

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

AUSTOST ANSTALT SCHAAN, BALMORE )  
FUNDS, S.A. and AMRO )  
INTERNATIONAL, SA )  
 )  
Plaintiffs, )  
 )  
v. ) Civil Action No. 00-771-SLR  
 )  
NET VALUE HOLDINGS, INC., )  
 )  
Defendant. )

---

Richard M. Beck, Esquire, of Klehr, Harrison, Harvey,  
Branzburg & Ellers LLP, Wilmington, Delaware, and Glenn A.  
Weiner, Esquire, Of Counsel, of Klehr, Harrison, Harvey,  
Branzburg & Ellers LLP, Philadelphia, Pennsylvania, attorneys  
for plaintiffs

Norman M. Monhait, Esquire, of Rosenthal, Monhait, Gross &  
Goddess, P.A., Wilmington, Delaware, Of Counsel, Law Offices  
of Kenneth A. Zitter, New York, New York

---

**MEMORANDUM OPINION**

Dated: August 10, 2001  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Presently before the court is the motion of Net Value Holdings, Inc. ("defendant"), to dismiss the complaint of Austost Anstalt Schaan ("Austost"), Balmore Funds ("Balmore") and Amro International, S.A. ("Amro") (collectively "plaintiffs"). Defendant argues that plaintiffs' complaint fails to state claims upon which relief can be granted pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b). (D.I. 7) On August 22, 2000, plaintiffs filed a complaint asserting six causes of action against the defendant, which include: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) fraud; (4) a violation of Section 10(b) of the Securities and Exchange Act and Rule 10(b)-5; (5) estoppel; and (6) reformation. (D.I. 1) Plaintiffs assert that as a result of defendant's actions and inaction, the plaintiffs suffered damages in excess of \$20 million. (Id.) Plaintiffs oppose the motion arguing that defendant's failure to timely register the shares underlying the convertible notes, as allegedly promised by defendant in an oral agreement, directly caused

the damages about which plaintiffs complain. In addition, plaintiffs argue that all claims asserted against defendant are well-pleaded and, as a result, defendant's motion to dismiss should be denied. (D.I. 10) **II. BACKGROUND**

In or about May 1999, each of the plaintiffs purchased \$500,000 (i.e., \$1.5 million collectively) of defendant's 8% unsecured convertible promissory notes pursuant to Subscription Agreements ("the Agreements") between the parties. Under certain circumstances, these notes were convertible into shares of defendant's common stock at a rate of \$2.50 per share.<sup>1</sup>

According to plaintiffs, they were unwilling to purchase the notes unless defendant agreed to register the stock underlying the notes with the Securities and Exchange Commission ("SEC"). This registration would allow plaintiffs to publicly resell the stock upon conversion of the notes. (D.I. 10 at 6) Defendant contends that the agreements "plainly state" that the stock issuable on conversion of the notes was intended to be exempt from registration with the SEC and that each plaintiff "represented and warranted" that it "fully under[stood] that . . . [defendant] does not expect the

---

<sup>1</sup> Defendant characterizes itself as an "internet 'incubator'" that provides capital and assistance to early stage e-businesses. (D.I. 7 at 3)

securities to be listed on a national stock exchange in the foreseeable future, if at all."<sup>2</sup> (D.I. 7 at 4) Absent defendant's registration, plaintiffs would not be able to resell the shares until one year after the notes were purchased pursuant to SEC Rule 144 and, thus, as plaintiffs argue, the return on their investment would be "substantially delayed."<sup>3</sup> (D.I. 10 at 6)

Initially, defendant was unwilling to grant registration rights because it had already sold \$6 million in notes to other investors to whom it did not grant registration rights. In order to get plaintiffs to purchase the notes, defendant eventually agreed to grant registration rights. (Id.) Under the Agreements, defendant allegedly promised to register plaintiffs' shares "as soon as possible but not later than the next registration statement which [defendant] would file."<sup>4</sup> (D.I. 10 at 7) Defendant was unwilling to specify the timing

---

<sup>2</sup>In addition, defendant asserts that plaintiffs warranted that they were purchasing the notes "for investment purposes only and not with a view to the resale or distribution thereof, in whole or in part." (D.I. 7, Exs. A-C, § 7(a)(x))

<sup>3</sup>According to plaintiffs, this "substantial delay" is particularly relevant because with an "internet incubator" company, such as defendant, this delay could mean the difference between a substantial gain and a substantial loss on their investment. (D.I. 10 at 6)

<sup>4</sup>Defendant specifically notes that this language appears nowhere in the Agreements. (D.I. 10 at 5)

of its registration commitment in the Agreements.<sup>5</sup>

Supposedly, defendant feared that other purchasers would learn of and request the same registration rights as those allegedly granted to plaintiffs; thus, the general registration language. (Id.) Ultimately, plaintiffs agreed to more general language and permitted defendant's attorneys to draft language which would allow the parties to retain the alleged oral agreement, while avoiding having to grant similar rights to other note holders.<sup>6</sup> (Id.)

On October 8, 1999, defendant filed a registration statement regarding some of the convertible notes. However, defendant did not include those notes which plaintiffs

---

<sup>5</sup>The Agreement reads in pertinent part:

5. Restrictions on Resale.

(a) The Common Stock has not been registered under the Securities Act or any state securities laws and may not be sold or transferred unless (i) subsequently registered thereunder; (ii) the undersigned shall have delivered to the Company an opinion of counsel (which opinion and counsel shall be reasonably acceptable to the Company) to the effect that the securities to be sold or transferred may be sold or transferred pursuant to Rule 144 promulgated under the Securities Act (or a successor). **The company agrees to use reasonable commercial efforts to register the Common Stock under the Securities Act at some future date.**

(D.I. 7, Ex. A) (emphasis added).

<sup>6</sup>Plaintiffs assert that defendant was allowed to "successfully deprive" other note holders of registration rights through the ambiguous language of the Agreements. (D.I. 7 at 7)

purchased and held pursuant to the Agreements. As this registration was the "next registration statement that defendant filed," plaintiffs interpreted this inaction (i.e., failure to register) as a breach of the Agreements. (D.I. 10 at 8) Defendant did eventually file a registration statement covering plaintiffs' stock, which became effective June 30, 2000.<sup>7</sup>

For its part, defendant argues that the Agreements were "fully integrated" at the time of ratification and, thus, no representations, other than those contained therein, are applicable. In support of this argument, defendant cites language in the Agreements which indicates that "[t]his Subscription Agreement and the Escrow Agreement contain the entire agreement of the parties with respect to the subject matter hereof and there are no representations, covenants or other agreements except as stated or referred to herein." (D.I. 7, Exs. A-C, § 14) Defendant argues that plaintiffs are simply seeking to enforce verbal promises that are entirely different from what is contained in the "fully integrated" Agreements. Further, defendant argues that this information

---

<sup>7</sup>Plaintiffs claim that this does not effectuate their agreement, however, because at the time of registration they could have already sold their shares without registration pursuant to SEC Rule 144. (D.I. 10)

is precluded by the parol evidence rule, and that plaintiffs' failure to particularize the details of the alleged oral agreements subjects their complaint to dismissal pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6).

## **II. STANDARD OF REVIEW**

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint should be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). On a motion to dismiss, the court must accept as true all facts alleged by plaintiff and should not award the motion unless plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). As the Third Circuit Court of Appeals noted in In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997), "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at 1420 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

## **III. DISCUSSION**

The complaint asserts six causes of action against defendant, each of which shall be addressed seriatim.

### **A. Breach of Contract**

Plaintiffs allege that at the time of the Agreements, defendant orally agreed to register the stock no later than the time at which the next registration statement was to be filed. When defendant failed to register the stock upon filing its next registration statement (i.e., October 8, 1999), plaintiffs claim their interests in the stock were damaged. (D.I. 1)

Defendant argues that plaintiffs have failed to state a claim for breach of contract because they have admitted the stock was eventually registered by defendant (i.e., consistent with registration at "some future date."). (D.I. 7) Further, defendant argues the alleged oral representations are precluded by the parol evidence rule because the representations, even if made, either preceded or were contemporaneous with the ratification of the Agreements which were themselves fully integrated. (Id.)

Defendant is correct in asserting that the parol evidence rule would preclude admission of the alleged oral agreements if the Agreements were fully integrated when ratified.<sup>8</sup> James

---

<sup>8</sup>The parties to this action have previously agreed that the Agreements are governed by Delaware law. See D.I. 10, Exs. A-C, § 17 ("This Subscription Agreement is governed by the laws of the State of Delaware as applied to the residents of that jurisdiction executing contracts wholly to be performed therein.").

River-Pennington Inc. v. CRSS Capital Inc., Civ. A. No. 13870, 1995 WL 106554, \*5 (Del. Ch. Mar. 6, 1995). However, at this juncture, the record is insufficiently developed to allow the court to definitively determine whether the Agreements were fully integrated and, thus, determine whether the parol evidence rule applies. Therefore, it does not appear that plaintiffs could not prove any set of facts which would entitle them to relief on this claim. See Conley, 355 U.S. at 45-46.

**B. Breach of Duty of Good Faith and Fair Dealing**

Plaintiffs allege defendant breached its duty of good faith and fair dealing owed to plaintiffs regarding their "registration rights" -- a duty violated when defendant failed to "timely" register plaintiffs' stock. (D.I. 1) Defendant charges plaintiffs' claim is based solely on their reliance upon the alleged oral representations regarding registration. Defendant argues that this claim is also barred under the parol evidence rule because the parties did not include the alleged representation in the fully integrated Agreements. (D.I. 7)

At first glance, plaintiffs' claim appears insufficient because it is yet unclear what duty was owed that defendant did not fulfill. Plaintiffs allege the registration was

"untimely." However, to the extent the registration was "untimely," the record is insufficiently developed to allow the court to determine whether the Agreements were indeed fully integrated, whether a more specific time component controlled registration and, if so, what additional duty was owed to plaintiffs by defendant.

Thus, it is premature to say plaintiffs can prove no set of facts which will entitle them to relief on this claim.

### **C. Fraud in the Inducement**

Plaintiffs claim defendant committed fraud by orally representing it would register the stock underlying the convertible notes "as soon as practical, but in any event, not later than the next registration statement" filed. (D.I. 1) These representations thereby induced plaintiffs to enter into the transaction (i.e., plaintiffs agreed to purchase the convertible notes) which they allegedly would not have done absent the oral representation. (Id.) In addition, plaintiffs allege that in furtherance of defendant's "fraudulent scheme," defendant insisted upon unspecific language in the Agreements regarding registration in an attempt to "deprive the plaintiffs of the benefit of their clear agreement." (Id.)

Defendant seeks to have plaintiffs' claim dismissed

pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In addition, defendant asserts plaintiffs have failed to plead fraud with adequate specificity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. (D.I. 7) In response, plaintiffs argue the claims have been well-pleaded, but that in the event that the court disagrees, they ask for leave to amend their claims.

### **1. Rule 9(b)**

Allegations of fraud must be pled with particularity to allow a defendant adequate opportunity to defend the plaintiff's allegations. Fed. R. Civ. P. 9(b). The Court of Appeals for the Third Circuit has specifically noted that the particularity requirement has been rigorously applied in securities fraud cases. Burlington Coat Factory, 114 F.3d at 1417. Satisfactory pleading under Rule 9(b) is often evidenced by a complaint which pleads the alleged fraud with "precise allegations of date, time, or place." Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp.2d 494 (D.N.J. 1999) (citing Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)). However, this standard is a ceiling rather than a floor. The requirement may also be satisfied by pleading which uses "alternative means of injecting precision and some measure of substantiation into their allegations of

fraud." Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998) (citing Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 791 (3d Cir. 1984)). It is with these parameters in mind that plaintiffs' claim is reviewed.

Plaintiffs have alleged that oral representations were made that induced them to enter into the aforementioned transactions. Further, plaintiffs have specifically pled what financial impact the alleged fraud had.<sup>9</sup> Defendant argues plaintiffs cannot reasonably rely upon the alleged representations due to the written language of the Agreements.

The current language of the Agreements (e.g., "[t]he company agrees to use reasonable commercial efforts to register the Common Stock under the Securities Act at some future date.") (D.I. 7, Ex. A) is not necessarily contradicted by or in conflict with the language presented by plaintiffs. In an agreement which is not fully integrated, plaintiffs' interpretation may help to explain what is meant by "some future date." Until the record is sufficiently developed to allow the court to determine whether the parties had fully

---

<sup>9</sup> Plaintiffs claim they suffered approximately \$20 million in damages. (D.I. 1)

integrated Agreements, it is premature to dismiss this claim pursuant to Rule 12(b)(6) alone. As defendant notes, however, plaintiffs' have neglected to plead with "precision" or "particularity" approximately when, by whom, and to whom the alleged representations were made which allowed the alleged fraud to take place. Under Rule 9(b), this information or a reasonable facsimile is necessary to give defendant notice of the claims against it. Burlington Coat Factory, at 1418. Therefore, plaintiffs' current pleading of fraud is insufficient to satisfy the standards of Rule 9(b).

## **2. Leave to Amend - Rule 15(a)**

In pertinent part, Rule 15 states that "leave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Third Circuit has recognized the importance of allowing claimants to amend their complaints after a Rule 9(b) dismissal. "[B]ecause we are hesitant to preclude the prosecution of a possibly meritorious claim because of defects in the pleadings, we believe that plaintiffs should be afforded an additional opportunity . . . to conform the pleadings to Rule 9(b)." Burlington Coat Factory, at 1435 (citing Ross v. A.H. Robbins Co., 607 F.2d 545, 547 (2d Cir.

1979).<sup>10</sup> Thus, in the event of a Rule 9(b) dismissal, it is customary for claimants to obtain a second opportunity to correct any deficiencies in their complaint. See Saporito v. Comubstion Engineering, Inc., 843 F.2d 666, 675 (3d Cir. 1988) (emphasizing that claimants should have an opportunity to amend a complaint to add greater specificity following the award of a motion to dismiss). Cf. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998) (denying leave to amend where even the first amended complaint was lacking the requisite particularity).

Therefore, although the court has found the aforementioned claim lacking in the requisite particularity of Rule 9, it finds that plaintiffs should have an opportunity to formally move to amend their complaint, to include an amended fraud claim that endeavors to meet the Rule 9 pleading requirements.

#### **D. Section 10(b) and Rule 10(b)-5**

Plaintiffs allege defendant knowingly violated § 10(b) of the Securities and Exchange Act and Rule 10(b)-5.

---

<sup>10</sup> In Burlington Coat Factory, the Third Circuit awarded leave to amend even though the original complaint had already been amended once and there had been approximately four months between the original filing of the complaint and amendment. 114 F.3d at 1435. The court specifically noted that where leave to amend is denied by the district court solely on Rule 9 particularity grounds, reversal is necessary. *Id.*

Specifically, plaintiffs allege defendant knowingly and/or recklessly (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the plaintiffs. (D.I. 1 at 7) In addition, plaintiffs allege defendant acted with scienter in that it acted with knowledge of the misrepresentations and omissions of material fact or acted with reckless disregard for the truth. Finally, plaintiffs allege that by falsely representing that it would register the shares, defendant induced plaintiffs to refrain from bringing suit to compel registration. (Id.)

Defendant contends plaintiffs' federal securities claims should be dismissed because they fail to meet the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"). Citing to 15 U.S.C. § 78u-4(b)(1) and (2) respectively, defendant claims plaintiffs are required to specify each allegedly false statement and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). In particular, defendant argues that with respect to plaintiffs' Rule 10(b)-5 claims, plaintiffs have

failed to plead "the who, what, when, where and how" of the alleged fraud, in addition to facts supporting "a strong inference of" scienter. (D.I. 7)

Section 10(b) prohibits the "use or employ, in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules as the Commission may prescribe . . . ." Semerenko v. Cendant Corp., 223 F.3d 165, 174 (3d Cir. 2000) (quoting 15 U.S.C. § 78j(b)). Rule 10(b)-5 is violated when any person makes "any untrue statement of a material fact or [omits] a material fact necessary to make the statements made in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." Semerenko, 223 F.3d at 174 (quoting 17 C.F.R. § 240.10b-5(b)). In addition, the PSLRA, 15 U.S.C. § 78u-4(b)(1) states:

In any private action arising under this chapter in which the plaintiff alleges that the defendant - (A) made an untrue statement of material fact; or (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts

on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). Further, § 78u-4(b)(2) reads in pertinent part, “[i]n any private action arising under this chapter . . . the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2).<sup>11</sup>

To establish a valid claim under 10(b)-5, a plaintiff must demonstrate the defendant “(1) made a misstatement or an omission of a material fact (2) with scienter (3) in connection with the purchase or sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff’s reliance was the proximate cause of his or her injury.” Semerenko, at 174 (citing Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997)).

In support of their Rule 10(b)-5 claim, plaintiffs essentially allege that defendant (1) misrepresented to plaintiffs when its stock would actually be registered, (2) had actual knowledge of the misrepresentation (or omission) or

---

<sup>11</sup> Failure to satisfy the requirements of §§ 78u-4(b)(1) & (2) results in the dismissal of the complaint. 15 U.S.C. § 78u-4(b)(3)(A); In re Advanta Corp. Sec. Litig., 180 F.3d 525, 531 (3d Cir. 1999).

acted with reckless disregard of its truth, (3) as it related to the sale of the convertible notes, (4) upon which plaintiffs reasonably relied as demonstrated by plaintiffs' forbearance from filing an action to compel earlier registration, and (5) that as a direct and proximate result of plaintiffs' reliance, they suffered damages in excess of approximately \$20 million. (D.I. 1 at ¶¶ 1-17, 27-35)

In support of their pleading of scienter, plaintiffs cite to the Third Circuit's opinion in In re Advanta Sec. Litig., 180 F.3d 525 (3d Cir. 1999). There, the court held "it remains sufficient for plaintiffs to plead scienter by alleging facts 'establishing a motive and an opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior.'"<sup>12</sup> Id. at 534-35 (quoting Weiner, 129 F.3d at 318 n. 8).

However, in Advanta, the court also explained that it believed Congress' intent in enacting the PSLRA was to

---

<sup>12</sup>To this end, plaintiffs contend that "motive" is demonstrated by defendant's unwillingness to "extend registration rights generally" to the purchasers of the convertible (promissory) notes. "Opportunity" is presumably demonstrated by the alleged fraudulent pre-ratification statements which induced plaintiffs to enter into the transaction. (D.I. 1)

establish a "pleading standard approximately equal in stringency to that of the Second Circuit."<sup>13</sup> Id. at 534. See also Novak v. Kasaks, 216 F.3d 300, 310 (2d Cir. 2000) (agreeing with Advanta in that the language of the Reform Act establishes a pleading standard equally stringent to the Second Circuit's). Thus, the court found that "[m]otive and opportunity, like all other allegations of scienter . . . must now be supported by facts stated 'with particularity' and must give rise to a 'strong inference' of scienter." Advanta, at 535.

Although plaintiffs briefly address each element of the alleged fraud in their pleading, few of the elements are pled with the particularity required by the PSLRA. While plaintiffs ostensibly have pled the "what" portion of the alleged fraud (i.e., defendant's motive as it relates to the sale of the convertible notes), the approximate "who, when, where and how" of the fraud are not pled with a level of particularity that would satisfy § 78u-4(b)(1). In addition,

---

<sup>13</sup>The foundation of the Second Circuit standard is that "a plaintiff must plead facts supporting a 'strong inference' that the defendant acted with the requisite scienter, by alleging either 'facts establishing a motive to commit fraud and an opportunity to do so' or facts constituting circumstantial evidence of either reckless or conscious behavior." In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 269 (2d Cir. 1993).

the court finds the pleading lacking in the particularity which would give rise to a "strong inference" of scienter.<sup>14</sup> 15 U.S.C. § 78u-4(b)(2). While plaintiffs have generally averred scienter, they have not provided the level of detail that Advanta seemingly requires.<sup>15</sup>

Indeed, plaintiffs arguably admit the deficiencies in their fraud claim as pled. In plaintiffs' reply brief, they assert that their 10(b)-5 claim is well pled, yet follow this assertion with language that "[p]laintiffs allege (or can allege) . . . ." the necessary specifics of the pleading. (D.I. 10 at 29-30) This language suggests that even plaintiffs recognize (or can recognize) the insufficiency of

---

<sup>14</sup> In Novak v. Kasaks, 216 F.3d 300 (2d Cir. 2000), the Second Circuit instructed that the "'strong inference' standard" will be met where a "complaint sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported fraud . . . (2) engaged in deliberately illegal behavior . . . (3) knew facts or had access to information suggesting that their public statements were not accurate . . . or (4) failed to check information that they had a duty to monitor . . . ." *Id.* at 311. Thus, the court is also not entirely satisfied that plaintiffs' have established the defendant's fraud under this equally meaningful interpretation of the prevailing pleading requirements under the PSLRA.

<sup>15</sup> Thus, it is not clear to the court that the pleading set forth in D.I. 1, ¶ 33, is armed with an adequate number of specific facts that would allow the court to discern defendant's "motive and opportunity" to commit fraud. A generalized unwillingness to "extend registration rights" or "register shares" at any given time is insufficient to carry the burden set forth in Advanta.

their present pleading of fraud. Therefore, pursuant to 15 U.S.C. § 78u-4(b)(3), because the pleading requirements of paragraphs (1) and (2) have not been adequately met, plaintiffs' Rule 10(b)-5 claim shall be dismissed.

**E. Estoppel**

Plaintiffs allege that, in order to get them to agree to the securities transaction, defendant promised to register the stock underlying the notes "as soon as practical but not later than the next registration statement." (D.I. 1) Plaintiffs assert that they agreed to the underlying transaction solely in reliance on the alleged promise. Further, plaintiffs assert defendant was aware of their reliance, and the specific reasons they agreed to allow the Agreements to contain general language regarding registration. Thus, plaintiffs claim that it would be unfair and inequitable to allow defendant to "deny its representation" regarding registration, and that defendant should be estopped from doing so.

Defendant argues that plaintiffs realistically have no grounds for estoppel, because there is an enforceable agreement between the parties. Defendant cites Fox v. Rodel, Inc., C.A. No. 98-531-SLR, 1999 WL 803885 (D. Del. Sept. 13, 1999), among other cases, for the proposition that it "is axiomatic that a claim for promissory estoppel is applicable

only in the absence of an enforceable contract." Fox, 1999 WL 803885, at \*9. Further, defendant asserts that plaintiffs must prove they reasonably relied on the alleged promise in order to obtain promissory estoppel. Defendant argues that in light of the "integrated written agreements" between the parties which contain different terms regarding registration, plaintiffs' estoppel claim must be dismissed. *Id.*

Previously, plaintiffs have, at least for the sake of argument, acquiesced to the argument that there were agreements between the respective parties. (See D.I. 1, ¶¶ 9, 14, 17, 19-23, 25, 27-30, 32-35, 43-46) While plaintiffs have argued that the Agreements do not accurately represent the full and complete agreement between the parties, one thing is abundantly clear -- agreements did exist. In light of this finding, the court will dismiss plaintiffs' estoppel claim.

#### **F. Reformation**

Plaintiffs assert that during the drafting phase of the Agreements, attorneys for the defendant "verbally assured" plaintiffs that the "future date" language meant the stock would be registered "as soon as practical, but not later than the next registration statement which [defendant] would

file."<sup>16</sup> (D.I. 1 at 9) Plaintiffs also assert that to the extent that defendant denies its obligation to register the shares pursuant to this "verbal assurance," the terms of the Agreements are based upon a mistake which was induced by defendant's wrongful conduct. Thus, plaintiffs argue they are entitled to reformation of the contract to reflect the "clear intent and agreement" of the parties. (Id.)

Defendant asserts reformation of a written agreement can occur only when plaintiff can demonstrate by "clear and convincing evidence" that the written agreement does not accurately or actually reflect the understanding of the parties. Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 386, 404-05 (3d Cir. 1993). Defendant also asserts Delaware courts have rejected such claims when they contradict an agreement executed by both parties. See Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 857 (Del. 1952); Demetriades v. Kledaras, 121 A.2d 293, 295-96 (Del. Ch. 1956). Defendant argues that because plaintiffs failed, like the plaintiffs in Hob Tea Room and Demetriades, to obtain the specific language regarding registration during the drafting phase, they cannot now subvert the Agreements and re-write their contracts through

---

<sup>16</sup>As alleged, the lack of specificity in the agreements was due to defendant's fear that other stock purchasers would request similar registration rights. (D.I. 1 at 9)

the filing of this complaint.

In citing the Coca-Cola case, defendant sets forth the proper burden plaintiffs must carry in order to achieve reformation of a contract. However, this burden must be carried during the "prosecution" stage of a case, not the "pleading" stage. In light of the Rule 12(b)(6) standard, it cannot be said that plaintiffs cannot successfully plead any set of facts in support of their reformation claim.<sup>17</sup>

#### **IV. CONCLUSION**

For the reasons stated, defendant's motion to dismiss is granted in part and denied in part. Defendant's motion is granted with regard to claim 4 of the complaint (the § 10(b) and Rule 10(b)-5 fraud claim) and claim 5 (the estoppel claim). Defendant's motion shall be denied with regard to claims 1, 2, 3 and 6 of the complaint. For claim 3, the fraud

---

<sup>17</sup>In fact, plaintiffs' assertion lends itself to an inference that the language regarding registration was sufficiently ambiguous as to make the intent of the parties subject to reasonable debate. See Shearing v. IOLAB Corp., 712 F. Supp. 1446, 1454-55 (1989) (finding license agreement language which purported to use "best reasonable commercial efforts" to effectuate contract sufficiently ambiguous to justify the use of extrinsic evidence to prove the intent of the parties). Similarly, the language of the Agreements requiring the use of "reasonable commercial efforts" is arguably so ambiguous that the intent of parties as to the meaning of "future date," as it relates to registration of the stock, is subject to interpretation. This "uncertainty" precludes a Rule 12(b)(6) dismissal of this claim at this stage of the proceedings.

in the inducement claim, plaintiffs are granted the opportunity to formally move for leave to amend, pursuant to Fed. R. Civ. P. 15. Plaintiffs' motion to amend should include a copy of their proposed amended complaint. Plaintiffs shall have 30 days to file their motion and amended complaint.

An appropriate order shall issue.