**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| ROBERT H. BOULDEN, | : | |
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| Plaintiff, | : | |
| | : | |
| v. | : | **C.A. No. 7051-VCN** |
| | : | |
| ALBIORIX, INC.; JANUS METHANOL AG; P. DEO VAN WIJK; WOLFF BALTHASAR; ULRICH WAGNER; and HUBERT MICHAELS, | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM OPINION**

Date Submitted: October 24, 2012
Date Decided: January 31, 2013

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Evan O. Williford, Esquire of The Willilford Firm LLC, Wilmington, Delaware, and Gerald L. Bracht, Esquire and Courtney Ervin, Esquire of Andrews Kurth LLP, Houston, Texas, Attorneys for Defendants Janus Methanol AG, P. Deo van Wijk, Wolff Balthasar, Ulrich Wagner, and Hubert Michaelis.

NOBLE, Vice Chancellor

Plaintiff Robert H. Boulden, II's ("Boulden") First Amended Verified Complaint (the "Complaint") asserts various claims against the entities and individuals (the "Defendants") collectively involved in the acquisition and restart of an ammonia and methanol plant located in Beaumont, Texas (the "Plant").[1] All of Boulden's claims relate to the events leading up to the execution of an asset purchase agreement (the "Asset Purchase Agreement") with Eastman Chemical Company ("Eastman") in December 2010 and the subsequent closing on the Plant in May 2011. Defendant Janus Methanol AG ("Janus") was an investor in the Plant. Defendant Albiorix, Inc. ("Albiorix") was formed in March 2011 ostensibly to hold an indirect ownership in the Plant. Boulden claims that, in exchange for originating the deal and working toward its consummation, Defendants promised him a 10% equity interest in Albiorix. Boulden never received any compensation from the deal. Also participating in the acquisition on behalf of Janus were Defendants P. Deo van Wijk ("van Wijk"), Wolff Balthasar ("Balthasar"), Ulrich Wagner ("Wagner"), and Hubert Michaelis ("Michaelis") (collectively, the "Individual Defendants"). Janus and the Individual Defendants are collectively referred to as the "Janus Defendants."

Boulden brings claims for breach of contract, quantum meruit, and breach of the covenant of good faith and fair dealing solely against Janus and Albiorix (the

[1] First Amended Verified Complaint (the "Compl.").

"Entity Defendants"). As for relief, he seeks, among other things, specific performance and the imposition of a constructive trust on 10% of the equity of Albiorix. Against all Defendants, Boulden brings claims for promissory estoppel, conspiracy to commit fraud, and breach of fiduciary duty. Against the Entity Defendants and van Wijk, Boulden brings claims for fraud and misrepresentation. Finally, Boulden, on behalf of Albiorix, brings a derivative claim against Janus and the Individual Defendants for breach of fiduciary duty.

All Defendants have moved to dismiss the Complaint on various grounds. For the following reasons, the Court will grant in part and deny in part their applications.

## I. BACKGROUND

### A. *The Parties*

Boulden is a Delaware resident.[2] Albiorix, a Delaware corporation, wholly owns non-party Pandora Methanol LLC ("Pandora"), a Texas limited liability company. Pandora owns and operates the Plant. Albiorix is wholly owned by non-party Iapetus B.V. ("Iapetus").[3] Iapetus is a private limited liability company formed under Dutch law. Janus is allegedly a company formed under Swiss law.[4] Iapetus appears to have been owned by both Janus and OCI, a third-party investor

[2] Compl. ¶ 4.
[3] *Id*. at ¶ 5.
[4] *Id*. at ¶ 35.

in the Plant for some period of time before Janus sold its interest to OCI, which now has full ownership of Iapetus.[5]

Van Wijk, a resident of Texas, is allegedly the Chairman and majority shareholder of Janus, and allegedly has an officer or director position at Albiorix, Iapetus, and Pandora. Balthasar, Wagner, and Michaelis are allegedly shareholders and directors of Janus, and like van Wijk, they allegedly hold officer or director positions at Albiorix and its affiliates.[6]

The Janus Defendants have challenged some of those assertions. In both their affidavits, Wagner and Michaelis aver that they have never been an officer or director at Albiorix or Janus, nor have they ever traveled to Delaware.[7] Van Wijk similarly avers that he has never been an officer or director of Albiorix or Janus.[8] In his affidavit, Balthasar avers that he has never been an officer or director of Janus, and that he has never been an officer of Albiorix.[9]

B. *Background*

In 2007, Eastman acquired a methanol and ammonia production, storage, and distribution facility in Beaumont, Texas to develop an industrial gasification

[5] *Id*. at ¶¶ 11-13. OCI is a limited liability company.
[6] *Id*. at ¶¶ 8-10.
[7] Janus Parties' Opening Br. in Supp. of Their Mots. to Dismiss the Am. Compl. ("Opening Br.") Ex. V (Aff. of Dr. Ulrich Wagner) ¶¶ 1-3, Ex. X (Aff. of Hubert Michaelis) ¶¶ 1, 3.
[8] Opening Br. Ex. W (Aff. of P. Deo van Wijk) ¶¶ 1,5.
[9] Opening Br. Ex. Y (Aff. of Dr. Wolff Balthasar) ¶ 1. Balthasar also avers that he was a director of Albiorix from its formation on March 1, 2011, until December 23, 2011. He further declares that he has never transacted business in Delaware and that he did not conduct any negotiations concerning a possible employment contract or equity interest with Boulden. *Id*. at ¶ 3.

facility. However, in December 2009, Eastman announced that it was abandoning the project and was interested in selling the Plant.[10] Perceiving an opportunity, Boulden conducted extensive research on the Plant. Among other things, he evaluated the technical and financial feasibility of operating the Plant, the market for the Plant's output, and the logistics of distributing the Plant's output.[11] In addition to obtaining the necessary capital to purchase the Plant, Boulden recognized that substantial improvements to the Plant were needed, as well as certain regulatory permits.[12] Boulden estimated that the Plant's annual profits could exceed $250 million by the third year of operation.[13]

In October 2010, van Wijk, on behalf of Janus, traveled to Wilmington, Delaware to meet with Boulden to discuss acquiring the Plant. At that meeting, and during subsequent conversations, Boulden shared with van Wijk his extensive research on the Plant.[14] Van Wijk expressed interest in becoming an investor in the project and after additional discussions with Boulden, determined that the Plant would be owned by a Texas entity, which would be a subsidiary of a new Janus entity ("Janus USA"), specially created as a holding company over the Texas entity.[15] According to Boulden, van Wijk offered him the choice of either 9% of

[10] Compl. ¶¶ 15-16.
[11] *Id*. at ¶ 18.
[12] *Id*. at ¶ 19.
[13] *Id*.
[14] *Id*. at ¶ 20.
[15] *Id*. at ¶ 21.

the equity of Janus or 10% of the equity of Janus USA for presenting this opportunity to Janus in Delaware and for Boulden's continued efforts to consummate the deal. Accordingly, van Wijk, acting on behalf of Janus (and Janus USA), and Boulden allegedly entered into an agreement by which he would receive 10% equity in Janus USA, which later became Albiorix (the "Equity Agreement").[16]

That alleged agreement was referenced in various communications among van Wijk, Boulden, and various Janus employees. A January 18, 2011 email from Timothy Unger, Janus's counsel, to van Wijk, Balthasar, and Janus executive Scott Charpentier, stated:

> At the moment the ownership plan for the Janus organization includes at least one individual (Bob Boulden) and perhaps others in the future who would only be participating in Janus' U.S. operations. It was also planned that there would be a U.S. holding company to hold Janus' U.S. assets, including Beaumont and other U.S. projects as they are developed. The persons participating in only U.S. operations would hold stock in the U.S. holding company and not Janus.
>
> If Beaumont is owned by the Janus-OCI offshore holding company, in order to get Bob his interest in the Beaumont plant we would have to give him a separate 5% interest in Pandora; so that the ownership interest in Pandora would be 50% (plus one share) for OCI, 5% for Bob and the remainder for Janus. But I don't think we want anyone in our group holding their interest separately.
>
> One way to avoid this is to do the following: set up a U.S. holding company to hold U.S. interests, as originally planned. Our U.S. holding company would hold the ownership interest in Pandora. Our

[16] *Id*. at ¶ 22.

> U.S. holding company would be owned by Gigamethanol, our already existing Dutch company, and Bob and anyone else who ony [(sic)] has interests in the U.S. operations. OCI would form their own Dutch holding company and that entity or a subsidiary of that entity would hold its interest in Pandora along with our U.S. holding company.[17]

After this email was forwarded to Boulden by Balthasar, Boulden responded: "Since Pandora [*i.e.*, Janus USA] is a 100% US holding of Janus Methanol AG, I was offered and accepted 10% equity."[18] In an email to Janus's board of directors, dated February 9, 2011, van Wijk wrote: "What I offered Bob last year was his actual salary per month as is, plus 10%. Furthermore, a 10 pct equity stake in Janus USA . . . ."[19]

Boulden also alleges that van Wijk, some of the Individual Defendants, and other Janus executives traveled to Delaware to attend meetings with Boulden. One such meeting occurred in October 2010 between van Wijk and Boulden, in which they discussed business strategies, corporate structure, the restart of the Plant, and the location of Janus USA, which they agreed would be located and organized in Delaware.[20] Boulden also alleges that van Wijk and Wagner, on behalf of Janus, separately offered Boulden employment as President and CEO of Janus's United States operations.[21]

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[17] *Id*. at ¶ 23.
[18] *Id*. at ¶ 24.
[19] *Id*. at ¶ 25.
[20] *Id*. at ¶¶ 26-27.
[21] *Id*. at ¶ 28.

According to Boulden, he performed his obligations under the Equity Agreement. Among other things, he revised the Asset Sale Agreement, researched tax abatement strategies, developed a business model and market studies, created a financial model for the Plant, attended a Janus board of directors meeting in Germany where he was introduced as the leader of U.S. operations, and solicited funding from banks.[22] Ultimately, the Asset Sale Agreement was executed in December 2010, and the acquisition of the Plant closed in May 2011.

However, sometime in January 2011 Janus approached OCI about becoming an investor in the Plant.[23] On February 20, 2011, a draft of the joint venture agreement between OCI and Janus was circulated among the Individual Defendants and Boulden. The terms of that agreement called for the Plant to be owned by Pandora, which in turn would be wholly owned by Albiorix.[24] It also omitted any reference to Boulden's 10% equity interest. Boulden immediately expressed his dissatisfaction to van Wijk and the other Individual Defendants, but notwithstanding his objections, Boulden received no equity interest in Albiorix when it was formed as a Delaware corporation on March 1, 2011. The joint

[22] *Id*. at ¶ 30.
[23] *Id*. at ¶ 34.
[24] *Id*. at ¶ 35. That agreement also showed that Albiorix would be wholly owned by Iapetus, which would be owned 50% minus one share by Janus and 50% plus one share by OCI. OCI would also invest $96.5 million in Iapetus and loan Janus up to $46.25 million.

venture agreement between Janus and OCI was executed on May 15, 2011 (the "Joint Venture Agreement").[25]

Thereafter, on November 11, 2011, Janus and OCI executed an agreement for the sale and purchase of 49.99% of the issued and outstanding shares in Iapetus (the "Purchase Agreement").[26] Among other terms, Janus agreed to sell its shares in Iapetus to OCI for $25 million. Also on that date, they executed an agreement by which Pandora would pay Janus $10 for every ton of methanol produced by the Plant (the "Consulting Agreement"), a payout of approximately $8.5 million per year.[27] As consideration, Janus would allegedly provide consulting services. Notably, the Consulting Agreement does not specify what those services actually entail or how much work is required.[28] Boulden was not a participant in these later developments (*i.e.*, the Purchase Agreement or the Consulting Agreement).[29]

C. *Procedural History*

Nine months after learning that the Joint Venture Agreement did not provide him with a 10% equity interest in Albiorix, Boulden commenced this action on November 17, 2011 by filing a Verified Complaint for Injunctive Relief. Boulden sought a temporary restraining order, as well as a preliminary and permanent injunction, enjoining the Defendants "from sale or transfer by or among Janus and

[25] *Id*. at ¶¶ 37-39.
[26] *Id*. at ¶ 40.
[27] *Id*. at ¶¶ 43-44.
[28] *Id*. at ¶ 45.
[29] *Id*. at ¶ 46.

OCI any interest . . . in Albiorix, Pandora, Lapetus [i.e., Iapetus], or the Plant."[30] On November 30, 2011, the Court denied Boulden's request for a temporary restraining order. On December 14, 2011, Boulden filed his amended Complaint. Defendants, in turn, filed their respective motions to dismiss the Complaint.

D. *Causes of Action*

Count I of the Complaint alleges a breach of contract against Janus and Albiorix, specifically, that they failed to transfer 10% of the equity of Albiorix to Boulden.[31] Count II seeks specific performance of the Equity Agreement by Janus and Albiorix.[32]

Count III is a promissory estoppel claim against Janus, Albiorix, and the Individual Defendants. Citing his significant work in bringing about the acquisition of the Plant, Boulden alleges that he relied upon van Wijk's promise and the agreement of the other Individual Defendants, that he would receive equity in Albiorix.[33]

Count IV is a quantum meruit claim against Janus and Albiorix. Boulden contends that "fairness and equity demand Janus and Albiorix make restitution to Boulden in the form of the promised stake in Albiorix."[34] Count V alleges that Janus and Albiorix breached the covenant of good faith and fair dealing under the

[30] Pl.'s Verified Compl. for Inj. Relief.
[31] Compl. ¶¶ 53-59.
[32] *Id*. at ¶¶ 60-64.
[33] *Id*. at ¶¶ 65-72.
[34] *Id*. at ¶ 75.

Equity Agreement when they refused to give Boulden his 10% equity interest in Albiorix.

Count VI alleges fraud against Janus, Albiorix, and van Wijk, who acted on behalf of Janus and Albiorix.[35] Count VII is a misrepresentation claim against Janus, Albiorix, and van Wijk.[36] Count VIII alleges that Janus, Albiorix, and the Individual Defendants engaged in a conspiracy to commit fraud against Boulden.[37] Count IX alleges that Janus, Albiorix, and the Individual Defendants breached their fiduciary duties to Boulden due to his status as a minority shareholder in Albiorix.[38]

Count X is a derivative claim brought on behalf of Albiorix against Janus and the Individual Defendants alleging they breached their fiduciary duties of care, loyalty, and good faith to Albiorix. Boulden has not made a demand upon Albiorix because, according to him, Janus, Pandora, and the Individual Defendants are interested parties in the Consulting Agreement.[39] Finally, Count XI seeks the imposition of a constructive trust over 10% of the equity in Albiorix and on any assets or other benefits obtained by Albiorix or Janus, including the proceeds of the Purchase Agreement and the Consulting Agreement.[40]

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[35] *Id*. at ¶¶ 80-86.
[36] *Id*. at ¶¶ 87-91.
[37] *Id*. at ¶¶ 92-95.
[38] *Id*. at ¶¶ 96-03.
[39] *Id*. at ¶¶ 104-11.
[40] *Id*. at ¶ 115.

## II. PERSONAL JURISDICTION & SERVICE OF PROCESS

Each of the Janus Defendants has moved to dismiss the Complaint under Court of Chancery Rules 12(b)(2) (lack of personal jurisdiction), 12(b)(4) (insufficiency of process), and 12(b)(5) (insufficiency of service of process). Jurisdiction over Albiorix is not contested. Those motions are granted with respect to Michaelis and Balthasar, who have not yet been properly served under the Hague Convention. Even if they had been properly served under the Hague Convention, the Court would not have personal jurisdiction over them, as well as Wagner, pursuant to statute or the conspiracy theory of jurisdiction. Wagner's motion to dismiss is granted for that reason. As explained below, van Wijk and Janus are amenable to Delaware jurisdiction under Delaware's long-arm statute and were properly served with process.

### A. *Applicable Standards*

In considering a motion to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2), the Court is not limited to the pleadings. The Court is also "permitted to rely upon the . . . proxy statement, affidavits, and briefs of the parties in order to determine whether the defendants are subject to personal jurisdiction."[41] Boulden has the burden of making a *prima facie* showing that a

[41] *Sample v. Morgan*, 935 A.2d 1046, 1055-56 (Del. Ch. 2007) (internal quotation marks omitted) (quoting *Crescent/Mach I P'rs, L.P. v. Turner,* 846 A.2d 963, 974 (Del. Ch. 2000)).

Delaware court has personal jurisdiction over the Janus Defendants.[42] For purposes of this motion, the Court will consider all pleaded facts as true, and draw all reasonable inferences in the light most favorable to the nonmoving party.[43]

Boulden has purportedly served the Janus Defendants under either 10 *Del. C.* § 3104, Delaware's long-arm statute, or 10 *Del. C.* § 3114, Delaware's director consent statute. However, in his brief, Boulden does not respond directly to the Janus Defendants' arguments that the Court does not have personal jurisdiction over Wagner, Balthasar, and Michaelis pursuant to either of those statutes.[44] Thus, it appears as if he has conceded that argument.[45] Instead, he asserts that the Court has jurisdiction over all of the Janus Defendants pursuant to the conspiracy theory of jurisdiction as set forth in *Istituto Bancario Italiano SpA, Inc. v. Hunter Engineering Co., Inc.*[46]

A two-step process is required to determine whether a Delaware court has personal jurisdiction over a nonresident of Delaware. The Court must determine, first, whether an applicable Delaware statute provides a means of exercising personal jurisdiction over a nonresident, and second, whether "subjecting the

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[42] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009); *Optimalcare, Inc. v. Hightower*, 1996 WL 417510, at *2 (Del. Ch. July 17, 1996).
[43] *Optimalcare, Inc.*, 1996 WL 417510, at *2.
[44] Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss (Pl.'s Mem.) 9-12.
[45] *See In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *7 (Del. Ch. Jan. 11, 2010) (noting that plaintiff abandons his claim when he fails to address or respond to defendants' arguments in their motion to dismiss).
[46] 449 A.2d 210 (Del. 1982).

nonresident defendant to jurisdiction would violate due process."[47] Due process requires that the "nonresident defendant . . . have sufficient 'minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[48]

The conspiracy theory of jurisdiction "is not an independent jurisdictional basis."[49] Rather, it is "based, in part, upon the well-established principle that, where a conspiracy exists, the acts of each co-conspirator with respect to the aim of the conspiracy are attributable to the acts of the other co-conspirators under a theory of agency."[50] In other words, "if the purposeful . . . acts of one conspirator are of a nature and quality that would subject the actor to the jurisdiction of the court, all of the conspirators are subject to the jurisdiction of the court."[51] Accordingly, Boulden must establish that the Court has jurisdiction over at least one of the Janus Defendants before invoking the conspiracy theory of jurisdiction over the remaining Janus Defendants.[52]

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[47] *Matthew v. Fläkt Woods Gp. SA*, 56 A.3d 1023, 1027 (Del. 2012).
[48] *Id*. (alteration in the original) (quoting *Int'l Shoe Co. v. State of Wash*., 326 U.S. 310, 316 (1945) (internal quotation marks omitted)).
[49] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *6 n.16 (Del. Ch. Feb. 4, 2005).
[50] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* ("Wolfe & Pittenger") § 3.04[b], at 3–81 (2012).
[51] *Istituto Bancario Italiano SpA, Inc.,* 449 A.2d at 222.
[52] *See Abajian v. Kennedy*, 18 Del. J. Corp. L. 179, 196, 1992 WL 8794, at ¶ §V(B) (Del. Ch. Jan. 17, 1992). ("It is apparently the case that the conspiracy theory of jurisdiction does not excuse the plaintiffs' burden of showing a statutory basis of jurisdiction under 10 *Del. C.* § 3104(c).")

Moreover, application of the conspiracy theory of personal jurisdiction must be consistent with constitutional due process. To address that concern, the Supreme Court enunciated a five-prong test in *Istituto Bancario* that was premised on the assumption that the nonresident conspirator was otherwise properly served under state law. To satisfy the test, a plaintiff must show that:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[53]

Delaware courts have emphasized that the conspiracy theory should be applied narrowly in order not to offend due process.[54] Consequently, Boulden must set forth "factual proof of each enumerated element."[55]

B. *Personal Jurisdiction under Delaware's Long-Arm Statute*

Accordingly, Boulden asserts, first, that the Court has personal jurisdiction over van Wijk and Janus by way of Delaware's long-arm statute. Under 10 *Del. C.* § 3104(c)(1), "a court may exercise personal jurisdiction over any nonresident . . . who in person or *through an agent* . . . [t]ransacts any business or performs any

[53] *Istituto Bancario Italiano SpA, Inc.*, 449 A.2d at 225.
[54] Wolfe & Pittenger § 3.04[b], at 3–84.
[55] *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc*., 1995 WL 694397, at *12 (Del. Ch. Nov. 21, 1995).

character of work or service in the State."[56] The Complaint alleges that van Wijk traveled to Delaware during October 2010 and thereafter, on numerous other occasions, to meet with Boulden to discuss the acquisition of the Plant and to conduct business in furtherance of the alleged Equity Agreement.[57] Van Wijk concedes in his affidavit that he traveled to Delaware to visit with Boulden in October 2010, but he disputes that any "contract was entered into, or business transacted, at that meeting."[58] Nevertheless, even if no business was transacted at that meeting, van Wijk's repeated trips to Delaware for purposes of furthering the acquisition of the Plant are sufficient to establish that van Wijk transacted business in Delaware.[59]

As for Janus, Boulden also relies upon 10 *Del. C.* § 3104(c)(1).[60] Specifically, Boulden asserts that van Wijk was acting on behalf of Janus when he was transacting business in Delaware with Boulden. If true, those facts would establish that Janus, through an agent, transacted business in Delaware and that

[56] 10 *Del. C.* § 3104(c)(1) (emphasis added).
[57] Compl. ¶¶ 26-27, 31.
[58] Opening Br. Ex. W. (Aff. of P. Deo van Wijk).
[59] Delaware courts have arguably taken an expansive view of what constitutes "transacting business" in Delaware. Some cases, although not all, have held that contacts through telephone calls, facsimile transmissions, and even emails can constitute the transaction of business under Section 3104(c)(1). *See* Wolfe & Pittenger § 3.04[a][1], at 3–43. Thus, van Wijk's communications with Boulden by way of telephone or email, regarding the acquisition of the Plant, could be additional grounds for finding personal jurisdiction over van Wijk. *See* Compl. ¶¶ 20-21.
[60] Because van Wijk is an officer or agent of Janus, it appears that Defendants may have to rely solely upon the long-arm statute because, subject to certain exceptions, a corporation, like Janus, "cannot be deemed to have conspired with its officers or agents for purposes of establishing jurisdiction under the conspiracy theory." Wolfe & Pittenger § 3.04[b], at 3–87.

Janus is also subject to Delaware jurisdiction. However, the Janus Defendants dispute any agency relationship between van Wijk and Janus. By affidavit, van Wijk avers that he never was an officer or a director of Janus and does not have "sole authority to agree to a contract on behalf of Janus."[61] In contrast, the Complaint alleges that van Wijk is the Chairman of Janus.[62] Notably, Defendants have not disputed that van Wijk is the controlling shareholder of Janus.

Where, as here, there are factual discrepancies over whether personal jurisdiction exists, the Court has discretion to "shape the procedure to resolve a motion to dismiss under Rule 12(b)(2) including evidentiary hearings . . . ."[63] However, after considering the pleaded facts in the light most favorable to Boulden, the Court concludes that he has established a *prima facie* case for exercising personal jurisdiction over Janus. The Complaint repeatedly alleges that van Wijk was acting on behalf of Janus in his efforts to acquire the Plant. Moreover, because it appears that van Wijk is the controlling shareholder of Janus, and because Janus ultimately obtained an indirect ownership of the Plant, the Court can reasonably infer that van Wijk was acting as an agent for Janus.[64]

Boulden also must establish that subjecting van Wijk and Janus to jurisdiction would not violate due process. The "constitutional touchstone remains

[61] Opening Br. Ex. W (Aff. of P. Deo van Wijk) ¶ 5.
[62] Compl. ¶ 22.
[63] *Optimalcare, Inc.*, 1996 WL 417510, at *2.
[64] Of course, the Court may reconsider the issue of personal jurisdiction once the parties more fully establish the factual record.

whether the defendant purposefully established 'minimum contacts' in the forum State"[65] such that maintenance of a suit in that state does not offend "traditional notions of fair play and substantial justice."[66] The minimum contacts analysis asks whether a "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[67] Finally, there must be some "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[68]

Accordingly, van Wijk has conducted significant activity in Delaware to warrant jurisdiction. The Complaint alleges that he visited Delaware on numerous occasions to attend meetings and to conduct business related to the acquisition of the Plant and in furtherance of the Equity Agreement. Van Wijk has also allegedly participated in the formation of Albiorix, a Delaware entity. Thus, van Wijk has purposefully availed himself of the privilege of conducting business within Delaware, and the Court's exercise of jurisdiction over him does not violate due process. For the same reasons, the Court properly has jurisdiction over Janus because it has, through its agent van Wijk, also purposefully availed itself of the privilege of conducting business in Delaware. However, the Court does not have

[65] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).
[66] *Int'l Shoe Co.*, 326 U.S. at 316.
[67] *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
[68] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

personal jurisdiction by way of Delaware's long-arm statute over Michaelis, Wagner or Balthasar, as Boulden conceded in his brief.[69]

C. *Conspiracy Theory of Personal Jurisdiction*

Second, Boulden asserts that the remaining Janus Defendants—Balthasar, Wagner, and Michaelis—are subject to Delaware jurisdiction under the conspiracy theory of personal jurisdiction. Boulden asserts a claim against Janus, Albiorix, and van Wijk for fraud (Count VI) and against all the Defendants for conspiracy to commit fraud (Count VIII) in his Complaint. If the conspiracy to commit fraud claim is properly pleaded, the first two prongs of the *Istituto Bancario* test would be satisfied.

Boulden argues that his Complaint has stated facts sufficient to permit a reasonable inference that the Janus Defendants purposefully conspired from the beginning to cut Boulden out of his 10% equity interest in what eventually would become Albiorix.[70] He also argues that knowledge of the plan should be inferred from their participation in the acquisition of the Plant and their receipt of relevant emails. Moreover, Boulden claims that the Janus Defendants "knew or should

[69] Based on the facts in the record, the Court would not have jurisdiction over Michaelis and Wagner under 10 *Del. C.* § 3104 in any event. Boulden has only generally alleged that some of the Individual Defendants (without naming which ones) traveled to Delaware in furtherance of the Equity Agreement. Compl. ¶ 26. However, both Wagner and Michaelis aver that they have never been to Delaware.

[70] Pl.'s Mem. 11.

have known that Boulden performed countless hours of work within Delaware pursuant to [the] Equity Agreement."[71]

A conspiracy to commit fraud is not an independent cause of action. It must be predicated on an underlying wrong: fraud.[72] Thus, Boulden must first demonstrate that a claim for fraud exists. Accordingly, the Court will initially consider Boulden's fraud claim in Count VI, and, if he has stated a claim, the Court will then consider his conspiracy to commit fraud claim in Count VIII.

Court of Chancery Rule 9(b) requires that "the circumstances constituting fraud . . . shall be stated with particularity."[73] Pleading the circumstances with particularity requires specific allegations of "the time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby."[74] A fraud claim also requires a level of scienter on the part of the defendant. Because the fraud claim here involves a false representation, Boulden must allege that van Wijk either knowingly, intentionally, or with reckless indifference to the truth represented that a false statement was true.[75] For obvious reasons—the inherent difficultly of

[71] Pl.'s Mem. 11.
[72] *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 892-93 (Del. Ch. 2009).
[73] Ch. Ct. R. 9(b).
[74] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm. Techs. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (internal quotation marks omitted) (quoting *York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999)).
[75] *Metro Commc'n Corp. BVI*, 854 A.2d at 143.

proving a person's state of mind—the Rule allows for "intent, knowledge and other condition of mind of a person [to] be averred generally."[76]

However, where, as here, a plaintiff "pleads a claim of promissory fraud, in that the alleged false representations are promises or predictive statements of future intent rather than past or present facts,"[77] merely alleging that the defendant knew or should have known is not adequate.[78] In this situation a higher burden is required: Boulden must allege specific facts that would permit the Court to reasonably infer that the "promisor had no intention of performing at the time the promise was made."[79] Without that requirement, any alleged misrepresentation involving future intent would be actionable as fraud.

Thus, to state a claim for fraud, Boulden must plead that: (1) a defendant made a false representation of fact; (2) a defendant knew or believed that the representation was false or was made with reckless indifference to the truth; (3) a defendant intended to induce Boulden to act; (4) Boulden's actions were taken in

[76] Ct. Ch. R. 9(b).
[77] *MicroStrategy Inc. v. Acacia Research Corp*., 2010 WL 5550455, at *15 (Del. Ch. Dec. 30, 2010).
[78] *See also Metro Commc'n Corp. BVI*, 854 A.2d at 144; *but see H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 146 (Del. Ch. 2003) ("Furthermore, courts have recognized in similar contexts that the particularity requirement must be applied in light of the facts of the case, and less particularity is required when the facts lie more in the knowledge of the opposing party than of the pleading party.").
[79] *MicroStrategy Inc.*, 2010 WL 5550455, at *15.

justifiable reliance upon the representation; and (5) Boulden suffered damages as a result of that reliance.

Although the Complaint states that van Wijk made numerous material misrepresentations to Boulden, it explicitly identifies only one:

> Specifically, in or around September 2010, van Wijk promised Boulden 10% equity in Albiorix in exchange for delivering the Plant deal and providing services in connection thereto while never intending to honor that promise. When van Wijk made these misrepresentations, he knew them to be false and misleading or recklessly disregarded whether those misrepresentations were true or false.[80]

That alleged misrepresentation fails to meet the particular pleading requirements for fraud for the simple reason that Boulden has not pleaded facts that would lead to a reasonable inference that van Wijk—at that time he promised Boulden 10% equity in Albiorix—did not intend to give Boulden his interest.[81] Indeed, until February 20, 2011, when a draft of the Joint Venture Agreement omitted any reference to Boulden's interest, the communications between the Janus Defendants and Boulden had all indicated that he would receive equity in Albiorix. Although that view seemingly changed, there are no facts in the Complaint that would cast doubt on van Wijk's intentions when he made that promise. The Court is mindful of the difficultly of establishing a person's state of mind and his

[80] Compl. ¶¶ 82-83. The other referenced misrepresentations seem to involve the same matter.

[81] Although the Complaint identifies van Wijk and the general time frame when the misrepresentation occurred, it fails to refer to any specific statement. *See Metro Commc'n Corp. BVI*, 854 A.2d at 144 (stating that "this particular allegation does not even purport to identify any specific statement by a specific defendant at a specific time").

subjective intentions. However, in the context of promissory fraud, simply stating that van Wijk knew his promise was false is not sufficient.

Because Boulden has failed to state a claim for fraud, and because the conspiracy to commit fraud claim must be predicated on an underlying wrong, Boulden's conspiracy to commit fraud claim must also fail.[82] Boulden has not alleged a conspiracy with respect to his other claims. Even if he had, however, that effort would be unavailing given that those claims which might support a conspiracy claim are either dismissed or would not constitute an independent tort.[83] Thus, the first prong of the *Istituto Bancario* test—that a conspiracy existed—is not satisfied. The Court does not have personal jurisdiction over Balthasar, Wagner, and Michaelis, and their motions to dismiss under Rule 12(b)(2) must be granted.

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[82] "The elements for civil conspiracy under Delaware law are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005).

[83] If Boulden fails to allege adequately the elements of any underlying claim upon which a conspiracy claim is based, the conspiracy claim must be dismissed. Boulden's claims against Balthasar, Wagner, and Michaelis are limited to Counts III (promissory estoppel), VIII (conspiracy to commit fraud), IX (direct fiduciary duty claim), and X (derivative fiduciary duty claim). All of these claims are dismissed under Rule 12(b)(6) for failure to state a claim except for the promissory estoppel claim. That claim does not constitute an independent tort. *See Kuroda*, 971 A.2d at 892-93 (noting that "unless the breach also constitutes an independent tort, a breach of contract cannot constitute an underlying wrong on which a claim for civil conspiracy could be based; similarly, a claim for civil conspiracy cannot be predicated on a breach of the implied *contractual* covenant of good faith and fair dealing unless the breach also constitutes an independent tort.").

D. *Dismissal Under Rules 12(b)(4) and 12(b)(5)*

Defendants contend the Complaint should be dismissed, pursuant to Court of Chancery Rules 12(b)(4) and 12(b)(5), as to Michaelis, Wagner, Balthasar, and Janus for insufficient process and service of process.[84] Boulden has the burden to show that service of process was effective.[85] He has certified and provided documentation that Wagner and Janus were successfully served under the Hague Convention on June 19, 2012 and July 27, 2012, respectively.[86] With respect to Michaelis and Balthasar, Boulden's counsel has attempted to serve them in accordance with the Hague Convention at addresses provided by defense counsel. As for Michaelis, despite two attempts, service of process could not be effectuated because in the first instance, the translations of the Amended Complaint and summons were allegedly not attached, and in the second instance, there were supposedly differences between the translation and the original documents.[87] However, the Janus Defendants aver that in both attempts correct documents were attached with German translations identical to those that were effectively served on

[84] Although the Court lacks personal jurisdiction over Michaelis, Wagner, and Balthasar, the Court also holds, as an alternative ground for dismissal, that Boulden failed to serve Michaelis and Balthasar properly under Delaware law.
[85] *Cairns v. Gelmon*, 1998 WL 276226, at *4 (Del. Ch. May 21, 1998).
[86] Pl.'s Mem. 8, Certification of Michael T.G. Long ("M. Long Cert.") ¶¶ 4, 6, Ex. 2E (confirmation that process was effectuated on Wagner), Ex. 2J (confirmation that process was effectuated on Janus).
[87] M. Long Cert. ¶¶ 4, 6; Pl.'s Mem. Exs. 2G & 2K.

Wagner and Janus. With respect to Balthasar, service was attempted under the Hague Convention, but he could not be located at the address provided.[88] However, Balthasar was apparently properly served under Delaware's director consent statute.[89]

The Janus Defendants argue that because service of process under the Hague Convention was not effective as to Michaelis and Balthasar, and because the process was identical to that served on Wagner and Janus, none of the Janus Defendants was served with proper process. They also contend that the failure to effectuate service of process on Michaelis and Balthasar under the Hague Convention precludes the Court from exercising personal jurisdiction over them even if they have actual notice of the lawsuit. Finally, the Janus Defendants assert that the director consent statute is inapplicable to Balthasar, an argument that Boulden failed to respond to in his answering brief, and therefore concedes.[90]

As noted, Boulden has provided documents certifying that service of process was effectuated on Wagner and Janus under the Hague Convention. That certification refutes any argument by the Janus Defendants that the process was inadequate.[91] The failure to effectuate service of process on Michaelis under the

[88] Pl.'s Mem. Ex. 2F.
[89] Oral Argument Tr. 68-70, October 24, 2012.
[90] *See supra* note 45.
[91] "Pursuant to the [Hague] Service Convention, the Central Authority in one State, or a competent judicial officer, may transmit documents to the Central Authority in the receiving

Hague Convention, however, prevents the Court from exercising personal jurisdiction over him. "Personal jurisdiction must be effected through proper service of process, and actual notice by a defendant does not satisfy this constitutional requirement."[92] The Court also lacks jurisdiction over Balthasar because he was not properly served process under the Hague Convention.[93]

In conclusion, Balthasar's and Michaelis's motions to dismiss pursuant to Rules 12(b)(2) and 12(b)(5) are granted. Wagner's motion to dismiss is granted pursuant Rule 12(b)(2). Therefore, the Court will not address the claims against them on the merits.

## III. MOTION TO DISMISS UNDER RULE 12(b)(6)

### A. *Reasonable Conceivability Standard*

The Defendants have each sought dismissal of the Complaint for failure to state a claim. The Delaware pleading standard under Court of Chancery Rule 12(b)(6) is "reasonable conceivability."[94]

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State. If the receiving Central Authority finds everything to be proper, it then formally or informally serves the party inside that country." Wolfe & Pittenger § 3.04[e][1], at 3–111.

[92] *Shurr v. Mun. City of Newark, Del.*, 2004 WL 332508, at *1 (D. Del. Jan. 28, 2004) "Notwithstanding plaintiff's good motives, due process demands that where a plaintiff has failed to obtain personal jurisdiction over each of the defendants through proper service of process the case must be dismissed." *Id.* at *2.

[93] Because Boulden has conceded that the Court does not have personal jurisdiction over Balthasar under Delaware's director consent statute, the Court need not address that matter, even if the Court might otherwise have jurisdiction over him under that statute.

[94] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

Under that standard, the Court must accept all well-pleaded allegations as true, "draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[95]

However, the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'"[96] As a general rule, the Court is limited to the facts alleged in the Complaint, but it may consider documents integral to and incorporated into the Complaint, as well documents not relied upon for the truth of their contents.[97]

B. *Count I: Breach of Contract Claim against Janus and Albiorix*

Boulden alleges a breach of contract claim against Janus and Albiorix. To state a claim for breach of contract, Boulden must allege facts that reasonably demonstrate "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff."[98] That Boulden has done.

First, he has alleged a contract—the Equity Agreement—in which Janus promised Boulden 10% equity in Janus USA (*i.e.*, Albiorix) for presenting the Plant opportunity to Janus and working to bring that deal to fruition. That

[95] *Id.* at 536 (citation omitted).
[96] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (quoting *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).
[97] *Orman v. Cullman*, 794 A.2d 5, 15–16 (Del. Ch. 2002).
[98] *Kuroda*, 971 A.2d at 883 (internal quotation marks omitted).

contention is supported by numerous emails that anticipate Boulden's receipt of a 10% interest in Janus USA, the entity that would become Albiorix. Importantly, one email speaks of van Wijk as having offered Boulden the equity interest in 2010, and another email indicates that Boulden had accepted that offer.[99]

The Janus Defendants have attempted to characterize the so-called "Equity Agreement" as one term of a larger employment contract that was not then finalized.[100] That an employment agreement was under negotiation is without doubt. One email from Balthasar, for instance, reads: "[van Wijk] has asked me to come up with your employment contract."[101] Another email from van Wijk reads: "I forgot one discussion point. You will be President US operations for all our activities in the US."[102] However, the Janus Defendants point to other emails that tend to show that the equity interest and employment contract were part of the same agreement that had not yet been completed. An email from Boulden in late December 2010 reads: "now seems an appropriate time to *crystallize* our

[99] Compl. ¶¶ 24-25.
[100] To support that inference, the Janus Defendants have also attempted to place additional facts that are not in the Complaint before the Court. Specifically, they ask that the Court take notice of a document attached to an email from Boulden. The email is quoted in the Complaint, but not included in its entirety as an exhibit. Also, the attached document—entitled "Executive Employment Agreement Checklist"—is not quoted from or otherwise referenced in the Complaint. Because the Complaint does not quote from this document, it cannot be incorporated into the Complaint and the Court will not consider it. Even if the Court had considered the document, however, the outcome would likely not differ. While the document adds weight to Defendants' contention, it does not eliminate all reasonable conceivability that Boulden has stated a claim.
[101] Compl. Ex. B.
[102] *Id*.

agreements regarding equity in [Janus USA] and involvement as President and CEO of [Janus's] . . . US companies . . . ."[103] Defendants' interpretation of these emails is certainly a reasonable one that can be drawn from the Complaint, and one that may ultimately prove correct. But it is not the only inference that can reasonably be drawn. Reading the Complaint in the light most favorable to Janus, as this Court must, Boulden has adequately pleaded—to a reasonable conceivability—the existence of the Equity Agreement between Janus and Boulden.[104]

Second, the Complaint alleges that despite Boulden's performing his obligations under the Equity Agreement, Janus and Albiorix breached it by failing to give Boulden his 10% equity interest in Albiorix. Boulden lists a wide-range of work that he performed to help consummate the deal, which is what he presumably agreed to do under the Equity Agreement. Third, Boulden has obviously suffered damages from Defendants' beach, if a breach occurred. Thus, Boulden has pleaded facts that raise a reasonably conceivable basis for his breach of contract claim against Janus.

As for Albiorix, Boulden's breach of contract claim will survive only if Albiorix has adopted or assumed the Equity Agreement under the doctrine of

[103] Compl. Ex. A.
[104] Based on the facts in the Complaint, it is reasonably conceivable that van Wijk was acting on behalf of Janus when the alleged Equity Agreement was formed.

preincorporation. That is, of course, because Albiorix did not exist when the Equity Agreement was purportedly made. "[U]nder Delaware law the doctrine of preincorporation agreements allows a promoter who is establishing a corporation to enter into agreements that bind the nascent corporation."[105] The doctrine holds that "if the subsequently formed corporation expressly adopts the preincorporation agreement or implicitly adopts it by accepting its benefits with knowledge of its terms, the corporation is bound by it."[106] However, the "mere coming into existence by incorporation does not render a corporation liable on the preincorporation contracts of its promoters."[107]

Boulden argues in his brief that Albiorix implicitly adopted the Equity Agreement because "Albiorix would not exist and would not own the Plant but for the opportunity presented by Boulden."[108] In response, Albiorix contends that the only benefit conferred from the Equity Agreement was to Janus because performance under the alleged Equity Agreement occurred before Albiorix was formed.[109]

Although far from certain, Boulden has pleaded facts from which a reasonable inference may be drawn that, when the acquisition of the Plant closed in

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[105] *Lorillard Tobacco Co. v. Am. Legacy Found*., 903 A.2d 728, 744 (Del. 2006).
[106] *Id*. at 745 (internal quotation marks omitted).
[107] 1A Carol A. Jones, *Fletcher Cyclopedia of the Law of Private Corporations* § 205 (Sept. 2012).
[108] Pl.'s Mem. 16.
[109] Reply Br. of Def. Albiorix, Inc. in Further Supp. of its Mot. to Dismiss the First Am. Verified Compl. ("Albiorix Reply Br.") 4.

May, Albiorix, by then an incorporated entity, implicitly adopted the Equity Agreement by obtaining the benefit contemplated therein: an interest in the Plant.[110] Of course, the viability of this claim turns on whether that agreement even existed, and also, on whether Albiorix knew of its terms and implicitly adopted it by accepting an interest in the Plant. At this preliminary stage, the Court only concludes that it is reasonably conceivable that the Equity Agreement existed and that Albiorix implicitly adopted it when it obtained partial ownership of the Plant.[111]

C. *Count II: Request for Specific Performance by Janus and Albiorix*

In Count II of the Complaint, Boulden seeks specific performance of the Equity Agreement. Although phrased as a claim, specific performance is a form of equitable relief dependent upon an underlying cause of action—in this case: breach

[110] Albiorix seeks to distinguish the facts here from those in *Lorillard Tobacco Co.* by arguing that it has not received any ongoing benefit from the Equity Agreement because the agreement, if it existed at all, was fully performed by Boulden before Albiorix's formation.

[111] The benefits accruing to Janus from the Equity Agreement, and which could be later adopted by Albiorix, include only (1) Boulden's presenting the Plant opportunity and his ideas for the Plant to Janus, and (2) the work Boulden continued to do to consummate the acquisition. The Complaint provides what might be considered only the flimsiest of reasons to support an inference that Albiorix expressly or implicitly adopted those benefits. By late February it appears that the Janus Defendants had no intention of giving Boulden an interest in Albiorix. The Court could infer that Albiorix also rejected the terms of the Equity Agreement. By then, it may be that Boulden's performance under the alleged contract had only benefited Janus. Although the Court is not without misgivings regarding its conclusion, it cannot write with any confidence that Boulden's chances under this theory are not reasonably conceivable.

of contract.[112] Because Boulden's breach of contract claim has survived a motion to dismiss, his request for specific performance may still be viable.

Not surprisingly, Albiorix argues that (1) Boulden has failed to allege or demonstrate that damages would be an inadequate remedy at law[113] and (2) Boulden's nine-month delay in bringing suit and the resulting uncertainty that such relief would create—requires that the Court dismiss his request for specific performance at the pleading stage.[114] The Court disagrees. The dismissal of Boulden's specific performance request may be premature at this stage. The Supreme Court has advised:

> In ruling on a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court is generally limited to facts appearing on the face of the pleadings. Accordingly, affirmative defenses, such as laches, are not ordinarily well-suited for treatment on such a motion. Unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate.[115]

Although Boulden's nine-month delay in commencing this action may be untimely for purposes of an award of specific performance, it is not clear

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[112] *Addy v. Piedmonte*, 2009 WL 707641, at *23 (Del. Ch. Mar. 18, 2009).

[113] *See Naughty Monkey LLC v. Marinemax, Ne. LLC*, 2010 WL 5545409, at *8 n.59 (Del. Ch. Dec. 23, 2010) ("Under Delaware law, courts may grant specific performance only if the terms of the contract are established by clear and convincing evidence, and only where the plaintiff has no adequate remedy at law.").

[114] Albiorix Reply Br. 9; *see Reid v. Spazio*, 970 A.2d 176, 183-84 (Del. 2009). Laches is generally defined as an "unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Id*. at 182.

[115] *Reid*, 970 A.2d at 183-84.

from the face of the Complaint that Boulden would not be able to avoid this affirmative defense. Furthermore, it is also not clear that money damages would provide an adequate remedy at law. Thus, Boulden's request for specific performance may not be dismissed.

D. *Count III: Promissory Estoppel Claim against Janus, Albiorix, and van Wijk*

Boulden also brings a promissory estoppel claim in Count III of his Complaint. The Janus Defendants argue, again, that the documents and allegations in the Complaint show negotiations over an employment agreement, not a stand-alone promise. However, as discussed above, while that argument is premised upon reasonable inferences that can be drawn from the Complaint, they are not the only reasonable inferences that can be drawn. Under the reasonably conceivable standard, Boulden has adequately alleged a claim for promissory estoppel against Janus and van Wijk.[116]

To state a claim for promissory estoppel, Boulden must plead facts:

> alleging that or allowing for a reasonable inference that "(i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise."[117]

[116] Boulden has pleaded his promissory estoppel claim in the alternative in case his breach of contract claim was dismissed. Of course, Boulden will not be able to recover on both claims, which are essentially the same. Even though duplicative, the Court will allow this claim to go forward to the extent that Boulden does not succeed on his contract claim.

[117] *James Cable, LLC v. Millennium Digital Media Sys., L.L.C.*, 2009 WL 1638634, at *5 (Del. Ch. June 11, 2009) (quoting *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000)).

A promise is defined as the "manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person's assurance that the person will or will not do something."[118] In addition, the promise must be reasonably certain and definite.[119]

The Complaint alleges that van Wijk promised Boulden 10% of the equity of Albiorix in exchange for presenting the Plant opportunity to Janus and for his continued services in completing the deal.[120] The Complaint does not describe what continuing obligations Boulden had under the Equity Agreement, but it does provide a thorough accounting of what actions Boulden performed to help effectuate the deal. At least for pleading purposes, the Court is persuaded that van Wijk made a reasonably certain and definite promise. The Complaint cites an email from van Wijk confirming that allegation: "What I offered Bob last year was . . . a 10 pct equity stake in Janus USA."[121] That is also consistent with an earlier email which contemplates Boulden's ownership interest in Janus USA. From those facts, and based on Boulden's own commitment to help effectuate the

[118] Black's Law Dictionary (9th ed. 2009).
[119] *James Cable, LLC*, 2009 WL 1638634, at *5.
[120] "[T]he principal question in Delaware promissory estoppel cases is not whether the plaintiff's response to a promise constituted detrimental reliance or consideration, but, instead, whether injustice could be avoided only by an enforcement of the promise." *Grunstein v. Silva*, 2009 WL 4698541, at *10 (Del. Ch. Dec. 8, 2009).
[121] Compl. ¶ 25.

deal, the Court can draw a reasonable inference that van Wijk (and Janus by agency theory) manifested an intent to act. Moreover, the Court can reasonably infer from the circumstances of van Wijk's offer that he reasonably expected to induce Boulden to act. For his part, Boulden's significant efforts to consummate the acquisition evince that he reasonably and detrimentally relied on that promise. And, finally, as to the last element, injustice might be avoided only by enforcement of that promise if Boulden is unable to prove his breach of contract claim.[122]

As for Boulden's promissory estoppel claim against Albiorix, the Complaint alleges that van Wijk, acting on behalf of Albiorix, promised a 10% equity interest. With Albiorix not in existence at the time the alleged promise was made, however, van Wijk's promise cannot be imputed to Albiorix. Unable to dispute that logic, Boulden seems to contend that the doctrine of preincorporation could or should apply to claims that are not based in contract. He provides no authority for that proposition. Nor does he argue for why the Court should expand a doctrine which is seemingly based on the existence of a contract. Finding no support for Boulden's contention in his brief or elsewhere, the Court rejects this argument. Accordingly, Boulden's promissory estoppel claim against Albiorix is dismissed.

[122] Boulden's promissory estoppel claim against Balthasar, Wagner, and Michaelis would fail because there are no allegations in the Complaint that they made any statement, let alone a promise, to Boulden regarding his 10% equity interest. That they may have been aware of that promise by having received relevant emails is not enough to impute that promise to them.

E. *Count IV: Quantum Meruit Claim against Janus and Albiorix*

Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[123] To state a claim, Boulden must allege facts that allow for a reasonable inference of: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[124] As is typical, Boulden has pleaded this claim in the alternative.

> In some circumstances, alternative pleading allows a party to seek recovery under theories of contract or quasi-contract. This is generally so, however, only when there is doubt surrounding the enforceability or the existence of the contract. Courts generally dismiss claims for *quantum meruit* on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls.[125]

Where, as here, doubt exists surrounding the existence of a contract, the Court will allow Boulden to seek recovery under this theory provided the requisite elements are adequately pleaded.

Boulden has pleaded adequately that Janus has been enriched by Boulden's having delivered the Plant to it and rendered services to bring about the acquisition of the Plant. To the extent that Boulden's work went uncompensated, he was

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[123] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007) (internal quotation marks omitted) (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)).
[124] *MetCap Sec. LLC*, 2007 WL 1498989, at *5.
[125] *Albert*, 2005 WL 2130607, at *8.

impoverished. Moreover, a relationship clearly exists between Janus's enrichment (acquisition of the Plant), which allegedly resulted from the time and effort of Boulden, and Boulden's impoverishment—a failure to be compensated for that time and effort. Although a reasonable inference can be drawn from the Complaint that Janus was justified in not compensating Boulden because his efforts were conferred officiously, a reasonable inference also exists that Janus was not justified because it had expressly requested Boulden's services with an expectation that he would be compensated. Finally, an absence of a remedy at law may exist if there is no contract, and Boulden did in fact unjustly enrich Janus. Accordingly, Boulden's claim for unjust enrichment is not dismissed.[126]

F. *Count V: Breach of the Covenant of Good Faith & Fair Dealing Claim against Janus & Albiorix*

Boulden generally alleges that Janus and Albiorix breached the Equity Agreement's implied covenant of good faith and fair dealing. Under Delaware law, "the implied covenant of good faith and fair dealing inheres in every contract and 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[127] Importantly, "the implied

[126] As for Albiorix, Boulden's claim fails for the same reasons that the Court has dismissed his promissory estoppel claim against Albiorix.

[127] *Kuroda*, 971 A.2d at 888 (Del. Ch. 2009) (internal quotation marks omitted) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)).

covenant of good faith and fair dealing is recognized only where a contract is silent as to the issue in dispute."[128] Otherwise, it would potentially override the express terms of the contract.

The Defendants argue that this claim is duplicative of Boulden's breach of contract claim. In response, Boulden contends that it is not, because unlike that claim, which is based on a breach of the Equity Agreement, his implied covenant claim is based on the Defendants' unreasonable conduct after the formation of the Equity Agreement.[129] However, Boulden has no specific allegations to this effect in his Complaint. [130] In his brief Boulden contends that Janus and Albiorix acted in bad faith when they allowed Boulden to perform his duties under the agreement knowing full well that they had no intention of giving him a 10% equity stake. This fails, however, to distinguish Boulden's breach of contract claim from his implied covenant claim because the breach is the same. In other words, there can be no breach of the implied covenant of good faith and fair dealing if there is no contract giving rise to an implied obligation independent of the express terms of the contract.

[128] *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc*., 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009).
[129] Pl.'s Mem. 22.
[130] *See Kuroda*, 971 A.2d at 888 ("General allegations of bad faith conduct are not sufficient. Rather, the plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract.").

As this Court observed before, "[a]bsent a contractual provision dictating a standard of conduct, there is no legal difference between breaches of contract made in bad faith and breaches of contract not made in bad faith. Both are simply breaches of the express terms of the contract."[131] Consequently, "[t]o the extent that [Boulden's] implied covenant claim is premised on the failure of defendants to pay money due under the contract, the claim must fail because the express terms of the contract will control such a claim."[132]

G. *Count VI: Fraud Claim against Janus, Albiorix, and van Wijk*

As discussed above, Boulden has failed to state a fraud claim against van Wijk or Janus because the Complaint fails to allege facts that would lead to a reasonable inference that van Wijk or Janus did not intend to give Boulden his equity interest in Albiorix when van Wijk entered into the Equity Agreement. This claim would also be dismissed because it attempts to bootstrap a "claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations."[133] Under Delaware law, "a plaintiff cannot state a claim for fraud simply by adding the term 'fraudulently induced' to a

[131] *AQSR India Private, Ltd.*, 2009 WL 1707910, at *11 (footnotes omitted).
[132] *Kuroda*, 971 A.2d at 888.
[133] *MicroStrategy Inc.*, 2010 WL 555045, at *17 (internal quotation marks omitted) (quoting *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. Dec. 21, 1998)).

complaint or alleging that the defendant never intended to comply with the agreement at issue at the time the parties entered into it."[134]

Boulden's fraud claim against Albiorix also fails to state a claim. As mentioned above, the doctrine of preincorporation does not help Boulden overcome the obvious fact that van Wijk's alleged misrepresentation occurred in September 2010 while Albiorix did not exist until March 2011. Van Wijk could not have been acting on behalf of Albiorix at that time. Even if his statement could somehow be attributed to Albiorix, Boulden's claim would fail for the same reasons that the fraud claims against van Wijk and Janus have also failed.[135]

H. *Count VII: Misrepresentation Claim against Janus, Albiorix, and van Wijk*

Relying upon the same misrepresentation cited in his fraud claim, Boulden attempts to plead a claim for negligent misrepresentation. Having failed to respond to arguments made by the Janus Defendants in their brief, Boulden has implicitly conceded the merits of this claim.[136] In any event, Boulden has failed to state a misrepresentation claim.

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[134] *Id*.

[135] Furthermore, given that Boulden was aware by late February that he would not receive a 10% equity in Albiorix, Boulden may not have justifiably relied upon any promise that Albiorix did make after its formation. Because "justifiable reliance is an element of common law fraud, equitable fraud, and negligent misrepresentation under Delaware law," those claims against Albiorix would fail for the same reason. *H-M Wexford LLC*, 832 A.2d at 142-43 (footnotes omitted).

[136] *See supra* note 45.

Unlike a common law fraud claim, a claim for negligent misrepresentation does not require a knowing or intentional state of mind. Instead, Boulden must allege that (1) a defendant had a pecuniary duty to provide accurate information; (2) a defendant supplied false information; (3) a defendant failed to exercise reasonable care in obtaining or communicating the information; and (4) he suffered a pecuniary loss caused by justifiable reliance upon the false information.[137] However, a negligent misrepresentation claim "cannot lie where the underlying representations take the form of promises, because promissory fraud requires an intentional or knowing act."[138] That is because a future promise, by its nature, cannot be made negligently or unknowingly.[139] Accordingly, because Boulden's negligent misrepresentation claim is based solely on a future promise, that claim is dismissed.

I. *Count VIII: Conspiracy to Commit Fraud Claim against Janus, Albiorix, and van Wijk*

As discussed above, Boulden's conspiracy to commit fraud claim is dismissed because Boulden has failed to plead adequately the underlying fraud.

J. *Count IX: Breach of Fiduciary Duty Claim against Janus, Albiorix, and van Wijk*

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[137] *Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *9 (Del. Ch. Dec. 20, 2005).
[138] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *9 n.56 (Del. Ch. Dec. 23, 2008).
[139] *See Grunstein*, 2009 WL 4698541, at *14 (explaining that a "promise to honor an agreement is only a misrepresentation if the promisor knows at the time of the promise that he will ultimately breach; such a misrepresentation cannot occur unknowingly or negligently.").

Boulden also brings a direct breach of fiduciary claim against all Defendants. The Complaint alleges that the Defendants owe fiduciary duties to Boulden because of his "status as a minority shareholder and/or co-venturer."[140] It then goes on to claim that the Defendants somehow "breached their fiduciary duties of care, trust, loyalty, confidence, candor, and good faith"[141] in relation to the alleged breach of the Equity Agreement.

In his brief, Boulden argues that dismissal of this claim is premature because if he successfully proves a valid contract, then he would be a 10% shareholder of Albiorix, and Defendants would then owe duties to him as a minority shareholder. Of course, this presupposes that at least one of the Defendants is a majority shareholder or director of Albiorix or a combination of shareholders constitute a control group.[142] Boulden explains in his brief how Defendants breached their fiduciary duties by not giving him the benefits of the Equity Agreement and by not informing him of the decision to enter the Consulting Agreement. In order perhaps to save his claim against some of the Defendants, Boulden, again in his brief, attempts to bootstrap an aiding and abetting claim to his Complaint.

This claim is dismissed as to all the Defendants because it is merely a restatement of Boulden's contract and covenant of good faith and fair dealing

[140] Compl. ¶ 101.
[141] Compl. ¶ 102.
[142] Although Balthasar was a director of Albiorix from March 1, 2011 to December 23, 2011, the Court does not have jurisdiction over him.

claims. These claims seemingly arise from the same alleged facts and conduct and seek the same relief. In similar circumstances as here, this Court has dismissed a fiduciary duty claim that is duplicative of a breach of contract claim.[143] Boulden's attempt to distinguish this claim, perhaps by arguing in his brief that the failure to inform him of the Consulting Agreement constitutes a breach of fiduciary duty, is unavailing. Apart from the fact that this contention is not pleaded in the Complaint, there is no set of facts in the Complaint that raise a reasonably conceivable basis from which to infer how that conduct might constitute a breach of fiduciary duty. Therefore, Boulden's breach of fiduciary duty claim is dismissed.

K. *Count X: Breach of Fiduciary Duty Claim on Behalf of Albiorix against Janus and the Individual Defendants*

On behalf of Albiorix, Boulden brings a fiduciary duty claim against Janus and the Individual Defendants for causing Pandora to enter the Consulting Agreement, which Boulden alleges was a self-dealing and unfair transaction.[144] Albiorix argues that Boulden, who is not a shareholder of Albiorix, lacks standing to bring a derivative action. It also argues that even if Boulden did have standing, he failed to make a demand on the board of Albiorix or adequately allege why demand was futile. Boulden, on the other hand, argues that he has standing based

[143] *See e.g.*, *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 833-34 (Del. Ch. 2006).
[144] Compl. ¶ 107.

upon the doctrine of equitable standing. He further contends that the Albiorix board, even if completely independent and otherwise disinterested, would not be able to impartially consider a demand related to a lawsuit claiming a 10% ownership stake in the company on which they sit as board members. [145]

Under Delaware Court of Chancery Rule 23.1(a), a derivative action requires that the complaint "allege that the plaintiff was a shareholder . . . at the time of the transaction of which the plaintiff complains or that the plaintiff's share . . . thereafter devolved on the plaintiff by operation of law."[146] Furthermore, the rule requires that, if no demand is made, the complaint allege with "particularity" the reasons why demand would be futile.

The doctrine of equitable standing is set forth in *Schoon v. Smith*, in which the Supreme Court declined to extend that doctrine to a director of a corporation absent a "show[ing] that a complete failure of justice [would] occur unless he [were] granted standing to sue as a director."[147] The Court reasoned that an existing stockholder could bring a derivative action if the stockholder deemed it necessary. As in *Schoon*, where the corporation's interest could be protected by its stockholders, the interests of Albiorix could be protected by non-party OCI—who, as Boulden concedes—wholly owns Albiorix. Boulden alleges no reason why OCI

[145] Pl.'s Mem. 21.
[146] Ct. Ch. R. 23.1
[147] *Schoon v. Smith*, 953 A.2d 196, 210 (Del. 2008).

could not or would not bring the derivative action if it deemed it necessary. Thus, without more, the doctrine of equitable standing does not avail Boulden standing to pursue this derivative action.

Even if Boulden did have standing, Boulden's derivative claim would also fail because he has not alleged with particularity why demand is futile. First, Boulden fails to allege—with certainty—who the members of the Albiorix board were at the time he filed suit. It appears that at the time he filed suit on November 17, 2011, only Balthasar of the Defendants was a director of Albiorix. But, Boulden did not allege with any particularity why Balthasar or any other board member was not disinterested and independent.[148] Second, Boulden makes a sweeping statement, without any supporting facts, that a disinterested and independent director would not be able to consider a demand impartially in which a shareholder seeks a 10% economic interest in the director's company. Without more, that is not sufficient under Delaware law to cast a reasonable doubt on the members of Albiorix's board. Thus, Count X is dismissed as to all Defendants.

L. *Count XI: Constructive Trust against Janus and Albiorix*

Boulden's final claim is a request for relief in the form of a constructive trust to be imposed on 10% of the equity in Albiorix. As with specific performance,

[148] The Complaint alleges that the Individual Defendants would not be able to sue themselves because the Consulting Agreement was a self-dealing transaction that was unfair to Albiorix. However, that agreement was between Janus and OCI.

"this court cannot impose the remedy of a constructive trust against a party unless that party is properly subject to an order of relief under a recognized cause of action."[149] The remedy is only available when "a defendant's fraudulent, unfair, or unconscionable conduct causes him to be unjustly enriched at the expense of another."[150] Given that Boulden's unjust enrichment claim has survived, and that a request for relief is otherwise not typically dismissed on a motion to dismiss, the Court will allow for the possibility that this form of relief might be justified if Boulden is successful on his underlying claims.

## IV. CONCLUSION

This action has narrowed to a few central claims and parties. If Boulden is able to prevail on any of his claims, the Court has also preserved certain forms of relief. The Court does not have personal jurisdiction over Wagner, Balthasar, and Michaelis, and Boulden has not effectuated service of process on Balthasar and Michaelis. Thus, Boulden's claims against these defendants are dismissed pursuant to Rules 12(b)(2) and 12(b)(5).

With respect to the causes of action, Boulden has stated a claim in Count I against van Wijk, Janus, and Albiorix. He has stated a claim in Counts III and IV against van Wijk and Janus. Counts II (specific performance) and XI (constructive

[149] *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 670 (Del. Ch. 2006).
[150] *Neumeister v. Herzog*, 2007 WL 2162556, at *5 (Del. Ch. July 12, 2007).

trust), which are really forms of relief, will survive. All other counts are dismissed under Rule 12(b)(6) for failure to state a claim.

Counsel are requested to confer and to submit a form of implementing order.