

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11277-RGS

GEORGE J. ADRION

v.

GARRETT KNIGHT, et al.

MEMORANDUM AND ORDER
ON MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

September 28, 2009

STEARNS, D.J.

Magistrate Judge Dein's Report is thorough and in almost all respects persuasive. I agree with her conclusion that the alleged misrepresentations, which are at the heart of plaintiff's case, fail for lack of specificity, or to the extent that they are identified with any hint of precision, amount to nothing more than expressions of mere opinion and belief that are not actionable under Massachusetts law. See, e.g., Commonwealth v. Quinn, 222 Mass. 504, 512-514 (1916). That being the case, whether reliance is adequately plead in the Amended Complaint is immaterial, although I am inclined to agree with Magistrate Judge Dein that no properly instructed jury could find that Adrion reasonably relied to his detriment on defendants' opinions (or more accurately, their refusal to offer them). I also agree with the Magistrate Judge's analysis of the deficiencies of Adrion's claims of "reverse" estoppel, breach of (a non-existent) fiduciary duty, (a fictive) civil conspiracy,

unjust enrichment,¹ and breach of contract .

I part company with Magistrate Judge Dein in one respect: her conclusion that defendant Retail Expert, Inc. (REI), breached the covenant of good faith and fair dealing by failing to provide Adrion with full and complete access to the company's financials. As the Magistrate Judge correctly concluded in her analysis of the breach of contract claim, there was "simply . . . no [contractual] obligation [on the part of REI] to provide financial information contained in the Stock Option Agreement" Mag. J. Report, at 27. She then noted, again correctly, that the implied covenant of good faith and fair dealing "may not . . . be invoked to create rights and duties not otherwise provided for in the existing contractual relationship." *Id.*, at 28, citing Liss v. Studeny, 450 Mass. 473, 477 (2008). See also Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004). She then, however, curiously determined that a subjective expectation on Adrion's part, formed wholly apart from any negotiation over the Stock Option Agreement, *sub silentio* became an implied term of the contract enforceable under the covenant. This determination cannot be supported as a matter of law and REI is entitled to summary judgment on the claim of a breach of the covenant as well.² See Lohnes v. Level 3

¹As the Magistrate Judge observed, the availability of an adequate remedy at law (whether successful or not) precludes an equitable claim of unjust enrichment. See LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 294-295 (D. Del. 2000), citing Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 393 (Del. Ch.1999). See also Lopes v. Commonwealth, 442 Mass. 170, 179 (2004).

²REI also makes the substantial argument that on this issue Adrion has omitted to plead causation, that is, that had he been given full access to the company's financials, he would in fact have exercised the options before they expired.

Commc'ns, Inc., 272 F.23d 49, 62 (1st Cir. 2001) (“[T]he fruits of the contract were limited to those enumerated in the warrant.”).

ORDER

For the foregoing reasons, the Magistrate Judge’s Report is ADOPTED in part. Consistent with her Recommendation, defendant Knight’s motion for summary judgment is ALLOWED. The court also ADOPTS the Magistrate Judge’s Recommendation that REI’s motion for summary judgment be ALLOWED as to Counts I-VI and Count VIII of the Amended Complaint. The court declines to adopt the Magistrate Judge’s Recommendation that REI’s motion for summary judgment on Count VII be denied and will instead enter judgment for REI on that Count as well. The Magistrate Judge’s Recommendation that Adrion’s cross-motion for summary judgment on Counts I-IV and Counts VII-VIII of the Amended Complaint be denied is ADOPTED. Adrion’s motion to add John Conmy as a defendant party is also DENIED.

CONCLUSION

Consistent with the above Order, the Clerk will enter judgment for defendants and close the case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE J. ADRION,)
)
 Plaintiff,)
 v.) CIVIL ACTION
) NO. 07-11277-RGS
 GARRETT KNIGHT, RETAIL EXPERT,)
 INC., TYCO ACQUISITION CORP. XXI,)
 TYCO INTERNATIONAL LTD., TYCO)
 HOLDINGS OF NEVADA, INC., SCOTT)
 TECHNOLOGIES, INC., SCOTT)
 TECHNOLOGIES HOLDINGS, INC.,)
 SENSOMATIC HOLDING CORPORATION,)
 and ADT SECURITY SERVICES, INC.,)
)
 Defendants.)

**REPORT AND RECOMMENDATION ON DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF’S
CROSS-MOTION FOR SUMMARY JUDGMENT**

September 9, 2009

DEIN, U.S.M.J.

I. INTRODUCTION

The plaintiff, George J. Adrion (“Adrion”), has brought this action against Retail Expert, Inc. (“REI”) and its founder and president, Garrett Knight (“Knight”),⁷ alleging that the defendants’ wrongful conduct precluded Adrion from

⁷ Pursuant to an Amended Complaint filed on April 20, 2009 (Docket No. 114), Adrion has also named a number of companies as alleged successors in interest to REI. These entities had not been joined as defendants when the pending motions for summary judgment were filed and are not parties to the motions. In addition, in his Amended Complaint the plaintiff sought to add John Conmy (“Conmy”), a co-founder of REI, as a

exercising his vested stock options in REI prior to their expiration. In his First Amended Complaint (Docket No. 114) (“Compl.”), Adrion has raised claims of intentional misrepresentation (Count I), negligent misrepresentation (Count II), intentional nondisclosure (Count III), breach of contract (Count IV), unjust enrichment (Count V), breach of fiduciary duties (Count VI), breach of the covenant of good faith and fair dealing (Count VII), and civil conspiracy (Count VIII).

This matter is presently before the court on the Motion of Knight and REI for Summary Judgment (Docket No. 66), and on their Motion for Summary Judgment on Newly Added Counts (Docket No. 121), pursuant to which the defendants are seeking summary judgment in their favor on all counts of the First Amended Complaint. In addition, this matter is before the court on Adrion’s Cross-Motion for Summary Judgment pursuant to which he is seeking summary judgment in his favor on Counts I, II, III, IV, VII and VIII. (Docket No. 87). Finally, this court has under advisement Adrion’s motion to add John Conmy, a co-founder of REI, as a defendant. (Docket No. 41). After consideration of the oral and written arguments of the parties, and for the reasons detailed herein, this court recommends to the District Judge to whom this case is assigned (1) that Knight’s motion for summary judgment be allowed and judgment be entered in his

defendant. The court has that motion under advisement pending a ruling on the motions for summary judgment.

favor on all counts of the Amended Complaint, (2) that Adrion's motion for summary judgment be denied in its entirety, (3) that REI's motion be denied as to the claim of breach of the implied covenant of good faith and fair dealing (Count VII) in light of the existence of material disputed facts, (4) that REI's motion for summary judgment be allowed as to the remaining Counts, and (5) that the motion to add Conmy as a defendant be denied.

II. STATEMENT OF FACTS⁸

Many of the facts proffered by the parties are hotly contested, and are distributed throughout numerous filings. Nevertheless, as evidenced by the filing of cross-motions for summary judgment, the parties believe that the material facts are not in dispute. Unless otherwise indicated, the following facts are undisputed.

⁸ The facts are derived from Defendants' Statement of Undisputed Facts (Docket No. 76) ("DF"); Plaintiff's Statement of Material Facts to Which There is a Genuine Issue to be Tried (Docket No. 89) ("PS"); Defendants' Statement of Disputed Facts in Opposition to Plaintiff's Cross-Motion for Summary Judgment (Docket No. 120) ("DS"); Defendants' Statement of Disputed Facts in Support of Motion for Summary Judgment on Newly Added Counts (Docket No. 133) ("DF2"); Appendix of Exhibits Offered in Support of Defendants' Motion for Summary Judgment on Newly Added Counts (Docket Nos. 127-132) ("Defs. Ex."); Defendants' Appendix of Exhibits Offered in Opposition to Plaintiff's Cross Motion for Summary Judgment (Docket No. 119) ("Defs. Supp. Ex."); Plaintiff's Exhibits to Memorandum in Support of Motion for Summary Judgment (Docket No. 90) ("Pl. Ex."); Affidavit of George J. Adrion (Docket No. 98) ("Adrion Aff."); Plaintiff's Exhibits in Opposition to Defendants' Motion for Summary Judgment on Newly Added Counts (Docket Nos. 139-140) ("Pl. Supp. Ex."); Affidavit of Garrett Knight (Docket No. 67) ("Knight Aff."); Supplemental Affidavit of Garrett Knight (Docket No. 116) ("Knight Aff.2 "); Affidavit of William E. Swiggart (Docket No. 123) ("Swiggart Aff."); and the Supplemental Affidavit of William E. Swiggart (Docket No. 117) ("Swiggart Aff.2").

Adrion's Hiring by REI

REI was founded by Knight and Conmy in 1996 to pursue opportunities in the retail theft prevention software market. (Compl. ¶ 13; DS ¶ 3). Knight was the company's President and CEO. (DF ¶ 2). Adrion was a long-time friend of Knight and, in September 2000, Adrion was hired as REI's Executive Vice President of Sales. (DF ¶ 4; Compl. ¶¶ 12-13). While Adrion asserts that he was a "partner" in the business, it is undisputed that REI was a corporation. (See DS ¶ 6 and cited deposition testimony). Moreover, Adrion was an employee of the company, and the terms of his employment with REI were detailed in a letter to him from Knight dated December 7, 2000. (Defs. Ex. 7). The terms of his stock options, which were to vest provided he was an "employee" of the company on the vesting dates, were detailed in an Incentive Stock Option Agreement dated May 3, 2001. (Defs. Ex. 8).⁹

In particular, but without limitation, the employment letter provided for a base annual salary of \$100,000; a bonus which would be defined annually; and stock options for 100,000 shares of stock, which were to vest over a four-year period, 25% annually each year from the anniversary date of his hire. (Defs. Ex.

⁹ Adrion contends that neither of these agreements accurately reflects what he had been promised, and that he was much more valuable to the company than these agreements indicate. Regardless of the merits of his position, these facts are not material to the pending motions since it is undisputed that Adrion accepted the terms of the employment and stock option agreements, albeit reluctantly. (See, e.g., Adrion Aff. ¶ 10).

7). The stock options were set at the price of \$1.00 per share. (Id.). The employment letter further provided for the immediate vesting of a percentage of Adrion's allocated shares if the company was sold, acquired or merged with another company within a one, two or three year period. (Id.). The letter concluded with Knight writing that he was looking forward "to a long and rewarding partnership." (Id.). As detailed infra, Adrion relies on this conclusory comment to convert the corporation into a partnership.

The Stock Option Agreement issued under the company's 2000 Stock Plan contained terms beyond those in the employment letter, but which were accepted by Adrion. (See, e.g., Adrion Aff. ¶ 10). Specifically, but without limitation, the Agreement provided that Adrion could purchase up to one hundred thousand shares of REI stock at the price of \$1.00 per share. (Defs. Ex. 8; DF ¶ 21). This comprised 10% of REI's one million shares. (Adrion Aff. ¶ 10). The Agreement included a vesting date of September 10, 2000, with 25% of the options vesting on each anniversary thereof. (Defs. Ex. 8). The Agreement provided:

Termination of Option. This Option shall terminate at 5:00 p.m. on the first business day that falls ninety (90) days after the date that Employee's employment ceases or on the scheduled expiration date [ten years from the vesting date], whichever occurs first.

(Defs. Ex. 8 (emphasis added)). With respect to exercising the option, the Agreement provided:

Method of Exercising Option. Subject to the terms and conditions of this Agreement, this option may be exercised by written notice to the Company, at the principal executive office of the Company, or to such transfer agent as the Company shall designate. Such notice shall state the election to exercise this Option and the number of Option Shares in respect of which it is being exercised and shall be signed by the person or persons so exercising this Option. Such notice shall be accompanied by payment of the full purchase price of such Option Shares, and the Company shall deliver a certificate or certificates representing such Option Shares as soon as practicable after the notice shall be received....

(Defs. Ex. 8 (emphasis added)). The Agreement further provided:

No Rights as Stockholder until Exercise. Employee shall enjoy no rights as a stockholder with respect to Option Shares subject to this Agreement until a stock certificate thereof has been issued to Employee and it is fully paid for by Employee.

(Defs. Ex. 8 (emphasis added)). The Agreement contains no duty by REI to disclose any financial information to Adrion. (Defs. Ex. 8).

Adrion's Employment at REI

Adrion's employment with REI continued, apparently smoothly, until Adrion and Knight had a falling out in or about March 2005. (See Adrion Aff. ¶ 16). Adrion tendered his resignation in August or September 2005, and it was accepted effective September 30, 2005. (DF ¶ 31; Adrion Aff. ¶ 18). Adrion contends that during his employment he received all of REI's financial information, including balance sheets and profit and loss statements, until March 2005 when his access to the financial information stopped. (Adrion Aff. ¶¶ 13-15). For his part, Knight denies that Adrion ever had free access to financial

information, including profit and loss statements, and contends that Adrion was provided only with unaudited operational information needed for Adrion to do his job. (Knight Aff.2 ¶¶ 9-10). In any event, by March 2005, when Adrion admits the flow of financial information ended, Knight was blaming Adrion for REI's lack of sales, and claimed that Adrion was hurting the business. (Adrion Aff. ¶ 16). Knight claimed that the company was in financial trouble and on a pace to lose \$500,000 due, in part, to Adrion's failure to bring in sales revenue. (Knight Aff.2 ¶¶ 11, 13). Adrion believed, however, that sales prospects were actually quite good during this period. (Adrion Aff. ¶ 16). In fact, on September 27, 2005, Adrion offered to work as an independent consultant for REI to help close a number of sales he believed were imminent. (Defs. Supp. Ex. 12). However, this offer was promptly rejected by REI as Adrion confirmed in an email dated September 30, 2005. (Defs. Supp. Ex. 13).

Exercise of Stock Option

In September 2005, prior to Adrion's departure from REI, Knight and Adrion met to discuss the possible sale of Adrion's options to REI, but no agreement was reached. (DF ¶¶31-35). Knight referred Adrion to William Swiggart ("Swiggart"), REI's corporate attorney, to answer any questions he had regarding his stock options. (DF ¶37).

Adrion contends that he had a number of conversations with Knight following his departure from REI on September 30, 2005 to the effect that he

wanted to review the company's financials so as to decide whether to exercise his stock options, and that he was led to believe that the financial information would be provided. (See, e.g., Adrion Aff. ¶¶ 19, 21, 25-26). Adrion also contends that Knight represented to him that his stock options had "no value." (PS ¶ 16). Adrion is very vague as to the specifics of any such conversations, and their existence is strenuously denied by the defendants. (See, e.g., Swiggart Aff.2 ¶ 6). In general terms, Adrion bases his misrepresentation claims on his contention that (1) the defendants failed to inform him that they were not going to disclose to him REI's financial information prior to the expiration of the stock options period; (2) Knight's alleged representations to Adrion on various occasions that the company was in no condition to be sold; and (3) Knight's alleged representation that REI had no value.

The undisputed evidence before this court is that there were no written communications between the parties about stock options after Adrion left until mid-December 2005. Then, on December 14, 2005, Michael Hepps ("Hepps") left Knight a voice mail stating that Hepps was a friend of Adrion and that Hepps was interested in buying REI for his daughter. (DF2 ¶ 45). Knight did not return Hepps' voice mail, because he felt that Hepps' message was "fishy" and, starting the next day, Hepps was designated an attorney and appeared as a "cc" on Adrion's emails to Knight. (Id. ¶ 48). Hepps is, in fact, an attorney and co-counsel to Adrion in this action. (Id. ¶44).

On December 15, 2005, Adrion sent Knight an email asking if REI was or would be for sale, whether dividends would be paid and whether Knight would consider purchasing back Adrion's stock options. (Defs. Supp. Ex. 9). He also noted that his stock options were "due to expire Dec. 31, 2005." (Id.). The email also stated:

In Sept. 05 I asked you on a phone call, if you were interested in purchasing my options back, as I recall you said, "they had no value to you," and that "the company had no value." Do you still feel that way and if so could you explain your reasoning for that position.

(Id.). Knight sent an email back to Adrion on December 16, 2005 stating:

As I mentioned, the option agreement specifies all issues related to the stock options, and that Bill Swiggart handles all matters related to the stock. I made an offer for you to talk to Bill. I'll forward your questions to him, and feel free to talk to Bill regarding the options. As I said to you, determining the value for a company like REI is difficult – especially when revenue is significantly down this year, following a couple years of flat revenue – the picture hasn't changed since you left.

(Defs. Supp. Ex. 6 (emphasis added)).

Adrion wrote another e-mail to Knight on December 19, 2005 and copied Hepps on the email as "Mike Hepps - Attorney." (DF ¶53). The email stated

It would appear to me that REI does have value based on years of taking continued reinvest earnings and applying it back into REI verses providing a structured executive compensation program.... Your position of "no value" seems an unclear position to take based on earned revenues, and REI's industry leading status, that has been achieved the last 5 years.

(Defs. Ex. 12).

Adrion wrote another email to Knight on December 20, 2005, again copying Attorney Hepps, stating that he had spoken with Swiggart but that Swiggart had not answered his questions and “I am looking for your thoughts on my email of yesterday with regard to your comment about the lack of value of my stock options.” (Defs. Ex. 13).

Adrion wrote another email to Knight on December 22, 2005, stating “I need to know what happened to the value of my last 5+ years of investment contribution into Retail Expert, Inc.” to which Knight replied later that day “you need to make your own determination of value. It is entirely your decision whether you want to exercise your shares or not. I’m fine with any decision you make.” (Defs. Ex. 14). Also on December 22, 2005 and again the next day by email, Adrion requested to see REI’s balance sheet and profit and loss statement. (PI. Ex. C). He made these requests as a “stockholder” of REI, presumably because he had sent a letter, dated December 18, 2005, purporting to exercise his option to purchase 10 shares of REI.

The next communication REI received was on December 24, 2005, when Knight received Adrion’s first exercise of his option for 10 shares, along with a check for \$10.00. (DF ¶ 59). It is undisputed that, absent an extension, Adrion’s right to exercise his stock options terminated on December 29, 2005, 90 days after Adrion’s departure from REI. (DF2 ¶ 43). Between December 24 and 27,

2005, REI received four letters from Adrion, and in each one he exercised his option to purchase 10 shares at \$1.00 per share. (DF ¶¶ 59-61). On December 29, 2005, Swiggart wrote to Adrion reminding him that he would not be a stockholder until after stock certificates were issued, and informing him that Knight would deposit Adrion's check upon his return from vacation on January 3, 2006, and issue the certificate after the check cleared. (Defs. Ex. 15). At no time in any of the numerous pleadings in this case does Adrion assert that he would have exercised more stock options if he had, in fact, received the financial information he requested.¹⁰

The Alleged Extension

Adrion contends that in mid-December 2005, he had a conversation with Swiggart and explained that he expected a reasonable amount of time to review REI's financials prior to deciding whether to exercise his options. (PS ¶ 22). As Adrion explained in his supporting affidavit, after speaking with Swiggart about an extension "I was given to understand that [Swiggart] understood my position, request, and expectations and he said HE AGREED. If he did not mean to agree to the extension, which is what we were talking about, he should have said so." (Adrion Aff. ¶ 28 (emphasis in original)). Defendants claim that neither Knight nor Swiggart provided Adrion with an extension. (DS ¶¶ 28, 30). Swiggart

¹⁰ The defendants continue to assert that REI's financial condition was dismal in 2005 and contend that Adrion would not have exercised his options.

additionally claims that Adrion never requested an extension for exercising his options. (Swiggart Aff.2 ¶ 8).

After the Option Agreement had officially expired, Adrion sent Swiggart an email on December 30, 2005 stating:

I am pleased that you have granted me, until a reasonable time after the options deadline, to review the documents I am entitled to review when I am a stockholder. It seemed so unlikely you and my long time friend Garrett would prevent me from reviewing information so critical that I am entitled to in exercising my options. My intent is to purchase the options upon review of these documents.

(Defs. Ex. 15). This is the first written reference to any extension. (DF ¶ 65).

Swiggart replied by email to Hepps on January 4, 2005 stating:

Dear Mr. Hepps:

George J. Adrion, III, former sales manager of my client, Retail Expert Inc., has shown you as a 'cc' in recent e-mails, and I must therefore assume that you represent Mr. Adrion.

Mr Adrion is the holder of Retail Expert, Inc. Incentive Stock Option No. ISO-104 (the 'Option'). The Option expired under its own terms 90 days after the date of resignation of Mr. Adrion from Retail Expert's employ on September 30, 2005. The Option potentially entitled Mr. Adrion to purchase 100,000 shares of Retail Expert for \$1/share through the expiration date.

During the period of December 18 through December 27, 2005, Mr. Adrion sent four separate notices of exercise under the Option for 10 shares each. This appears to have been the full extent of Mr. Adrion's exercises under the Option. Three notices were sent to Retail Expert's headquarters, and one was sent to me - presumably in my capacity as transfer agent.

Adrion then sent me the following email on December 30, 2005:

I am pleased that you have granted me, until a reasonable time after the options deadline, to review the documents I am entitled to review when I am a stockholder. It seemed so unlikely you and my long time friend Garrett would prevent me from reviewing information so critical that I am entitled to in exercising my options. My intent is to purchase the options upon review of these documents.

Though it is not completely clear, Mr. Adrion seems to be implying that he was granted an extension of time to exercise the Option. As you are no doubt aware, the rule of 90-day post termination expiration is a requirement under the Internal Revenue Code, and may not be modified without disqualifying an option for incentive stock option tax treatment. It is not the policy of my client to grant extensions for the exercise of stock options, and my client has not departed from its policy in this instance.

Mr. Adrion had no reason to believe that any extension of the 90-day exercise deadline for the Option was granted. Please be advised that your client was granted no such extension. The Option has expired, and no further exercises under it may be made.

(Defs. Ex. 16 (emphasis added)).

Hepps claims he was not representing Adrion at this time and Adrion claims he did not receive this letter until sometime later. (Adrion Aff. ¶ 30).¹¹ Adrion claims he copied Hepps on his emails to Knight for the purpose of “worrying him.” (Id.) Adrion did not respond to Swiggart’s letter and never tried to exercise his remaining options, even after he learned that it was the defendants’ position that no extension had been granted.

¹¹ It does appear, however, that Hepps forwarded the letter to Adrion that evening. (See Defs. Supp. Ex. 11).

Adrion's stock certificates were mailed on January 6, 2006. (DF ¶ 70). Adrion and Hepps then made requests for copies of REI's financial statements as stockholders. (DF ¶ 72). Adrion claims that weeks into 2006 he was assured that he would receive REI's financials. (Adrion Aff. ¶ 32).

On January 20, 2006, Knight sent Adrion a letter stating that REI's financial statements were being prepared by the accountants and would be available on or after March 3, 2006. (Defs. Supp. Ex. 14). In February 2006, Knight learned that Adrion was interviewing for a position with DataVantage, REI's primary direct competitor. (DF ¶ 78). Knight claims he was concerned that DataVantage would receive REI's financial information. (DF ¶ 79). Adrion began to work for DataVantage as its director of sales in March 2006. (DF ¶¶ 81-82). On April 6, 2006, Swiggart wrote to Adrion stating that REI would not provide to him its financials since Adrion was now working for its competitor, DataVantage. (DF ¶ 80). These written communications, which followed after Adrion became a shareholder, are the only ones in which the company indicates at all that it would (or would not) be providing financial information.

Sale of REI

In April 2005, REI had retained Stonebridge Associate, LLC to be its financial advisor regarding any proposed sale or merger of the company. (Pl. Ex. E). However, no specific company had been identified as having expressed interest in purchasing REI at this time. (Id.)

A year later, in late April 2006, Tyco expressed interest in purchasing REI and eventually bought REI on December 15, 2006. (DF ¶¶ 91-92). The purchase price was approximately fourteen million dollars. (Compl. ¶26). Adrion contends that he was wrongfully deprived of his share of the proceeds – in excess of \$1 million – because he had been induced not to exercise his stock options.

Additional facts will be provided below where appropriate.

III. ANALYSIS

A. Summary Judgment Standard of Review

Summary judgment is appropriate when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “A dispute is ‘genuine’ if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (quotations and citations omitted). A material fact is one which has “the potential to affect the outcome of the suit under the applicable law.” Id. (quotations and citations omitted).

The court must view the record in the light most favorable to the non-moving party and indulge all reasonable inferences in that party’s favor. See O’Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). “If, after viewing the

record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 143 (D. Mass. 2006).

The moving party bears the initial burden of establishing that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). If that burden is met, the opposing party can avoid summary judgment only by providing properly supported evidence of disputed material facts that would require trial. See id. at 324, 106 S. Ct. at 2553. "[T]he non-moving party 'may not rest upon mere allegation or denials of his pleading,'" but must set forth specific facts showing that there is a genuine issue for trial. LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986)).

"Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

"When facing cross-motions for summary judgment, a court must rule on each motion independently, deciding in each instance whether the moving party has

met its burden under Rule 56.” Dan Barclay, Inc. v. Stewart & Stevenson Servs., Inc., 761 F. Supp. 194, 197-98 (D. Mass. 1991).

B. Counts I and II: Intentional and Negligent Misrepresentation

In Massachusetts,¹² a party may bring a claim for either intentional or negligent misrepresentation. Logan Equip. Corp. v. Simon Aerials, Inc., 736 F. Supp. 1188, 1199 (D. Mass. 1990). Many of the elements for these two causes of action are identical. See Rodi v. So. New England Sch. of Law, 532 F.3d 11, 15 (1st Cir.2008); Mass. Sch. of Law at Andover v. Am. Bar Ass’n, 142 F.3d 26, 41 (1st Cir.1998). These are: (1) the defendant made a false representation of material fact, (2) for the purpose of inducing the plaintiff to act thereon, (3) the plaintiff relied upon the representation to his or her detriment, and (4) the plaintiff’s reliance was reasonable. Id. For an intentional misrepresentation claim the defendant must have made the false representation with knowledge of its falsity. Rodi, 532 F.3d at 15. For a negligent misrepresentation claim the defendant had to have made the false representation without any reasonable basis for believing it to be true. Mass. Sch. of Law, 142 F.3d at 41. Finally, “mere non-disclosure generally will not support any cause of action for misrepresentation.” Logan Equip. Corp., 736 F. Supp. at 1200. “However, a party who discloses partial information that may be misleading has a duty to

¹² Because this is a diversity case, Massachusetts law controls. B&T Masonry Const. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 38 (1st Cir. 2004).

reveal all the material facts he knows to avoid deceiving the other party.” Id. (internal quotation omitted).

In this case Adrion has alleged that Knight and REI made three misrepresentations and omissions: (1) they failed to inform Adrion that it had been decided that he had no right to see financial information, (2) Knight told Adrion that REI was in no condition to be sold, and (3) Knight said that REI had no value. In addition, Adrion argues that the defendants should be estopped from denying various statements made by Adrion in emails to the defendants. For the reasons detailed herein, this court recommends that summary judgment be entered in favor of the defendants on these counts.

1. Lack of Specificity

As an initial matter, Adrion’s claims of misrepresentation must fail because he has failed to identify the alleged misrepresentations with any specificity. Vague and conclusory allegations are insufficient to support a claim of fraud. Logan Equip, Corp., 736 F. Supp. at 1199-1200. Rather, “a claimant alleging fraud or mistake must provide particulars as to the time, place and content of the alleged false or fraudulent misrepresentation.” Int’l Floor Crafts, Inc. v. Adams, 477 F. Supp. 2d 336, 341 (D. Mass. 2007).¹³ Adrion has failed to do so.

¹³ These heightened pleading requirements apply to both intentional and negligent misrepresentation claims. Lindner Dividend Fund, Inc. v. Ernst & Young, 880 F. Supp. 49, 57 (D. Mass. 1995); No. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d. 8, 15 (1st Cir. 2009).

As evidenced by the vagueness of his assertions in his affidavit, Adrion's misrepresentation claims are premised on his interpretation of the defendants' conduct, but not on actual actions of the defendants. For example, he claims generally that "it was often stated and/or implied" that "he would be getting" financial statements soon (Adrion Aff. ¶ 20), and that he did not have "the mind set that [his] options would soon expire" based on "the entire tone of [his] conversations with Knight and Attorney Swiggart." (Id. ¶ 26). Adrion fails to identify with any specificity what statements or actions led him to his conclusions. Such vague statements are insufficient to sustain a claim of fraud.

Similarly, although he points generally to his correspondence with the defendants, he has failed to identify any statements therein which were false and misleading. (See Adrion Aff. ¶¶ 23-24 (the attached emails "reflect my understanding of what I was being told from April 2005 through the time they were written")). A review of correspondence attached to Adrion's Affidavit (Pl. Ex. C) shows that the defendants' actual representations are inconsistent with Adrion's claims that he was being provided false and misleading information. For example, in an internal email dated September 4, 2005, Knight wrote to Conmy that the company had \$1.5 million in revenue and a \$500,000 loss — the same financial information Adrion contends he was given. The attached communications on which plaintiff relies further evidence that Adrion waited until the very end of his option period — shortly before Christmas — to purchase shares and

then, beginning on December 22, 2005, demanded to see “the balance sheet and profit and loss statement” as a shareholder. On December 29, 2005, Swiggart informed him by email and fax that he would not be a shareholder until a stock certificate issued — a statement which is entirely consistent with the Stock Option Agreement. With respect to plaintiff’s claim that he was given an extension to exercise his options, the first written indication of an extension is Adrion’s “confirmation” email to Swiggart of December 30, 2005, which Swiggart promptly refuted by correspondence dated January 4, 2006.¹⁴ Again, there is nothing false or misleading about this communication. Finally, in response to plaintiff’s email of December 15, 2005, in which Adrion stated that Knight had represented that the company had no value, Knight immediately responded on December 16, 2005 that “determining value for a company like REI is difficult – especially when revenue is significantly down this year, following a couple years of flat revenue – the picture hasn’t changed since you left.” Again, on December 22, 2005, Knight confirmed that Adrion had to make his own determination of value. Contrary to Adrion’s conclusory claims, these communications do not support the assertion that Adrion was being misled about the value of the company. In light of the

¹⁴ Adrion cannot complain that Attorney Swiggart communicated with Attorney Hepps, who plaintiff had copied on his correspondence. As Swiggart had noted in an email to Adrion of December 19, 2005, it was entirely appropriate and, in fact, required for counsel to communicate with counsel when an individual was represented in a matter. (Pl. Ex. C; Swiggart Aff.2 Ex. A).

plaintiff's failure to identify any false and misleading information with any specificity, summary judgment is appropriate on these counts. See Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir.1991) (dismissing claim of misrepresentation for failing to provide specific facts as to the alleged representations).

2. The Statements and Omissions Are Not Actionable

With respect to the alleged misrepresentations that the company was in no position to be sold, or had no value, these statements are not actionable as a matter of law. "Only statements of fact are actionable; statements of opinion cannot give rise to a deceit action, or to a negligent misrepresentation action." Cummings v. HPG Int'l, Inc., 244 F.3d 16, 21 (1st Cir. 2001) (internal citation omitted). "[A] representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment." Id. In the instant case, the alleged misrepresentations are to the quality or value of REI, and were apparently raised in the context of Adrion's attempt to sell his options to Knight. They constituted mere expressions of Knight's opinion of the value of the options and, therefore, for this additional reason judgment should be entered in favor of the defendants.

Furthermore, with respect to the defendants' failure to disclose that they were not going to provide financial information, Adrion has not established how

this silence can form the basis for a misrepresentation claim. There is no evidence that the company disclosed partial information or that there was any agreement to provide financial information before Adrion became a stockholder. Therefore, this claim fails as well.

3. No Reasonable or Detrimental Reliance

Adrion's misrepresentation claims must fail for the additional reason that the record does not support a finding that he reasonably relied on any of the alleged misrepresentations to his detriment. Summary judgment is appropriate in misrepresentation claims "if no reasonable jury could find the party's reliance reasonable." Rodj, 532 F.3d at 15 (internal citations omitted). "In order to justify recovery, the recipient of a misrepresentation must rely upon the truth of the misrepresentation itself, and his reliance upon its truth must be a substantial factor in inducing him to act or refrain from action." Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 243 n.5 (D. Mass. 1999).

With respect to Knight's alleged failure to disclose that he was not producing the financial statements, assuming, arguendo, that he had any obligation to do so, Adrion has failed to establish that he relied on this non-disclosure in electing to only exercise his options for 40 shares. As detailed above, Adrion has not identified any financial information that he did not have. Rather, the evidence is that Knight truthfully told Adrion that the company was operating at a loss. In addition, the evidence in the record is that Adrion knew all

about the potential sales that were in the pipeline, as he had worked on them. Finally, there is no evidence in the record that if he had been provided with additional financial information Adrion would have acted differently.¹⁵

Finally, with respect to all the alleged misrepresentations to the effect that the company had no value or was in no condition to be sold, a jury cannot find that Adrion's reliance was reasonable. Adrion was attempting to have Knight confirm and/or explain why he thought the company lacked value. In response, however, Knight made it clear that he was not valuing the company and that Adrion would have to make his own assessment. At his deposition, Adrion said that prior to the expiration of his options he understood Knight "was not going to give me any information based on the value of the company." (DF ¶¶ 93-95). Adrion cannot continue to assert that he was relying on Knight's assessment of no value. See Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 242-43 (a "person who is confronted with inconsistent or contradictory representations may not reasonably rely on one side of the controversy without attempting to resolve the inconsistency or contradiction . . ."). Based on this record, Adrion's claim of misrepresentation must fail as no jury could find that he reasonably relied on the acts or omissions of the defendants.

¹⁵ The defendants contend that Adrion would not have exercised his options since the company was in poor financial condition. Adrion has not asserted that now having seen the financials (albeit in litigation), he would have exercised his options.

4. Estoppel

Finally, Adrion argues in his cross motion for summary judgment that the defendants should be estopped from denying the statements that Adrion himself made in his emails and which conveyed his understanding that he would be provided financial information about REI and sufficient time to review it prior to deciding whether to exercise his options. This claim is without merit.

“Circumstances that may give rise to an estoppel are (1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission.”

Cannon v. Cannon, 69 Mass. App. Ct. 414, 422, 868 N.E.2d 636, 643 (2007)

(quoting Bongaards v. Millen, 440 Mass. 10, 15, 793 N.E.2d 335, 339 (2003)).

Here, Adrion is not attempting to bind the defendants to their own representations — rather, he claims that they should be bound by Adrion’s representations. He has cited no support for applying an estoppel theory under such circumstances. Moreover, in light of Adrion’s deposition testimony that he understood by mid-December from the defendants’ conduct that he was not going to get the financial statements, it would not be appropriate to estop the defendants from asserting in this litigation that they never represented that they would provide Adrion with such financial information, or to estop them from challenging Adrion’s present contention that he did believe that he was going to get the financial information.

For all these reasons, defendants motion for summary judgment should be allowed as to Counts I and II of the Complaint, and Adrion's cross-motion for summary judgment on these Counts should be denied.

C. Count III: Intentional Nondisclosure

Count III of the Amended Complaint alleges a claim of intentional non-disclosure of the financial information of REI. In Massachusetts, non-disclosure “[u]sually . . . does not amount to fraud and is not a conventional tort of any kind.” Rood v. Newberg, 48 Mass. App. Ct. 185, 192, 718 N.E.2d 886, 893 (1999) (quotation omitted). However, it is actionable when there is both concealment of information and a duty requiring disclosure. JSB Indus., Inc. v. Nexus Payroll Serv., 463 F. Supp. 2d 103, 107 (D. Mass. 2006). “[T]he duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.” Id. (quoting Chiarella v. United States, 445 U.S. 222, 228, 100 S. Ct. 1108, 1114, 63 L. Ed. 2d 348 (1980) (internal quotation and punctuation omitted)).

As detailed below, the undisputed facts establish that there is no fiduciary relationship between Adrion and Knight or REI, nor is there any special relationship of trust or confidence. Therefore, summary judgment as to this Count should be allowed as to REI and Knight, and Adrion's cross-motion should be denied.

In addition to his claim of a fiduciary relationship discussed infra, Adrion relies on Securities & Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 73 S. Ct. 981, 97 L. Ed. 1494 (1953), to support his claim that the defendants had a duty to disclose additional financial information. In Ralston Purina, the issue was whether sales of stock to employees were “private offerings” under the securities laws and, therefore, exempt from the registration requirements of the Securities Act. Id. The Court held that “[t]he design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.” Id. at 124, 73 S. Ct. at 984. Therefore, the sale of stock to employees who did not “have access to the kind of information which registration would disclose” were found to be non-exempt transactions. Id. at 127, 73 S. Ct. at 981. However, Ralston Purina has no application to the instant case.

Significantly, Ralston Purina did not recognize a fiduciary relationship or an obligation to disclose financial information separate and apart from the registration requirements of the Securities Act. It is undisputed in the instant case, however, that the stock options offered to Adrion were exempt from any express disclosure requirements under the securities laws. Thus, in 1988, the SEC “adopted Rule 701 under the Securities Act to allow private companies to sell securities to their employees without the need to file a registration statement, as public companies do.” Securities Act Release No. 33-7645 (February 25,

1999) at § I-Executive Summary and Background. The SEC expressly decided “to require no specified disclosure requirements for sales up to \$5 million” because “the additional burdens related to mandatory financial and risk disclosure for these limited offerings are unnecessary.” Id. at § IIB-Disclosure to Persons Covered by Rule 701. For companies such as REI, which sold less than \$5 million worth of stock in a 12 month period as part of compensation packages (as opposed to raising capital), the company need only provide a copy of the compensatory benefit plan or contract. See 17 C.F.R. § 230.701(e).¹⁶ In this case, REI needed to provide Adrion with the Stock Option Agreement, which it did. Since REI complied with its disclosure requirements under Rule 701, Adrion’s reliance on Ralston Purina is misplaced.¹⁷

¹⁶ 17 C.F.R. § 230.701(e) provides:

(e) Disclosure that must be provided. The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds \$5 million, the issuer must deliver the following disclosure to investors a reasonable period of time before the date of sale ... (3) Information about the risks associated with investments in the securities sold pursuant to the ... compensation contract; and (4) Financial statements required to be furnished by Form 1-A....

¹⁷ Adrion argues that disclosure is required under the preliminary notes to 17 C.F.R. § 230.701, which provide that issuers of stock “have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.” However, Adrion has not alleged that REI breached any federal securities laws and has not identified how REI’s actions were deficient under the security laws. Therefore, this argument is waived.

Adrion also relies upon The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., which held that an option to purchase stock was a “security” for purposes of SEC Rule 10b-5. 532 U.S. 588, 593-94 121 S. Ct. 1776, 1780, 149 L. Ed. 2d 845 (2001). This case is inapplicable to the instant case, however, as Adrion has not brought a 10b-5 claim, and there is no issue before the court as to whether Rule 10b-5 applies to Adrion’s Stock Option Agreement. Therefore, the plaintiff has failed to establish that the defendants had any duty to disclose additional financial information, and the claim of intentional non-disclosure must fail.

D. Counts IV and VII: Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

In Count IV, Adrion alleges a breach of contract claim against REI and Knight, and in Count VII Adrion alleges that these defendants breached the implied covenant of good faith and fair dealing. As detailed herein, material factual disputes preclude the entry of summary judgment on the claim against REI for breach of the implied covenant of good faith and fair dealing. However, summary judgment should enter in favor of REI on the breach of contract claim and in favor of Knight on both Counts.

1. Breach of Contract

“To recover damages in a breach of contract claim, the plaintiff must prove the existence of a valid binding agreement, the defendant’s breach thereof, and damages resulting from the breach.” Mass. Cash Register, Inc. v. Comtrex Sys.,

Corp., 901 F. Supp. 404, 415 (D. Mass. 1995). As an initial matter, the undisputed facts establish that Knight is not a party to any contract with Adrion, and Adrion does not contend otherwise. “Unless otherwise agreed, a person making or purporting to make a contract for a disclosed principal does not become a party to the contract.” Marshall v. Stratus Pharm., Inc., 51 Mass. App. Ct. 667, 673, 749 N.E.2d 698, 705 (2001) (citing Nishimatsu Constr. Co. v. Houston Nat’l Bank, 515 F.2d 1200, 1205-1207 (5th Cir.1975)). In this case, Knight signed the Stock Option Agreement at issue on behalf of REI, not in his personal capacity. Therefore Knight is entitled to summary judgment on the breach of contract claim. In addition, because Adrion has not alleged a contract between Knight and Adrion, Knight is also entitled to summary judgment on the claim for breach of the implied covenant of good faith and fair dealing, since that claim requires an enforceable contract between the two parties. See Christensen v. Kingston Sch. Comm., 360 F. Supp. 2d 212, 226 (D. Mass. 2005) (in “order to demonstrate a claim for the breach of the covenant of good faith and fair dealing, the plaintiff must show that there existed an enforceable contract between the parties”) (internal quotations omitted).

With regard to defendant REI, there is no dispute that there is a contract in this case, but Adrion does not identify any specific provision of the Option Agreement which the defendants allegedly breached. Nevertheless, Adrion argues that the Option Agreement was breached when Knight and REI failed to

provide Adrion with financial information and failed to timely notify Adrion that they did not intend to do so. Both of these arguments fail however as no such duty exists in the contract. There simply is no obligation to provide financial information contained in the Stock Option Agreement and REI is entitled to summary judgment on Count IV.

2. Breach of Implied Covenant of Good Faith and Fair Dealing

Adrion also argues that the same conduct alleged in the breach of contract claim above fails to meet the requirements of the implied covenant of good faith and fair dealing because REI, through Knight's failure to disclose, sought to deprive Adrion of the benefits of the Option Agreement.

In Massachusetts “[e]very contract is subject to an implied covenant of good faith and fair dealing.” Christensen, 360 F. Supp. 2d at 226 (quoting Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 473, 583 N.E.2d 806, 821 (1991)). “In order to demonstrate a claim for the breach of the covenant of good faith and fair dealing, the plaintiff must show that there existed an enforceable contract between the two parties.” Id. (internal quotations omitted.) The implied covenant of good faith and fair dealing creates an obligation to preserve the spirit and not just the form of a contract. Id. A breach “requires conduct taken in bad faith either to deprive a party of the fruits of labor already substantially earned or unfair leveraging of the contract terms to secure undue

economic advantage.” Id. Nevertheless, the implied covenant “may not . . . be invoked to create rights and duties not otherwise provided for in the existing contractual relationship.” Liss v. Studney, 450 Mass. 473, 477, 879 N.E.2d 676, 680 (D. Mass. 2008).

In this case, Adrion has alleged that Knight and REI breached the implied covenant by first telling him that REI and his option were worthless and then implying or promising that he would receive REI’s financial statements when they never intended to deliver them. This resulted in Adrion being deprived of the benefit of his stock option, since, as he argues, who would invest \$100,000 in a company with no value. It also resulted, Adrion argues, in the company gaining undue economic advantage by holding onto its stock.

This court concludes that summary judgment is unwarranted for either REI or Adrion on this Count because of the disputed facts concerning Adrion’s access to financial information at the time the Stock Option Agreement was executed. Thus, according to Adrion, he had full access to relevant financial information as part of his employment with REI until his access was improperly terminated in March 2005. Reading the record in the light most favorable to Adrion, as this court must, there is evidence from which a jury may find that the parties understood Adrion’s employment as Executive Vice President involved access to financial information, so there was no need to further detail the requirement of disclosure of financial information in the Stock Option Agreement. Finding that

the implied covenant of good faith and fair dealing in the instant case included an obligation to disclose financial information would not be adding a new contract provision, but merely preserving the expectations of the parties at the time the Stock Option Agreement was signed. The existence of disputed facts on this point make summary judgment inappropriate.

E. Count V: Unjust Enrichment

Adrion contends that following the sale of REI to Tyco, Knight was paid \$7,000,000 and Conmy was paid \$5,000,000, which included over \$1,000,000 that should have gone to Adrion. As he argues, “[i]t is the Plaintiff’s position that Knight and Conmy unlawfully benefitted from the five years of service Adrion performed at a fraction of what he would have otherwise earned.” (Pl. Mem. (Docket No. 90) at 18-19). Therefore, Adrion argues, he is entitled to compensation under a theory of unjust enrichment. (Id.). For the reasons detailed herein, the defendants are entitled to summary judgment on this claim.

“Where plaintiff has an adequate remedy at law, equity will not consider a claim for unjust enrichment.” Taylor Woodrow Blitman Constr. Corp., v. Southfield Gardens Co., 534 F. Supp. 340, 347 (D. Mass. 1982). Here, Adrion has made no showing that his remedy at law against the defendants is inadequate. Adrion’s entitlement to compensation for his employment and/or from the sale of REI is based on his employment letter and Stock Option Agreement. He has brought numerous legal claims asserting his rights under

these agreements. The fact that he may not prevail on those theories does not make them inadequate as a matter of law entitling Adrion to equitable relief.

Similarly, if Adrion's legal arguments fail, he cannot invoke a doctrine of unjust enrichment to circumvent his failure to exercise his options. "A party who stumbles in exercising an option is generally not entitled to equitable relief."

Loitherstein v. IBM, 11 Mass. App. Ct. 91, 96, 413 N.E.2d 1146, 1149 (1980).

The undisputed facts establish that the defendants are entitled to summary judgment on this unjust enrichment claim.

F. Count VI: Breach of Fiduciary Duty

Adrion claims in Count VI that Knight, Conmy and REI owed Adrion fiduciary duties¹⁸ based upon his partnership in REI, his status as a stock option holder, his status as a stockholder, and as an employee of REI, and, therefore, they were obligated to provide him with requested financial information. As detailed herein, the undisputed facts establish that the defendants did not owe him any fiduciary duties, and that summary judgment should enter in favor of the defendants on Count VI.

As an initial matter, Adrion claims he was owed a fiduciary duty because he was a partner in REI. Adrion relies on the fact that his offer letter from REI

¹⁸ When Adrion amended his complaint, he purported to state claims against Conmy as well as REI and Knight. This court has taken the motion to add Conmy as a party under advisement and, as detailed infra, recommends that the motion be denied. Therefore, this court will not address the claims against Conmy.

closed by stating that Knight looked “forward to a long and rewarding partnership” and his vague claims that he was treated as a partner. However, it is clear from the record that despite Adrion’s contention, he was not a partner in REI. REI is a corporation and thus does not have partners. Adrion never entered a partnership agreement with the defendants and Adrion was never liable for the debts of REI. Also, Adrion’s offer letter offered employment at REI, including a salary and potential bonus, which are hallmarks of employment and not partnership. Knight’s general closing comments did not change an employment relationship into a partnership.

Adrion also claims that based upon his stock options he was owed the same fiduciary duties as owed to stockholders. While there are no cases within this jurisdiction on point, the law elsewhere is clear — stock options do not give rise to a fiduciary duty. “The instrument stands alone, claiming no equity in the corporation, entitled to no vote, and with no fiduciary obligation of the management to the option holder’s interest.” Herbal Care Sys., Inc. v. Plaza, No. CV-06-2698-PHX-ROS, 2009 WL 692338, at *3 (D. Ariz. 2009) (quoting Starkman v. Warner Comm., Inc., 671 F. Supp. 297, 304 (S.D.N.Y.1987)). See also McGoldrick v. Trueposition, Inc., 623 F. Supp. 2d 619, 626 (E.D. Pa. 2009) (“Under Delaware law, courts have clearly stated that a fiduciary duty does not arise until there is an existing property right and that stock options of employees do not give rise to such an interest.”); In re Cendant Corp. Sec. Litig., 76 F. Supp.

2d 539, 550 (D.N.J. 1999) (“Holders of unexercised stock options merely have a contractual right to purchase an equitable interest in a corporation at some later date.”). In addition, REI’s Stock Option Agreement contains a specific clause stating that Adrion will not have any rights as a stock owner until he exercises his option and is issued his shares. Adrion has made no attempt to explain why this clause is not enforceable. Thus, the mere existence of the stock options did not create a fiduciary relationship.

Alternatively, Adrion claims he was owed a fiduciary duty as a stockholder. In accordance with the Option Agreement, Adrion did not become a stockholder until his stock certificates issued on January 6, 2006, after the expiration of his options. Adrion claims that despite the explicit language in the Option Agreement, he should be considered a stockholder as of December 24, 2005, when he delivered his check to purchase shares. However, Adrion offers no legal support for this contention and relies upon a broadly articulated fairness argument. The language in the Option Agreement is clear, and there is no evidence that the time it took to issue the stock certificates was unreasonable. Considering Adrion delivered his check in the middle of a major holiday when most employees are away on vacation, more than conclusory allegations are needed to find that the stock certificates were not sent as soon as practicable as required by the Stock Option Agreement. Thus, there was no breach of fiduciary duties by REI’s failure

to provide financial information to Adrion as a shareholder prior to the expiration of the option period.

After he received his stock certificates, Adrion began expressly requesting financial statements on January 17, 2006 as a shareholder. (Defs. Ex. 18). REI's decision not to disclose financial information to Adrion as a stockholder because it was unaudited and/or because of Adrion's employment with a competitor is irrelevant to the instant case, and cannot be used to establish either the existence of a fiduciary duty or a breach thereof. By the time Adrion became a stockholder, the option period had expired. Moreover, assuming, arguendo, that any extension of the stock option period could be or was granted, by letter dated January 4, 2006, Swiggart made it very clear that REI would not honor any extension. Since the stock option period had expired, the subsequent non-disclosure of financial information would be irrelevant and need not be considered in assessing whether REI fulfilled any fiduciary duties it owed to Adrion while his options were in effect.¹⁹

¹⁹ This court notes that Mass. Gen. Laws ch. 156D, § 16.20(a) grants shareholders the right upon request to a company's annual audited financial statements. Nevertheless, a corporation need not provide financial statements to a shareholder "if it can demonstrate a proper corporate purpose for withholding information contained in those statements from that shareholder." Mass. Gen. Laws ch. 156D §16.20(d). As the comments to this section make clear, this provision recognizes that "[a] closely-held corporation should not be required to send its annual statements to a shareholder who is one of its competitors."

Finally, Adrion claims he was owed a fiduciary duty as an employee of REI. As a general rule, there is no fiduciary duty between employers and employees. See Kinsey v. Cendant Corp., No. 04 Civ.0582 RWS, 2005 WL 1907678, at *6 (S.D.N.Y. 2005); Lind v. Vanguard Offset Printers, Inc., 857 F. Supp. 1060, 1067 (S.D.N.Y. 1994). A “business relationship does not, in and of itself, create a fiduciary situation or position of trust requiring disclosure.” JSB Indus., Inc., 463 F. Supp. 2d at 107-08. Nor does the fact that Adrion and Knight were friends for many years create a fiduciary relationship. See Rood, 48 Mass. App. Ct. at 193, 78 N.E.2d at 893 (“A confidential relationship does not arise merely by reason of family ties”). The record does not support a conclusion that Adrion was historically dependent on Knight’s “judgment in business affairs or property matters” so as to create a special fiduciary relationship based on a relationship of dependency or trust. See id. Rather, in this case, Knight was merely the possessor of information Adrion wanted — this does not make him a fiduciary. In sum, the defendants are entitled to summary judgment on Count VI as the plaintiff has failed to establish the existence of a fiduciary relationship.²⁰

²⁰ Adrion also relies on Gishen v. Dura Corp., 362 Mass. 177, 285 N.E.2d 117 (1972), to establish a fiduciary relationship, but that case is inapposite here. The issue in Gishen was whether the company had breached its contract to its salesman by failing to pay commissions due. The company purported to advise the employee of the amount owed, and the parties reached an agreement accordingly. However, it was subsequently learned that the calculations were in error. The parties assumed that there was a fiduciary relationship since the company had all the information and the parties recognized that it was the company’s obligation to calculate the commissions. This contrasts with the instant case where the defendants did not undertake to value the company. Moreover, in Gishen,

G. Count VIII: Civil Conspiracy

Adrion claims that REI, Knight and Conmy conspired to misrepresent the status and prospects of REI, to withhold financial statements, to unjustly enrich themselves, and to breach their fiduciary duty so that Adrion would not exercise his options. This Count also fails to state a claim.

As an initial matter, there cannot be a conspiracy between a corporation and its own employees or agents because that would result in the corporation conspiring with itself. United States v. President & Fellows of Harvard Coll., 323 F. Supp. 2d 151, 199 n.5 (D. Mass. 2004) (citing Rice v. President & Fellows of Harvard Coll., 663 F.2d 336, 338 (1st Cir.1981)); Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 131 (1st Cir. 2006). Adrion himself concedes that this claim does not apply to REI. (Pl. Mem. at 6). Therefore, summary judgment is appropriate for REI on this count.

Because the issue whether Conmy should be added as a party is under advisement, this court will consider whether the conspiracy count could proceed if Conmy is added as a defendant to the complaint.

For conspiracy claims, the plaintiff must prove “first, a common design or an agreement, although not necessarily express, between two or more persons to

the Court ruled that “[e]ven if the parties had been dealing at arm’s length ... the fact of [the company’s disclosure of the alleged commission calculation] bound it to speak honestly and to divulge all material facts.” Id. at 184, 285 N.E.2d at 122. No such partial disclosures were made here.

do a wrongful act, and second, proof of some tortious act in furtherance of the agreement.” Platten, 437 F.3d at 131 (quoting Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1564 (1st Cir. 1994)). Conspiracy claims are predicated on the proof of underlying tortious activity. Mass. Laborers’ Health & Welfare Fund, 62 F. Supp. 2d at 245. For the reasons stated above, this court has concluded that there has been no underlying tortious activity in this case. Therefore, the civil conspiracy count necessarily fails as well.

In addition, Adrion has offered no factual allegations supporting his argument that Knight and Conmy engaged in a common design or agreement to do a wrongful act. Despite his broad allegations, the only affirmative acts complained of were all done by Knight. In his complaint, Adrion provides no specifics but alleges:

81. Knight, Conmy and REI engaged in a concerted action to: 1) exclude Adrion from any plans or discussions regarding the potential sale of REI while he was employed at the company; and 2) prevent Adrion from obtaining documents and information necessary to determine whether to exercise his stock options.

82. The affirmative steps taken by Knight, Conmy and REI amounted to a “freeze out” as Adrion was prevented from benefitting financially from either the sale of the company or the value of his stock options had he been able to exercise them.

In his motion papers, Adrion states that the “emails from Knight to Conmy establish that there in fact was a conspiracy.” As support, Adrion attaches one

email from Knight to Conmy that lays out the problems Knight foresees in maintaining the company's subchapter S status now that Adrion will be a minority shareholder, and how difficult Adrion had been regarding the financials statements. (Pl. Supp. Ex. D). The email explains Knight's reasons for believing he had acted ethically towards Adrion. Even assuming that this email indicated that Knight intended to do a wrongful act, which is far from clear, what it does not do is show that Conmy was in any way complicit or in agreement with Knight. No reply from Conmy is even included in the record. Adrion has simply offered no evidence that Conmy in any way participated in a common design of any sort with Knight. Therefore, summary judgment should be entered in favor of the defendants on the civil conspiracy claim.

H. Adrion's Motion to Add Conmy as a Defendant to the Complaint

After a review of the summary judgment record, this court recommends that Adrion's motion to add Conmy as an additional defendant be denied. Adrion has offered no evidence of any actions taken by Conmy, only that he was the recipient of emails from Knight. This is an insufficient basis for bringing in a new defendant this late in the proceeding. Moreover, as detailed herein, Adrion has failed to establish any personal liability on the part of Knight. Any claim of personal liability on the part of Conmy would be equally futile.

IV. CONCLUSION

For all of the reasons detailed above, this court recommends to the District Judge to whom this case is assigned that the defendants' motion for summary judgment (Docket No. 66) and motion for summary judgment on newly added counts (Docket No. 121) be ALLOWED IN PART and DENIED IN PART, and that Adrion's cross-motion for summary judgment (Docket No. 87) be DENIED. Specifically, this court recommends that the defendants' motion be denied as to Count VII against REI, but otherwise allowed as to both REI and Knight. Finally, this court recommends that the motion to add John Conmy as a defendant (Docket No. 41) be DENIED.²¹

/ s / Judith Gail Dein

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Judith Gail Dein

²¹ The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72 any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-05 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985). Accord Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998).

United States Magistrate Judge