id.* ¶ 7). Desert Gateway, Inc. ("Desert Gateway") is Plaintiff's former parent company, and was the subject of a reverse-merger with Plaintiff that occurred on or about December 12, 2012. (*Id.* ¶¶ 34, 47).

B. THE TERMINATION AGREEMENT

Mr. Pierotti was employed with MSMB from approximately September 2011 to November 2012. (*Id.* ¶¶ 10, 46). According to the Amended Complaint, Mr. Pierotti's performance in this role was "unremarkable," "unimpressive," and "lackluster," and that Plaintiff and MSMB "realized nominal returns on [Mr. Pierotti's] investment and trading decisions." (*Id.* ¶¶ 12-13, 18). On November 12, 2012, Mr. Pierotti and MSMB executed a termination agreement (the "Termination Agreement") that ended Mr. Pierotti's employment with MSMB. (*See* Am. Compl., Ex. A). Plaintiff was also a party to the Termination Agreement. (Am. Compl.

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1 For the purpose of this Motion, Mr. Pierotti accepts the allegations of the Amended Complaint as true except for those allegations that are directly contradicted by the documentary evidence pursuant to N.Y. C.P.L.R. 3211(a)(1). However, Mr. Pierotti vigorously denies Plaintiff's allegations and claims against him.

2 Numbers in parentheses prefixed by "Am. Compl. ¶" refer to paragraphs in the Amended Complaint.

¶ 27).[3] Under the Termination Agreement, Plaintiff agreed to make a $20,000 severance payment to Mr. Pierotti in exchange for his release of any claims against Plaintiff. (Am. Compl., Ex. A ¶ 2(a)). The Termination Agreement contains a merger clause, stating the following:

> 9. Entire Agreement. This is the entire agreement with respect to the termination of your employment with MSMB and Retrophin and the forfeiture of your interests in Retrophin. Neither MSMB nor Retrophin makes any representations regarding its relationship with or obligations to you, and none it may have made in the past survive, except as set forth in this Agreement. This Agreement supersedes and fully replaces all existing or contemporaneous agreements, whether written or oral, between you and MSMB and/or Retrophin.

(*Id.* ¶ 9). The Termination Agreement also prohibits any oral modifications and requires any future amendments to be made only in writing. Specifically, the Termination Agreement states:

> 10. Amendments. This Agreement cannot be amended or modified, nor may compliance with any provision be waived, except by a written instrument executed by the party against whom enforcement of any such amendment, modification or waiver is sought.

(*Id.* ¶ 10).

C. THE PURCHASE AGREEMENT

On December 11, 2012, Mr. Pierotti entered into a purchase agreement (the "Purchase Agreement") for the sale of shares of Desert Gateway with Troy Fearnow, a shareholder of Desert Gateway. A true and correct copy of the Purchase Agreement is attached as Exhibit A ("Ex. A") to the Kern Affirmation ("Kern Aff.") that is submitted in support of this Motion. Plaintiff is not a party to the Purchase Agreement. Rather, the Purchase Agreement is limited to Mr. Pierotti and Mr. Fearnow, who agreed to the sale of 400,000 shares (the "Shares") of common stock, par value $0.0001 per share, of Desert Gateway for the good and valuable

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[3] Although Mr. Pierotti was never employed by Plaintiff, Plaintiff alleges that in or around June 2012, Mr. Shkreli asked Mr. Pierotti to "focus on identifying medical device opportunities for the MSMB Companies and their affiliates, including Retrophin LLC." (Am. Compl. ¶ 13). In or around September 2012, a month prior to Mr. Pierotti's termination with MSMB, Retrophin LLC statutorily converted into Plaintiff. (*Id.* ¶ 25).

consideration of $400.00. (Kern Aff., Ex. A ¶ 1). Mr. Pierotti paid for the Shares under the terms of the Purchase Agreement. (Am. Compl. ¶ 43). Pursuant to the Purchase Agreement, the Shares are free and clear of any encumbrances or restrictions on transfer. (Kern Aff., Ex. A ¶ 2). The Purchase Agreement also contains a merger clause and a no oral modification clause, stating the following:

> This Agreement sets forth the entire understanding and agreement (and supersedes any and all understandings, negotiations and agreements, written or oral, not expressly set forth in this [Purchase] Agreement) between the parties hereto relating to the subject matter thereof. This [Purchase] Agreement shall be binding upon and shall inure solely to the benefit of the parties and their respective successors and assigns. This [Purchase] Agreement cannot be modified, changed, amended or terminated or assigned except by an instrument in writing signed by the party sought to be charged.

(*Id.* ¶ 3).

On December 15, 2012, stock certificates for 350,000 of the Shares were transferred to Mr. Pierotti. (Am. Compl. ¶ 48). The remaining 50,000 shares are being held in escrow. (*Id.*). On or about December 17, 2012—after the Shares were transferred to Mr. Pierotti—the Desert Gateway stock converted into Retrophin stock as a result of the "reverse merger" between Desert Gateway and Plaintiff. (Am. Compl. ¶¶ 37, 49).

ARGUMENT

A. THE STANDARD ON A MOTION TO DISMISS

While the facts alleged in the Amended Complaint are presumed to be true, this Court need not accept as true factual allegations or legal conclusions that are flatly contradicted by documentary evidence. *See Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003). Moreover, a court will not accept as true vague or conclusory allegations. *See id.* (a court need not give weight to "factual allegations that do not state a viable cause of action, that consist of

bare legal conclusions, or that are inherently incredible"); *Marino v. Vunk*, 39 A.D.3d 339, 340 (1st Dep't 2007) (stating that "[v]ague and conclusory allegations are insufficient" to sustain a cause of action). Rather, a complaint must set forth the essential elements of the cause of action or be subject to dismissal. *See Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318 (1st Dep't 1994). Indeed, a complaint must be dismissed if it provides no more than bare assertions of legal conclusions or a formulaic recitation of the elements of a cause of action. *See Lanzi v. Brooks*, 54 A.D.2d 1057, 1058 (3d Dep't 1976) *aff'd*, 43 N.Y.2d 778 (1977). Here, as set forth below, even if the Amended Complaint is liberally construed, its claims are (1) contradicted by documentary evidence; and (2) based on conclusory allegations that do not fit within any cognizable legal theory. Accordingly, the Amended Complaint should be dismissed.

B. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE THEY ARE CONTRADICTED BY TWO FULLY INTEGRATED CONTRACTS

The subject matter of the Amended Complaint is centered on Mr. Pierotti's purchase of the Shares and Mr. Pierotti's agreement to "to provide business development services for Plaintiff." (Am. Compl. ¶ 42). This subject matter, however, is explicitly governed by two fully integrated contracts: the Purchase Agreement and the Termination Agreement. Therefore, in order for any of the claims in the Amended Complaint to survive this Motion, this Court, in effect, must disregard the plain terms of these two fully integrated contracts.

The Purchase Agreement is a straightforward contract that sets forth the basic bargain entered into between Mr. Pierotti and Mr. Fearnow, and, notably, is the only document that governs Mr. Pierotti's ownership of the Shares. Under the terms of the Purchase Agreement, "[t]he Seller hereby sells the Shares to Purchaser, and the Purchaser hereby purchases the Shares from the Seller, for a purchase price of $0.001 per share ($400 in the aggregate)." (Kern Aff., Ex. A ¶ 1). The Purchase Agreement further contains explicit language regarding its primacy as

the document controlling the ownership of the Shares at issue. In relevant part, the Purchase Agreement states:

> This Agreement sets forth the entire understanding and agreement (and supersedes any and all understandings, negotiations and agreements, written or oral, not expressly set forth in this [Purchase] Agreement) between the parties hereto relating to the subject matter thereof. This [Purchase] Agreement shall be binding upon and shall inure solely to the benefit of the parties and their respective successors and assigns. This [Purchase] Agreement cannot be modified, changed, amended or terminated or assigned except by an instrument in writing signed by the party sought to be charged.

(*Id.* ¶ 3). Therefore, by its very terms, the Purchase Agreement is limited to its two signatories—Mr. Pierotti and Mr. Fearnow—and is not susceptible to modification without a subsequent writing.

Despite these explicit terms, through the claims made in its Amended Complaint, Plaintiff seeks to insert itself into the Purchase Agreement as if it were a party and had the power to unilaterally change the terms of the Purchase Agreement by emerging long after both actual parties to the agreement satisfied their respective obligations and went their separate ways. In effect, Plaintiff is claiming that because it "facilitated" Mr. Pierotti's purchase of the Shares, Mr. Pierotti's enjoyment of those Shares is somehow dependent on whether he fulfilled his alleged promise to continue working for Plaintiff.

Central to this particular claim is Plaintiff's allegation that once Mr. Pierotti obtained the Shares, he "absconded with the stock." (*See* Am. Compl. ¶ 2). Yet, while Mr. Pierotti may never have gone back to work for Plaintiff, he certainly did not "abscond" with the stock. Mr. Pierotti paid for the Shares per the terms of the Purchase Agreement and so, as a matter of law, he could not have "absconded" with something that he legally owned under the Purchase Agreement.

Plaintiff's "absconding" allegation, then, is a misguided attempt to condition Mr. Pierotti's ownership rights of the Shares on his compliance with his purported promises to assist in Plaintiff's growth. However, Mr. Pierotti's rights in this regard are governed solely by the Purchase Agreement and whether he complied with this purported promise is irrelevant. Therefore, Plaintiff cannot premise any claim on an act or event that is governed by a written agreement with an integration clause. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-96 (1st Dep't 2006) (court affirmed dismissal of fraud claim pursuant to N.Y. C.P.L.R. 3211(a)(1) because the claim was contradicted by the plain language of available documents); *Capricorn Investors III, L.P. v. Coolbrands Int'l, Inc.*, 66 A.D.3d 409, 410 (1st Dep't 2009) (court affirmed dismissal of fraud and promissory estoppel claims because they were "flatly contradicted by the parties' written agreement which covered the same subject matter and expressly superseded all other prior agreements and understandings, written and oral"); *Rakus, Inc. v. 3 Red G, LLC*, No. 16594/09, 2010 WL 26252, at *6 (N.Y. Sup. Ct., Kings Cnty. Jan. 5, 2010) (dismissed unjust enrichment claim because "[i]t is well-settled that '[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery under a quasi-contract theory for events arising out of the same subject matter.'") (quoting *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987)). Stated differently, the Purchase Agreement, through which Mr. Pierotti came by his ownership of the Shares, and which contains a fully effective integration clause, bars Plaintiff's claims as a matter of law.

Plaintiff's new theory regarding post-termination "promises" also violates the unambiguous terms of the Termination Agreement. The Termination Agreement prohibits oral modification, stating: "This Agreement cannot be amended or modified, nor may compliance with any provision be waived, except by a written instrument executed by the party against

whom enforcement of any such amendment, modification or waiver is sought." (Am. Compl., Ex. A ¶ 10). The bar on oral modifications embodies the parties' intentions that the Termination Agreement, which explicitly operates to finalize Mr. Pierotti's employment relationship with Plaintiff. In fact, Plaintiff voluntarily elected to become a party to the Termination Agreement between Mr. Pierotti and his actual employer, MSMB, thereby binding itself to the Agreement's terms. Yet, despite inserting itself into an agreement that finalizes its employment relationship with Mr. Pierotti, Plaintiff now seeks to undo the finality of this agreement, in direct contravention of the oral modification clause. Quite simply, Plaintiff's alleged agreement with Mr. Pierotti effectively modifies the terms of his severance because it imposes upon him numerous post-termination obligations beyond those set forth in the Termination Agreement. Under the terms of this alleged agreement, Mr. Pierotti obligated himself to commit to Plaintiff's "growth and development" and "to work collaboratively with others." (*See* Am. Compl. ¶ 39). However, such modifications are foreclosed by the explicit terms of the Termination Agreement.

Because each claim in the Amended Complaint requires the Court to ignore the clear terms of two fully integrated contracts, the Amended Complaint should be dismissed with prejudice on these grounds alone. *See Zanett Lombardier,* 29 A.D.3d at 495-96; *Capricorn Investors*, 66 A.D.3d at 410; *Rakus*, 2010 WL 26252, at *6.

C. PLAINTIFF'S FRAUD CLAIM MUST BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A CAUSE OF ACTION

To prevail on a claim of fraud, a plaintiff must allege (1) that the defendant made a representation of material fact; (2) the falsity of such representation; (3) scienter; (4) plaintiff's reasonable and justifiable reliance on defendant's misrepresentation; and (5) damages. *See Lanzi,* 54 A.D.2d at 1058 (court granted a motion to dismiss claims of fraud that were based on conclusory allegations of future profit sharing); *Caniglia v. Chicago Tribune-New York News*

Syndicate, Inc., 204 A.D.2d 233, 234 (1st Dep't 1994) (court granted motion to dismiss where the only fraud alleged merely related to a contracting party's alleged intent to breach a contractual obligation). Further, each element of fraud "must be pled with the particularity required by CPLR 3016(b), the standard of which is 'more stringent . . . than the generally applicable notice of the transaction rule of CPLR 3013, and complaints based on fraud . . . which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed.'" *Orchard Hotel, LLC v. D.A.B. Grp., LLC*, 35 Misc.3d 1206(A), 950 N.Y.S.2d 724, at *3 (N.Y. Sup. Ct., N.Y. Cnty. Mar. 28, 2012) (quoting *Lanzi*, 54 A.D.2d at 1058) (court granted motion to dismiss fraud claim because it was contradicted by the plain language of fully integrated contracts). The Amended Complaint fails to sufficiently plead an action of fraud because (1) the Amended Complaint contains only conclusory allegations of Mr. Pierotti's intent to defraud Plaintiff; (2) Plaintiff fails to plead reasonable reliance; and (3) Plaintiff fails to allege "out-of-pocket" damages.

1. Plaintiff's Fraud Claim Fails To Sufficiently Plead That Mr. Pierotti Intended To Deceive Plaintiff At The Time He Allegedly Made Misrepresentations

As a general rule, fraud may not be predicated on statements as to future events. *See Lanzi*, 54 A.D.2d at 1058. Indeed, misrepresentations alleged in a pleading must be more than mere promissory statements about what the defendant will do in the future, such as promises of goodwill or cooperation. *See id.*; *see also Cacchione v. Westchester Country Club*, 27 Misc. 2d 757, 762, 209 N.Y.S.2d 52 (N.Y. Sup. Ct., N.Y. Cnty. Sept. 26, 1960), *aff'd sub nom. Cacchione v. Harrison-Rye Realty Corp.*, 16 A.D.2d 911 (1st Dep't 1962). Here, Mr. Pierotti's alleged misrepresentations—that he would be "committed to [Plaintiff's] growth and development" and that he would "work collaboratively" with Mr. Shkreli and others (Am.

Compl. ¶ 39)—are, in fact, promises of goodwill and cooperation that cannot be the basis of a claim of fraud.

Moreover, a cause of action for fraud based on promissory statements will stand only if the plaintiff can adequately plead that the promisor had the intent to deceive at the time he made the alleged misrepresentation. *See Lanzi*, 54 A.D.2d at 1057. A court cannot infer a party's fraudulent intent not to perform a promise, however, simply because that party later failed or refused to perform. *See Lanzi*, 54 A.D.2d at 1057 ("[A]ny inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions."); *see also Brown v. Lockwood*, 76 A.D.2d 721, 732-33 (2d Dep't 1980) ("Where the only proof is that the defendant failed to keep his promise, it is insufficient to establish that the defendant did not intend to perform at the time the promise was made."). What is no more than a claim for breach of promise may not be transformed into one for fraud by the mere addition of a token allegation that the promisor did not intend to keep his promise. Plaintiff must plead specific, additional facts demonstrating that the promisor did not have the requisite intent at the time the alleged misrepresentation was made. *See Lanzi*, 54 A.D.2d at 1058.

Here, Plaintiff, merely alleges in conclusory fashion that at the time Mr. Pierotti allegedly represented that he would continue working for Plaintiff, he "knew that his statements were false." (Am. Compl. ¶ 45). Plaintiff alleges no additional facts regarding Mr. Pierotti's mindset. Plaintiff cites no communications, such as emails, letters, or statements to others, that are at odds with Mr. Pierotti's alleged representations and that would demonstrate that Mr. Pierotti knew his statements were false at the time he allegedly made them. Plaintiff fails to identify any actions on the part of Mr. Pierotti that are inconsistent with his statements, except

his subsequent refusal to continue working for Plaintiff, which, as set forth above, is insufficient by itself to sustain a viable fraud pleading.[4] *See Lanzi*, 54 A.D.2d at 1058. As a result, Plaintiff has failed to carry its heightened burden of sufficiently pleading fraudulent intent. *Id.* Accordingly, Plaintiff's fraud claim must be dismissed.

2. Plaintiff's Fraud Claim Fails To Sufficiently Plead That Plaintiff's Reliance On Mr. Pierotti's Alleged Promises Was Reasonable

For a misrepresentation to be considered actionable as fraud, a plaintiff must not only demonstrate that it relied on the misrepresentation at the time it was made, but that its reliance was reasonable and justifiable. *Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011). New York courts have routinely held that a party cannot reasonably rely on an assurance of at-will employment so as to have a cause of action for fraud where the agreement is not honored. *See Skillgames LLC v. Brody*, 1 A.D.3d 247 (1st Dep't 2003) (court affirmed dismissal of employer's fraud and promissory estoppel claims to the extent they were based on an employee's assurances of committed continued employment when he quit after less than four months on the job); *Arias v. Women in Need, Inc.*, 274 A.D.2d 353, 354 (1st Dep't 2000) (court dismissed claims of fraud and promissory estoppel because an individual plaintiff could not reasonably rely on defendant employer's representations of at-will employment); *Meyercord v. Curry*, 38 A.D.3d 315, 316 (1st Dep't 2007) (in an at-will employment setting, "any reliance on representations of future intentions, such as job security or future changes, would be deemed unreasonable as a matter of law"). In *Skillgames LLC v. Brody*, an employer sued an employee for, *inter alia*, fraud and promissory estoppel based on his

[4] In fact, in a telling slip, Plaintiff alleges that had it known that Mr. Pierotti was going to "renege" on his commitments, then it would not have facilitated the stock purchase. (Am. Compl. ¶ 77). "Renege" means to go back on a promise. Thus, even in Plaintiff's own telling of events, at the time Mr. Pierotti allegedly uttered his promise to continue working for Plaintiff, he intended to fulfill it.

assurances that he was "committed to continued employment" with the employer. *Skillgames*, 1 A.D.3d at 250. Despite the employee's assurances, he quit after four months of employment, prompting the employer to sue. *Id.* In granting the employee's motion to dismiss, the court held that despite any agreement between the parties, the employee's "*status* as an at-will employee . . . render[ed] unreasonable [the employer's] reliance on [the employee's] alleged representation (or promise) that he was 'committed to continued employment.'" *Id.*

Taken at face value, Plaintiff's description of its alleged arrangements with Mr. Pierotti amount to the same type of at-will employment as that in dispute in *Skillgames*. Here, Plaintiff fails to allege a start date, a termination date, compensation terms, or any other terms that would create meaningful expectations for the parties. New York courts have routinely found that where an offer of employment is silent as to duration, absent a limitation on the employer's right to discharge the employee, there is a rebuttable presumption of an at-will employment relationship. *See, e.g., Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329 (1987); *Marino v. Oakwood Care Ctr.*, 5 A.D.3d 740, 741 (2d Dep't 2004). In an at-will arrangement, either party could decide to part company with the other whenever it desired without having any further legal obligations. *See Sabetay*, 69 N.Y.2d at 333. So, it follows that if Mr. Pierotti was free under the law to terminate his arrangement with Plaintiff at any time, then Plaintiff had no basis whatsoever to place any amount of reliance on Mr. Pierotti's alleged statements of commitment.

The inherent unreasonability of Plaintiff's reliance on Mr. Pierotti's alleged representations is a particularly acute in light of Mr. Shkreli's extensive corporate background. As stated in the Amended Complaint, Mr. Shkreli is a savvy business leader and he has employed multiple individuals in a variety of capacities. (*See generally* Am. Compl.). His entry into a Termination Agreement with Mr. Pierotti just one month before the arrangements at issue

here demonstrates his appreciation of the practical benefits and legal necessity of reducing employment-related agreements to writing. Mr. Shkreli, and by extension, Plaintiff, were, therefore, well-positioned to realize that Mr. Pierotti's alleged professions of commitment do not equate to his acceptance of concrete employment terms that are in any way enforceable.

In this sense, Plaintiff's claimed reliance on the alleged promises of continued support that Mr. Pierotti made in early December is even more unreasonable given that Plaintiff terminated Mr. Pierotti's employment less than a month earlier. Plaintiff asserts that it terminated Mr. Pierotti "as part of the winding down of the MSMB Companies" (*Id.* ¶ 27), even though Plaintiff continued (and continues) to exist as a functioning entity (*See generally id.*). Rather than simply redefine Mr. Pierotti's job description, Plaintiff elected to enter into a Termination Agreement with him. As set forth above, the Termination Agreement, is a fully integrated document that prohibits any oral modifications. In particular, it states:

> 9. Entire Agreement. This is the entire agreement with respect to the termination of your employment with MSMB and Retrophin and the forfeiture of your interests in Retrophin. Neither MSMB nor Retrophin makes any representations regarding its relationship with or obligations to you, and none it may have made in the past survive, except as set forth in this Agreement. This Agreement supersedes and fully replaces all existing or contemporaneous agreements, whether written or oral, between you and MSMB and/or Retrophin.
>
> 10. Amendments. This Agreement cannot be amended or modified, nor may compliance with any provision be waived, except by a written instrument executed by the party against whom enforcement of any such amendment, modification or waiver is sought.

(*Id.*, Ex. A ¶¶ 9, 10). Additionally, the Termination Agreement provided to Mr. Pierotti $20,000 in severance. (*Id.* ¶¶ 2(a)). Terminating an employee and providing him severance is completely at odds with any intention to resume an employment relationship. It is therefore unreasonable for Plaintiff to develop a reliance on any oral commitments from Mr. Pierotti regarding continued employment when the clear terms of the Termination Agreement barred the

enforceability of such assurances. *See Zanett Lombardier*, 29 A.D.3d at 495-96; *Orchard Hotel,* 950 N.Y.S.2d 724, at *3 (reasonable reliance on oral commitments could not be pled where the commitments were refuted by a clear agreement that expressly prohibited oral modifications).

Because Mr. Pierotti's alleged promise was for nothing more than at-will employment, and because the Termination Agreement—a fully integrated document—addressed Mr. Pierotti's employment obligations with respect to Plaintiff, Plaintiff cannot plead that its reliance was reasonable. Accordingly, Plaintiff's cause of action for fraud should be dismissed.

3. Plaintiff's Fraud Claim Fails To Sufficiently Plead That Plaintiff Incurred Any Out-Of-Pocket Injury

New York's "out-of-pocket" rule requires that a plaintiff plead that it suffered an actual pecuniary loss to sustain a fraud action. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996) (court affirmed motion to dismiss fraud claim where plaintiff did not allege it suffered any pecuniary loss). Under the "out-of-pocket" rule, the loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain." *Lama Holding*, 88 N.Y.2d at 421. The damages are to compensate the plaintiff for what it actually lost, and not for what it failed to gain as a result of the alleged fraud. *Lama Holding*, 88 N.Y.2d at 421.

Here, Plaintiff has failed to allege that it suffered any pecuniary loss. The Amended Complaint does not allege that Plaintiff spent a single penny as a result of any of Mr. Pierotti's alleged misrepresentations. Rather, the only cognizable injury Plaintiff has suffered is the purported value of the services Mr. Pierotti allegedly failed to provide – clearly not sufficient to satisfy the "out-of-pocket" rule. Plaintiff even admits that Mr. Pierotti's prior performance was "unremarkable," "unimpressive," and "lackluster," and that MSMB "realized nominal

returns on [Mr. Pierotti's] investment and trading decisions."[5] (Am. Comp. ¶¶ 12-13, 18). Even if the value of Mr. Pierotti's services could be ascertained—which it cannot—the value of a lost bargain is precisely the type of injury that is barred by the "out-of-pocket" rule. *See Starr Foundation v. Am. Intern. Grp., Inc.* 76 A.D.3d 25, 28 (1st Dep't 2010) (dismissal of fraud claim where plaintiff seeks to recover the value it might have realized). Indeed, such a lost bargain is too "undeterminable and speculative" to survive a motion to dismiss. *See id.*; *see also Lama Holding*, 88 N.Y.2d at 422. Accordingly, because Plaintiff failed to plead that it suffered any pecuniary loss, its cause of action for fraud must be dismissed.

D. PLAINTIFF'S EQUITABLE CLAIMS MUST ALSO FAIL

1. Plaintiff's Promissory Estoppel Claim Must Be Dismissed Because Plaintiff Fails To State A Cause Of Action

To prevail on a claim of promissory estoppel, a plaintiff must allege that (1) defendant made a clear and unambiguous promise; (2) plaintiff reasonably and foreseeably relied on the promise; and (3) plaintiff sustained an injury upon that promise. *See N.Y. City Health & Hosps. Corp. v. St. Barnabas Hosp.*, 10 A.D.3d 489, 491 (1st Dep't 2004). Plaintiff has failed to plead any of these elements.

As discussed *supra*, the terms of Mr. Pierotti's alleged promise were neither clear nor unambiguous. The Amended Complaint is splattered with vague and conclusory statements that Mr. Pierotti assured Mr. Shkreli or Marek Biestek that he would provide services to Plaintiff. The most concrete formulation offered by Plaintiff of Mr. Pierotti's alleged promises is that in early December 2012 he promised he would be "committed to [Plaintiff's] growth and

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[5] Despite Plaintiff's low regard for Mr. Pierotti's abilities, Plaintiff claims that Mr. Pierotti's alleged refusal to provide these same services caused it $3 million in damages. Of course, this figure roughly equates to the present value of the Shares, and Plaintiff's inconsistent and unsupported claim to this amount of purported damages reflects its quixotic quest, commenced in its original complaint, to glom on to Mr. Pierotti's market gains.

development" and that Mr. Pierotti would "work collaboratively" with Mr. Shkreli and others. (Am. Compl. ¶ 39). Plaintiff does not identify any specific tasks associated with Mr. Pierotti's prospective work or any relevant employment term such as duration and compensation. Plaintiff's failure to allege any specific facts regarding Mr. Pierotti's alleged promise alone warrants the dismissal of its cause of action for promissory estoppel. *See Richbell Info. Servs. v. Jupiter Partners,* 309 A.D.2d 288 (1st Dep't 2003) (dismissing promissory estoppel claim because an alleged promise to use "best efforts" was "too indefinite to be the type of clear and unambiguous promise required for promissory estoppel").

Further, as was discussed *supra* in Section C.2, Plaintiff failed to establish that its reliance on Mr. Pierotti's alleged promises was reasonable. Taken at face value, Mr. Pierotti's alleged promises amounted to an at-will employment arrangement from which either party was free to extricate itself without further obligation to the other. *See Skillgames*, 1 A.D.3d at 250; *Arias*, 274 A.D.2d at 354. Therefore, Plaintiff had no basis whatsoever to rely on Mr. Pierotti's continued involvement in its development.

Additionally, Plaintiff has not sufficiently alleged that it was injured as a result of Mr. Pierotti's absence from its workplace. To adequately plead promissory estoppel, a party must allege that the injury it suffered was "unconscionable." *See Bitter v. Renzo*, No. 652003/11, 39 Misc.3d 1208(A) (N.Y. Sup. Ct., N.Y. Cnty. Apr. 12, 2012) (denied promissory estoppel claim where only injury alleged was for unpaid commissions), *aff'd*, 101 A.D.3d 465 (2012). An unconscionable injury is an "injury beyond that which flows naturally (expectation damages) from the non-performance of an unenforceable agreement or promise." *See Greene v. Ratner*, No. 0601545/2007, 2008 WL 2937183 (N.Y. Sup. Ct., N.Y. Cnty. July 22, 2008). Plaintiff's only alleged injury is that which flowed from Mr. Pierotti's alleged promise to provide future

services. Such injury cannot be considered "unconscionable," as is required by law. New York courts have made clear that a promisee's mere failure to obtain an uncertain prospective benefit does not warrant the application of the doctrine of promissory estoppel. *See Country-Wide Leasing Corp. v. Subaru of Am.*, 133 A.D.2d 735 (2d Dep't 1987).

For the foregoing reasons, Plaintiff is unable to plead a cause of action for promissory estoppel. Accordingly, this claim must be dismissed.

2. Plaintiff's Unjust Enrichment Claim Must Be Dismissed Because Plaintiff Fails To State A Cause Of Action

To successfully plead a cause of action based upon unjust enrichment, a plaintiff must establish that (1) the other party was enriched; (2) at the plaintiff's expense; and (3) "it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *See Onebeacon Am. Ins. Co. v. Whitman Packaging Corp.*, No. 158896/12, 2013 WL 3064604, at *4 (N.Y. Sup. Ct., N.Y. Cnty. June 10, 2013) (citing *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 421 (1972)). The "essence of unjust enrichment is that one party has received money or a benefit at the expense of another." *Id.* (quoting *Syracuse v R.A.C. Holding*, 258 A.D.2d 905, 906 (4th Dep't 1999)). Plaintiff has failed to sufficiently allege these necessary elements of unjust enrichment.

Plaintiff has identified Mr. Pierotti's enrichment as the profits he made from selling the Shares and the injury it incurred as the loss of Mr. Pierotti's services. (Am. Compl. ¶ 70). Plaintiff then claims that as a result of Mr. Pierotti's enrichment, it incurred "millions of dollars" of damages. (*Id.* ¶ 73).

With respect to Mr. Pierotti's alleged enrichment, while he may have profited from the substantial uptick of the price of Plaintiff's shares, Mr. Pierotti did not come by these profits at Plaintiff's expense. Far from it. Even as alleged, Mr. Pierotti's enrichment came

about because of market forces that drove the price of Plaintiff's stock substantially upward. So, far from incurring expense, Plaintiff substantially benefitted. In fact, it can be argued that no individual or entity benefitted more from the meteoric rise in the value of Plaintiff's stock than Plaintiff itself. Moreover, while Plaintiff claims that it "facilitated" Mr. Pierotti's purchase of this stock, Plaintiff's fails to allege that its facilitation efforts caused it any expense. Its own pleadings reveal that these efforts consisted of introducing Mr. Pierotti to Mr. Fearnow. (Am. Compl. ¶¶ 41, 44). Even if Plaintiff had identified the out of pocket costs of these efforts-which it did not-those costs would be nominal at best.

With respect to its claimed loss of Mr. Pierotti's services, Plaintiff fails to allege how its loss of Mr. Pierotti's services caused millions of dollars of damages, which is not surprising given the inherent vagueness of the alleged arrangements. In fact, by characterizing Mr. Pierotti's prior work performance as "unremarkable," "unimpressive," and "lackluster." (Am. Compl. ¶ 12-13, 18), Plaintiff has unwittingly diminished the theoretical value of his services. In any event, nowhere in its Amended Complaint, does Plaintiff link Mr. Pierotti's absence from its workplace with the millions of dollars this absence supposedly cost it.

As set forth above, in addition to alleging enrichment by the defendant at the plaintiff's expense, a plaintiff must also allege that "it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Onebeacon America*, 2013 WL 3064604, at *4. Here, because of the convoluted and disjointed nature of its theory of recovery, Plaintiff cannot possibly fit its pleading into this required formulation. The only thing that Mr. Pierotti would possibly retain in this case is the proceeds from his sale of the Shares. Plaintiff, however, is actually not seeking to recover these profits. Instead, it is seeking to recover the value of Mr. Pierotti's services. (Am. Compl. ¶ 72).

All of these pleading deficiencies fatally undermine Plaintiff's unjust enrichment claim. *See Onebeacon America*, 2013 WL 3064604, at *5 (court granted motion to dismiss unjust enrichment claim because, "without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal"); *see also Clark v. Daby*, 300 A.D.2d 732 (3d Dep't 2002) ("[T]he mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment."). Accordingly, Plaintiff's unjust enrichment claim must be dismissed.

3. Plaintiff's Equitable Estoppel Claim Must Be Dismissed Because Plaintiff Fails State A Cause Of Action

Plaintiff's fourth and final claim also fails as a matter of law. To establish a claim for equitable estoppel under New York law, a party must show: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. *DiLascio v. Tilden Glen Head, Inc.*, 69 A.D.3d 1171 (3d Dep't 2010). Additionally, the doctrine of equitable estoppel "is to be invoked sparingly and only under exceptional circumstances." *LoCiciro v. Metro. Transp. Auth.*, 288 A.D.2d 353, 355 (2d Dep't 2001). Indeed, "[t]he purpose of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another." *Am. Bartenders Sch. v. 105 Madison Co.*, 59 N.Y.2d 716, 718 (1983).

Here, Plaintiff is seeking to "estop" Mr. Pierotti from (1) claiming that the stock purchase opportunity was a gift; (2) claiming that the stock purchase opportunity was in consideration for prior services rendered; and (3) denying his alleged misrepresentations and omissions to Plaintiff. Plaintiff fails to plead a single allegation, however, that Mr. Pierotti has engaged in any such conduct. Moreover, as stated *supra* in Section D.1, Plaintiff's alleged injury cannot be considered "unconscionable," as is required by law. *See Am. Bartenders*, 95 N.Y.2d at

718 ("The circumstances set forth by plaintiff [of defendant's refusal to execute lease modification] simply do not rise to a level of unconscionability warranting application of equitable estoppel."); *see also Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, 35 Misc.3d 1201(A), 950 N.Y.S.2d 611 (N.Y. Sup. Ct., N.Y. Cnty. Sept. 13, 2011) (cause of action for equitable estoppel dismissed where there was no allegation of unconscionable injury as a result of reliance on an alleged promise).

For the foregoing reasons, Plaintiff fails to plead a cause of action of equitable estoppel. Accordingly, this claim must be dismissed.

CONCLUSION

For the foregoing reasons, Mr. Pierotti respectfully requests that this Court dismiss Plaintiff's Amended Complaint together with such other and further relief as this Court deems just and proper.

Dated: September 12, 2013
New York, New York

Respectfully submitted,

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