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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICHARD W. VAGUE,	:	
Plaintiff,	:	
v.	:	
BANK ONE CORPORATION,	:	
Defendant and Third-Party Plaintiff,	:	
and	:	**C.A. No. 18741**
FIRST USA BANK, N.A.,	:	
Third-Party Plaintiff,	:	
v.	:	
CLINTON W. WALKER,	:	
Third-Party Defendant.	:	

MEMORANDUM OPINION

Date Submitted: September 14, 2005
Date Decided: February 1, 2006

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NOBLE, Vice Chancellor

Plaintiff Richard W. Vague ("Vague") earned, through his employment with First USA, Inc. ("FUSA"), a predecessor of Defendant Bank One Corporation ("Bank One" or the "Bank"), the right to exercise valuable options to acquire Bank One stock. Those options were conferred upon Vague by two option agreements which established dates by which Vague had to exercise his options or those rights would lapse. Vague, who mistakenly believed that he had a few extra years, failed to exercise certain options before they expired on August 21, 2000. The Bank rejected his untimely effort to exercise those options.

In this post-trial memorandum opinion, the Court confronts unambiguous contracts between the parties that required Vague to exercise his options, if ever, by a certain date. Yet, if Vague prevails here, he will merely receive that which he undeniably earned. If the Bank prevails, it will obtain a windfall: simply because a ministerial action was not undertaken by Vague in a timely manner, it will be able to retain the substantial benefits that it otherwise was bound to confer upon Vague. The reasons for Vague's failure to act in a timely fashion are several-fold. There is, however, blame that can fairly be attributed to both Vague and the Bank. Ultimately, the Court must determine if the parties' conduct allows Vague to escape the

clear terms of his option agreements and the consequences of missing the deadline for exercise of the options.

I. BACKGROUND

A. *The Disputed Options*

Vague was a director, president (1991-97) and chief executive officer (1997-99) of FUSA, a financial institution providing credit card services. In 1995, the FUSA board approved a grant of options in accordance with the FUSA 1991 Stock Option Plan ("the Plan")[1] to senior management, including Vague. Options were similarly awarded in 1996. The options had comparable terms. By § 4(d) of the Plan, the exercise period could not exceed ten years from the date of the grant unless the option holder's relationship with First USA was earlier terminated. "[I]f the Optionee's employment shall terminate by reason of . . . retirement, all Options therefore granted to such Optionee . . . may . . . be exercised by the Optionee . . . at any time *within six months* (or such longer period as may be determined by the Committee in its sole discretion) after the date of . . . retirement of the Optionee."[2] The option grants were to be memorialized by written agreements, in this instance, the Nonqualified Stock Option

[1] JX 1.
[2] Plan, § 4(f) (emphasis added). If the Optionee was terminated by First USA, he had only three months to exercise his options. Plan, § 4(e).

Agreements, dated as of July 19, 1995 and July 17, 1996 (conferring the "Disputed Options"). An executed copy of the agreement for the 1995 options was admitted into evidence.[3] No signed copy of the agreement for the 1996 options has been found.[4] The Court finds that Vague did have a binding agreement with FUSA for the 1996 options. Option summaries provided by the Bank's agent reflected that he held the options; the options were reflected in the FUSA's federal securities filings;[5] and there is no reason to believe that those records are not accurate. Thus, Vague held options conferred under both the 1995 and 1996 option agreements.

B. *Corporate Acquisitions*

In June 1997, FUSA was acquired by and merged with Banc One Corporation ("Banc One"), which became obligated to honor Vague's rights to the Disputed Options. Vague became an officer of Banc One and continued to manage the FUSA credit card business.[6] In October 1998, Banc One merged with First Chicago NBD; the surviving entity was Bank One. The Disputed Options also survived this merger. Both Banc One and Bank One granted options to Vague. Thus, he held options conferred by the

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[3] JX 2.

[4] The form of the agreement is JX 4.

[5] JX 8 at 10.

[6] Under the terms of Banc One's acquisition of FUSA, the outstanding and unexercised FUSA options converted into Banc One options following the merger.

three entities—FUSA, Banc One, and Bank One—each of which had separate stock option plans with different terms.

C. *Vague Decides to Depart*

By October 1999, Vague had decided to leave Bank One because, in part, of strained relations with Bank One executives. He met with John B. McCoy ("McCoy"), Bank One's President and Chief Executive Officer, who agreed that Vague's departure was likely the better solution. Vague memorialized his intent to depart by letter of October 19, 1999.[7] It was understood that Bank One would treat his departure as a resignation "in the best interests of the Corporation."[8]

D. *The Walker-Lindsay Conversations*

McCoy had advised Vague to contact Timothy P. Moen ("Moen"), Bank One's Executive Vice President and Head of Human Relations. Vague did not recall the terms for the exercise of his options, including the Disputed Options.[9] He asked his friend and confidant, Third-Party

[7] JX 24.

[8] JX 28. Vague would be subject to restrictions on competition with the Bank and solicitation of its employees. The restrictions were imposed by his Employment Agreement and the Plan.

[9] On October 21, 1999, Vague's accountant inquired if the change in his employment status would affect his options. JX 25. Vague told him to contact Walker. JX 30.

Defendant Clinton W. Walker ("Walker"),[10] to contact Moen to acquire the necessary information.[11]

Walker promptly called Moen, but Moen was not then available. Walker's call to Moen was returned, not by Moen, but by Nancy J. Lindsay ("Lindsay"), a Bank One senior vice president and counsel providing advice to its human relations group.[12] Lindsay and Walker talked on or about October 18, 1999. Lindsay generally addressed Vague's severance benefits and promised a package of information regarding his benefits.[13] Following their conversation, Lindsay faxed to Walker three documents: the Executive Management Separation Plan, a Bank One Stock Performance Plan for Stock

[10] Walker had been general counsel for First USA; after the merger with Banc One, he became general counsel of the FUSA subsidiary. At Bank One, his position had evolved to one with responsibility for its credit card operations. He remained at Bank One for a few months after Vague's departure, but eventually joined him (in mid-January 2000) in his new venture.

[11] Although the Plan under which the Disputed Options were issued had been adopted while Vague was a director and officer of FUSA (and was approved by him), he did not serve on Bank One's board and it was possible that the terms had changed. Accordingly, he could not rely exclusively upon his personal knowledge. This contention, while accurate as far as it goes, fails to reflect that Bank One's ability to change the Plan was limited in that it could not make the terms any less favorable to the option holder. Thus, the potential changes about which Vague was worried would have acted only to have extended his exercise period.

[12] Vague emphasizes that McCoy told him to call Moen for matters regarding his separation and the related benefits. Of course, Vague did not follow McCoy's guidance. Instead, he directed Walker to contact Moen. Although there was nothing "wrong" in this approach, Moen's apparent reluctance to discuss Vague's separation with Walker was both understandable and, in light of Walker's efforts in the second conversation with Lindsay to probe the extent of Vague's non-competition obligation, prudent.

[13] Walker did not know (or at least he was not focused on) the range of options granted to Vague. He does not contend that he reminded Lindsay that Vague had options granted by several entities. In retrospect, that might have been helpful.

Option Awards, and a Bank One Stock Performance Plan for Restricted Stock Awards.[14]

Walker and Lindsay talked again on or about October 28, 1999. Lindsay, who does not deny that she talked with Walker, has no recollection of any discussion regarding Vague's options.[15] Instead, the portion of the conversation that remained with her regarded Walker's inquiry about the scope of Bank One's non-competition covenant that bound Vague.[16] Lindsay thought it peculiar that Walker would ask about that because (1) Walker was an attorney for a Bank One subsidiary and he should not be acting on Vague's behalf with respect to such a matter, and (2) Vague had told McCoy that any new venture that he might pursue after his departure would not compete with Bank One. Both Walker and Lindsay recall that Lindsay was uncomfortable with this topic and that the conversation, accordingly, was brief.

Walker, whose recollection of the conversations is concededly less than complete, did memorialize them in his notes and in an e-mail sent a few

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[14] JX 140. The stock option performance plan faxed by Lindsay to Walker on October 18, 1999, recited that an option holder who resigns in the Bank's "best interests" could exercise the Bank's options "for up to five years *or the expiration of the original grant, whichever is earlier*." (emphasis added).

[15] Tr. at 478.

[16] This covenant encompassed both competition and hiring the Bank's employees.

days later to David Eppes, Vague's accountant. His notes of the first conversation recite:

a) Nancy Lindsy [sic] . . .

"Severance – he just got a packet
will get

2 x salary
1 x average bonus – no [?]
1 x end of pay continuation
period of exercise
i) options all vest at end of pay continuation
~~ii)~~ need to get detail
ii) depends on grant
(Feb '99

he will be on payroll for a year

5 yr. vesting – he get pro rata
from time of grant to end of employment/time of grant
to end of vesting

~~a) he will have~~
a) he will do a letter of resignation
awarded tomorrow – but will be letter
resign effective – has to decide w/McCoy
b) do not need an agreement –
gets what he gets – does not have
to sign anything
c)"

His notes of the second conversation recite:

Nancy Lindsay

RWV options
treat as retiree
BO gives 3 yrs from

termination date – when he takes
lump sum or ~~1 yr of salary~~ 1 yr
after drawing of salary"[17]

The e-mail reported:

> As you know, [Vague] has been given the option of electing to take a lump sum payment or do salary continuation for one year. Either when he takes the lump sum or at the end of the year should he elect salary continuation, he will be treated as if he retired. All his options will vest and *he will have 3-5 yrs to exercise them* (depending on the specific grant).[18]

Thus, as a result of conversations with Lindsay, the message conveyed to Vague (or his representative) by Walker was that exercise of his options, including the Disputed Options, would not be necessary for a few years.[19]

Walker's notes of his first conversation do not support (nor do they necessarily undercut) the message he eventually conveyed regarding the Disputed Options. Lindsay apparently told Walker that the period of exercise "depends on grant." Nothing inaccurate can be found in that communication, especially in light of Lindsay's now obviously sage advice: "need to get detail."

[17] JX 86; JX 125; JX 126. The notes are not dated.

[18] JX 31 (emphasis added). Walker is confident that the outer limit of five years came from Lindsay even though it does not appear in his notes.

[19] Although Vague had options granted by FUSA, Banc One, and Bank One, by the time of Lindsay's conversation with Walker, they were options to acquire stock in Bank One. Whether Lindsay distinguished (in her own mind) between Bank One and FUSA options for purposes of that call is a question that cannot be resolved on this record and might not matter in any event.

Walker's notes of the second conversation recite that "BO gives three years from termination date" for the exercise of the options. "BO," of course, refers to Bank One. Lindsay's message, as recorded by Walker, however, is somewhat ambiguous. She could have meant: options granted by Bank One (*i.e.*, under the Bank One plan) had three years for exercise. Or, as apparently understood by Walker, she could have meant: any option that Bank One was bound to honor (*i.e.*, including those granted by entities that Bank One had acquired) could be exercised within a three-year period following termination of the employment relationship.[20]

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[20] Lindsay asserts that she could not have (and, thus, would not have) provided information regarding plans adopted by entities that had been acquired by Bank One because she did not have a full appreciation of the details of the more than twenty option plans under which Bank One was obligated at the time. (Tr. at 480). The Court accepts Lindsay's post-hoc reconstruction of what she likely intended. The Court, however, also accepts Walker's account of the conversation. The conclusions which he drew are understandable in light of what Lindsay told him, even though they may well not have been what she intended and they were not free of ambiguity.

Bank One chastises Walker and Vague for the risks inherent in telephone communications regarding topics such as this. As a general matter, Bank One has it right and with reason: a brief telephone conversation is a poor means of communicating such important (and easily misunderstood or miscommunicated) information. In this instance, however, Bank One's argument misses the mark. First, McCoy, Bank One's chief executive officer, told Vague to call Moen for assistance; this anticipated a telephone call. Second, Lindsay, who returned the call because she is a lawyer, is not a mere functionary. As a senior lawyer dealing extensively with human relation issues, she should have been well aware of the risk that she was running (especially since she was apparently deviating from Bank One's normal protocol) in attempting to deal with such information over the telephone. In short, the Bank cannot suggest informal communications and engage in informal communications at the upper levels of its executive structure and then complain about the foreseeable consequences. By her comments in the first conversation, Lindsay anticipated that Vague would be sent a packet with the necessary information. Perhaps she was relying upon the transmittal—which, as will be seen, was never sent—to provide any necessary detail or clarification.

E. *Bank One Develops the Relevant Information*

During the days between the Walker-Lindsay conversations, Bank One was developing the information regarding Vague which it normally provided to departing executives.[21] Two internal summaries were prepared. One addressed the compensation that Vague would receive on account of his departure.[22] The other summary—now referred to as the "October 21 Option Summary"—set forth Vague's rights under the numerous option grants he had received.[23] It assumed, presumably for want of a precise date, a termination date of December 30, 1999, and a retirement date of January 1, 2000, with the consequence that it showed the Disputed Options having an expiration date of June 30, 2000. A separate notation under the heading of "Terms and Conditions" was: "100% vest[ed], exercise for six months."[24] Summaries of this nature would typically be given to Lindsay, who would then draft a letter for Moen's signature that would transmit the summaries

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[21] Lindsay explained that it was difficult to obtain the necessary information regarding Vague's rights from his years at FUSA. (Tr. at 501-02). The record does not demonstrate that any such difficulties materially impaired Bank One's capacity to develop the appropriate information in a reasonable time.

[22] JX 26. Vague had the choice of a salary continuation program or a lump-sum payment. When he did not inform Bank One of his choice, he received salary continuation by default.

[23] JX 27. It bears a caption of "Outstanding Stock Awards."

[24] *Id.* It also recited that "[a]ll grants have a non-compete provision," a notation that summaries for other departing executives did not contain (Tr. at 592). This suggests that Bank One was even then concerned about Vague's potential for violating his non-compete covenant.

and provide other information to exiting executives. Lindsay—for reasons that are not altogether clear—never received the October 21 Option Summary.[25] Moreover, it was never transmitted to Vague. Moen, in a letter, dated October 25, 1999, authored by Lindsay, advised Vague that he would be receiving "a package within the next several days that summarizes [Vague's] entitlements under the various stock and benefit plans."[26] The only transmittal accompanying this letter was the Separation Plan which had been faxed to Walker a few days earlier.

F. *The December Summary*

In early January 2000, FCT/EquiServe, Inc. ("EquiServe"), Bank One's then recently retained benefits coordinator, forwarded to Vague an Option and Award Summary as of December 30, 1999 (the "December Summary").[27] It showed the exercise dates for the Disputed Options: the exercise date for the 1995 options was July 19, 2005 and the exercise date for the 1996 options was July 17, 2006. Those dates were both likely incorrect because, by then, Vague had taken leave from the Bank. He could have remained under the salary continuation program for up to one year. If he remained on leave for the entire year, his options would then have

[25] Tr. at 586.
[26] JX 28.
[27] JX 43.

become exercisable for six months following the end of that year. Thus, unless the highly unlikely event of his return to (or continuing with) Bank One occurred, the latest possible expiration date for the Disputed Options would have been in April or May 2001.[28] On the other hand, at least one of the exercise dates was inconsistent with the information Walker had obtained. Walker believed that the exercise dates would, depending upon the grant, be in the range of between 3 and 5 years following termination. Assuming expiration of the salary continuation program at the latest possible date—October or November 2000—that would leave October or November 2005 as the outside date, a date not consistent with the information shown by the December Summary for the 1996 options.

The December Summary, however, clearly informed the reader that:

> Although the foregoing information, provided as a convenience to the Option Holder, is believed to be true and accurate as of the date set forth above, to the extent that the foregoing may differ from the actual award status, such actual award status and the underlying Award Agreement(s), Summary Terms and Conditions, and Plan documents will control. *It is specifically noted that if employment termination has occurred recently and prior to the date set forth above, certain Awards may have been terminated or the periods of exercise modified, which matters may not be reflected above.*[29]

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[28] Vague resigned on October 19, 1999. There is some debate as to whether it was not effective for thirty days. With a projected year of salary continuation and the six months for option exercise, the most favorable exercise date from Vague's perspective would have been either April or May 2001.
[29] JX 43 (emphasis added).

Thus, a reasonable reading of the December Summary would have led a recently separated employee, such as Vague, to view the expiration dates with, at least, skepticism. Specifically, the departing employee was warned that recent employment termination might have modified the periods of option exercise set forth in the summary.

G. *The Relationship Between Bank One and Vague Continues to Deteriorate*

By January 2000, the relationship between Vague and his Bank One colleagues, one that had suffered tension even before his departure, had deteriorated further because of Bank One's ongoing concerns that he was in the process of starting a competing business.[30] On January 12, 2000, Vague notified Bank One (through its FUSA operations) that he had accepted other employment, effective January 14, 2000.[31] By letter of January 27, 2000,[32] Moen again requested that Vague confirm his compliance with the non-competition agreement, including his commitment not to solicit any of Bank

[30] By letter of November 23, 1999 (JX 37), Vague told McCoy of his plans to develop an "internet" bank. Vague remembered that McCoy had encouraged such a venture; McCoy denied encouraging him to do so. On December 6, 1999, McCoy sent Vague a letter reminding him of his non-competition obligation. JX 40. McCoy requested written assurances of Vague's intentions to comply with those restrictions. His letter ended with "We will await the requested information." Vague did not timely respond.
[31] JX 45.
[32] JX 48.

One's (or its FUSA subsidiary's) employees.[33] Moen informed Vague that, until it received a response to McCoy's letter of December 6, 1999, Bank One would not "process the various payments that might be due to [Vague] upon termination of [his] pay continuation . . . ."[34] On February 9, 2000, Bank One, without telling Vague, froze his options (*i.e.*, it gave instructions to EquiServe not to honor any effort to exercise them).[35] Bank One did this because of its views that any breach by Vague of his covenant not to compete would jeopardize his option rights. By mid-March 2000, however, Bank One and Vague had resolved their differences through an agreement which, in substance, reflected the parties' release of claims related to the non-competition agreement and restricted Vague and his new venture from soliciting certain additional Bank One (FUSA) employees.[36] Thus, on March 29, 2000, the freeze on the exercise of his options was lifted.[37] Because Vague had taken other employment, his anticipated year of salary continuation was cut short. The Bank established his "retirement" date as February 21, 2000, but never directly informed him of that decision.

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[33] On or about January 19, 2000, Walker agreed to become General Counsel of Vague's new venture. In November 1999, he had retained counsel to explore the potential consequences of leaving Bank One. JX 39. His employment agreement specifically addressed the potential for litigation by Bank One to restrict his ability to work for that new venture. JX 46.

[34] JX 48.

[35] JX 51.

[36] JX 56.

[37] JX 57.

H. *No Benefits Package is Ever Sent*

Lindsay was aware that Vague had not been given the benefits package that had been promised to him and that was typically given to other departing executives. That package would have contained information regarding arrangement of employee benefits, ranging from extended health care to pension benefits to salary continuation programs to exercise of options. Lindsay decided that since most of the benefits covered by the package had already been provided to Vague, there was no need to send one.[38] Thus, Vague never received the benefit of one source of additional information regarding the exercise of his options that had been promised to him and that he had reason to expect.[39]

If Vague, however, had expected to receive the package, the question becomes one of why did he not inquire further after he had not received it. His recollection is that he thought the EquiServe transmittal of early January 2000 was the package (or part of it). That may be what he believed, but if that is accurate, then his belief was not a reasonable one because the December Summary only addressed option rights when it should have been clear to Vague that he was to receive a comprehensive document addressing

[38] Tr. at 503.

[39] At some point, probably late February or March 2000, the Bank prepared another summary (JX 132), similar to the October Option Summary. It showed "as of February 21, 2000," the expiration date as August 21, 2000, and continued to note that "[a]ll awards are subject to . . . applicable restrictive covenants."

the numerous and valuable rights that arose from his separation from Bank One.[40]

I. *The March and June Summaries and Vague's Choice Not to Read Them*

At the end of March 2000 (or in early April), EquiServe sent Vague another quarterly Option and Award Summary (the "March Summary").[41] This time, because it was after Vague's separation date had been established, the correct expiration date for the Disputed Options, August 21, 2000, was

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[40] There are, obviously, two related "facts" that established the expiration date of the Disputed Options. The first is how long an option holder would have after termination (*i.e.*, retirement) to exercise the options. The second is the effective date of such termination. Until January or February 2000, the effective date of Vague's termination was unknowable. The six-month exercise period, however, was known and had not changed since it was adopted, with Vague's participation, by FUSA.

The Bank argues that Vague, in accordance with the Stock Option Exercise Guide (JX 21) (the "Guide"), provided to him shortly before his decision to leave the Bank, could have contacted EquiServe directly to find out the necessary information. The Guide contains a series of questions and answers regarding stock options exercise procedures, one of which reads as follows:

> 3.) If I have a question regarding the stock exercise process, who should I call?
> Contact FCT/EquiServe at 1-(877) ONE STOCK. They offer 24-hour access to information about your options.

Id. at 14. Vague responds that any contact before March (or perhaps late February) 2000 would not have yielded accurate information.

As to the actual expiration date of the Disputed Options, that would have been true. There is, however, no reason to believe that, if asked, EquiServe could not (or would not) have provided accurate information regarding the six-month exercise period for the Disputed Options under FUSA's 1991 plan. On the other hand, no witness from EquiServe testified and, thus, there is no direct proof of the extent of EquiServe's knowledge.

[41] JX 59.

clearly set forth.[42] Also, at the end of June (or in early July), another quarterly Option and Award Summary (the "June Summary") was sent to Vague. That one, as well, clearly provided the expiration date (August 21, 2000) for the Disputed Options on the first page. Vague, however, read neither of these transmittals from EquiServe. Instead, he forwarded them to his accountant.

There is an explanation for why Vague did not read the March and June Summaries. Vague had retained David Eppes ("Eppes") of Falcidian LLC as his accountant. Eppes' practice focused on "high net worth clients and helping them to keep track of their financial affairs and their tax obligations" and "relieving them of a lot of the burdens of what [Falcidian called] mundane financial tasks."[43] Falcidian also provided "family office services" which included paying household bills and handling payroll for household employees.[44] One of Falcidian's tasks for Vague was the preparation of quarterly fair market value financial statements.[45] In the

[42] The March Summary also set forth Vague's retirement (or termination) date of February 21, 2000. The expiration dates for certain other options (not at issue here) were not correct. Tr. at 668-69. Although that may adversely affect the confidence one should have in the accuracy of the summaries, the March Summary provided notice to Vague (or would have provided notice if Vague had read it) that his understanding of the exercise dates was incorrect.

[43] Eppes Dep. I at 27, 36. Eppes did not testify at trial.

[44] *Id*. at 32.

[45] *Id*. at 48-50.

process, Falcidian used the option summaries prepared by or for Bank One.[46] From the option summaries, Falcidian "update[d] and maintain[ed] a spreadsheet . . . that [it] used to summarize his option positions."[47] When the quarterly option summaries were received, they became part of Falcidian's work papers.[48] Falcidian received both the March Summary and the June Summary but failed to notice the expiration dates that had been established as the result of the termination of Vague's relationship with Bank One.[49] As a result, Vague's personal financial statements, prepared by Falcidian for the first and second quarters of 2000, did not accurately reflect the expiration dates of the Disputed Options.[50]

J. *Vague Misses the Exercise Date*

Vague believed that he had a couple of years—not six months running from February 2000—to exercise the Disputed Options. Thus, August 21, 2000, the expiration date for the Disputed Options, came and went without Vague's ever exercising them. Vague, either by borrowing the necessary

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[46] *Id.* at 50-51.
[47] *Id.* at 53-54; *see also id.* at 36.
[48] *Id.* at 67-68.
[49] *Id.* at 138-39; 169-70.
[50] Vague maintains that he did not read the summaries because he already knew his rights based on previous communications from Bank One or its agents. Vague may have already drawn his conclusions—justifiably or not—but that is not why he did not read the summaries. He did not review them because he had delegated that function to Falcidian. Indeed, he did not simply throw the summaries away.

funds or utilizing a so-called "cashless" feature, could have exercised the Disputed Options and would have exercised them.[51]

Falcidian did note, however, on review of the Option and Award Summary, as of September 29, 2000 (the "September Summary"),[52] that the expiration date was shown as August 21, 2000.[53] Eventually, Falcidian retraced its steps and realized that it had failed to react appropriately to the information in the March Summary and the June Summary (both of which it found in its files).[54]

Following its review of the September Summary and recognizing that the date shown for expiration of the Disputed Options had gone by, Eppes informed Vague. Vague's initial response was that it would not be a problem.[55] Vague's initial optimism turned out to be unwarranted.

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[51] Vague was waiting, for tax reasons, until after 2000 to exercise the Disputed Options.

[52] JX 67. The form of the September Summary was the same as that of both the March Summary and the June Summary.

[53] Eppes Dep. I at 87-88.

[54] *Id*. at 91. Although Eppes worked with Walker in the fall of 1999 regarding Vague's options and received information from Walker indicating that Vague would have three years to exercise the options, the information prepared by Falcidian does not reflect that input (*id.* at 155-56); instead, as conceded by Eppes, Falcidian used the option summaries provided on behalf of Bank One and, unfortunately, did not use them accurately.

[55] *Id*. at 89.

When Vague formally sought to exercise the Disputed Options on or about June 28, 2001,[56] Bank One rejected that effort as untimely.[57]

II. CONTENTIONS

Vague seeks an order compelling Bank One to honor Vague's efforts in June 2001 to exercise the Disputed Options. He invokes concepts of both negligent and innocent misrepresentation, perhaps enhanced with some suggestion that Bank One may have acted with the hope that Vague would lose his rights. His claim starts with misrepresentations by the Bank regarding the Disputed Options, continues with reasonable reliance, and concludes with the absence of adequate efforts by the Bank to inform him of the correct exercise date. He contends that his failure to review either of the March or June Summaries was not unreasonable under the circumstances. Finally, he seeks to bolster his position by comparing the relative fault of the

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[56] JX 94. Earlier efforts to resolve the dispute, *e.g.*, JX 73, had failed, and this action had been commenced on March 19, 2001. JX 89.

[57] JX 96. These are the salient facts. As to the testimony in general, there are instances of either no recall or fuzzy recall by the various actors that leave the Court with some questions as to what actually transpired. The Court is satisfied that the witnesses testified as to the truth as they understood it and recalled it, but the witnesses are very busy people with substantial responsibilities and, as sometimes happens, the events which are significant for purposes of this case were, at least for the most part, of relatively minor importance when they occurred.

Vague, to some extent, seeks to attribute the conduct of Bank One to, if not malice, then hostility between him and Bank One executives. Tensions existed, but there was no action by Bank One taken for the purpose of depriving Vague of the opportunity to exercise his option rights (other than the freeze which was lifted in March 2000) or even with the hope that he would, somehow, miss the exercise date.

parties. In his view, equitable relief is necessary and appropriate to protect him from the failure of the Bank to meet the standards of conduct to which he was entitled (and which could reasonably have been expected).

The Bank, in turn, contests whether any misrepresentation occurred and argues that Vague neither did rely nor could have continued to rely upon any misrepresentation. The March and June Summaries, which he could have easily read but chose not to read, would have provided him with all of the information about which he now complains. It also contends that there is no proof that Vague ever executed the 1996 option agreement and, therefore, any options under that grant have been lost.[58] Finally, the Bank argues that Vague failed to prove that Lindsay intended to induce him to rely upon what she told Walker during their conversations.

In addition, the Bank (together with its subsidiary, First USA Bank, N.A.) has asserted, that if it is held liable to Vague, it is entitled to indemnification from Walker. The Bank argues that, if it is held liable, it could only be as the consequence of Walker's failure to act reasonably and competently as an employee of the Bank or its subsidiary.

[58] This contention has been rejected, as discussed *supra*.

III. ANALYSIS

A. *As a Matter of Contract, Vague's Effort to Exercise the Disputed Options was Untimely*

Vague's rights to the Disputed Options are determined, in the first instance, as a matter of contract. The right to exercise the options was conditioned upon his exercise by a certain date, which in this case turned out to be August 21, 2000. The parties do not dispute the expiration date. It is also undisputed that Vague did not exercise (or attempt to exercise) the Disputed Options on or before that date. Thus, for Vague to prevail here in his efforts to obtain the benefit of the Disputed Options, he must find a path around the unambiguous terms of the Plan and the agreements governing the Disputed Options.

B. *Vague Relies Upon Principles of Negligent and Innocent Misrepresentation*

Vague acknowledges that he must demonstrate "that Bank One provided him false information and that he justifiably relied on the false information, thereby suffering damage."[59] Vague devotes little effort to differentiating between negligent misrepresentation and innocent misrepresentation. The principles governing this Court's equitable jurisdiction over claims of misrepresentation have been aptly summarized:

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[59] Vague's Opening Post-Trial Br. at 25 (quoting *Vague v. Bank One Corp.*, 2004 WL 1202043 (ORDER), 850 A.2d 303 (Del. 2004) (TABLE).

> Common law fraud in Delaware requires that: (1) a false representation, usually one of fact, made by the defendant, exists; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance. In addition to overt representations, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak. To state a claim for equitable fraud under Delaware law, a plaintiff must satisfy all the elements of common law fraud with the exception that the plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly. However, equitable fraud does not swallow common law fraud because it can only be applied in those cases in which one of the two fundamental sources of equity jurisdiction exists: (1) an equitable right founded upon a special relationship over which equity takes jurisdiction, or (2) where equity affords a special remedy (e.g. rescission or cancellation).[60]

Vague's efforts present three principal questions: (1) did Bank One misrepresent the exercise date(s) for the Disputed Options; (2) did Vague reasonably rely upon those misrepresentations, if any, and reasonably continue to rely upon them until it was no longer feasible to exercise the

[60] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 628-29 (Del. Ch. 2005) (citations omitted); *see also Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *9 (Del. Ch. Dec. 20, 2005) ("To successfully assert a claim for negligent misrepresentation, plaintiff must adequately plead: (1) the defendant had a pecuniary duty to provide accurate information; (2) the defendant supplied false information; (3) the defendant failed to exercise reasonable care in obtaining or communicating the information; and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information.").

Bank One argues—and I need not decide—that this dispute is governed by the law of Illinois, the situs of Bank One's headquarters, and that Illinois law does not accept notions of negligent misrepresentation in the employment context.

Disputed Options; and (3) do the "equities" of this case allow, or require, the Court to grant relief to Vague from the hardships resulting from the uncertainty or misapprehension about the exercise date for the Disputed Options for which Bank One is, at least in part, to blame?[61]

C. *Vague Identifies Three Misrepresentations*

1. <u>The Walker-Lindsay Conversation</u>

Walker inaccurately informed Eppes and Vague that all of Vague's options through Bank One would vest in three to five years following his

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[61] The proponent of a claim for negligent misrepresentation must prove that the defendant had "pecuniary duty" to provide correct information. Although framed as the defendant's "pecuniary duty," the question is whether the defendant owed the plaintiff "a particular duty to provide accurate information, based on the plaintiff's pecuniary interest in that information . . . ." *H.M. Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 147 n.44 (Del. Ch. 2003). The Bank knew—or can reasonably be charged with the obligation to have known—that the expiration dates had potentially serious consequences for Vague's "pecuniary interest." The Bank (Lindsay, in particular) knew that Walker was searching for information about the expiration dates to assist Vague with his decision as to when to exercise his options. The Bank, thus, knew that Vague would be relying upon the information which it provided. Whether other information was available that would undercut the reasonableness of Vague's reliance on the brief and informal second conversation between Walker and Lindsay is a different question. Moreover, the full relationship between the Bank and Vague, one based on employment contract, the Bank's commitment to help in arranging an orderly departure, and the special assistance routinely provided by the Bank to senior executives, precludes, in equity, any effort by the Bank to avoid responsibility for any misrepresentations simply by claiming that Walker had not expressly informed Lindsay that Vague would be relying on the fruits of his conversation. Moreover, the Bank, as "[o]ne who, in the course of [its] business" provided information "for the guidance of others in their business transactions" had a pecuniary duty to provide information to Vague with reasonable care. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977); *Glosser v. Cellcor Inc.*, 1994 WL 593929, at *21 - *22 (Del. Ch. Sept. 2, 1994). Vague's efforts to exercise the Disputed Options would qualify as a business transaction within the meaning of the Restatement.

retirement. That statement was inaccurate. Although it is less than clear,[62] the better inference from the factual record before the Court is that Walker competently conveyed the information that Lindsay gave him in their second conversation even though Lindsay may not have intended her comments to reach options granted by FUSA.[63] Thus, Lindsay's statement during the

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[62] The second Lindsay-Walker conversation presents the Court with a fact-finding challenge. Neither participant has any reliable, comprehensive present-recollection. Walker's notes, because he had no reason to be inaccurate, tilt the balance in Vague's favor. It is, however, a conclusion that is not free of doubt. First, the second conversation was, by all accounts, brief, and Lindsay, for good reason, was taken aback by Walker's efforts on behalf of Vague with respect to Vague's non-competition obligation. Curiously, Walker's notes do not reflect this aspect of their conversation. Second, Lindsay's explanation that she would not have given a blanket statement regarding the expiration date of the various option programs obligating the Bank is entirely believable. The better conclusion, although not by much, is that Walker asked an imprecise (or inherently ambiguous) question and Lindsay, without fully appreciating the scope of the question as asked, answered it truthfully as she understood it but, unfortunately, incorrectly in light of the breadth of Walker's inquiry and without the benefit of any review of the appropriate records. That such a critical aspect of this action is shrouded in informal conversational haze may be unfortunate, but, in the overall context, it refutes the contention by Vague that Lindsay was seeking to mislead him or otherwise was acting deviously. It also makes more difficult the Court's later inquiry into the sufficiency of the accurate information that the Bank's agent would provide Vague. Because Lindsay (and, thus, the Bank) was not even aware that she may have provided inaccurate information, it is not clear how the Bank could have known to take any additional steps to provide the more "conspicuous" information to Vague that he now maintains was the Bank's duty.

[63] An underlying question throughout this litigation involves whether Walker, with respect to the events in question, was working for Bank One or for Vague. Walker contacted Moen (and talked to Lindsay) at Vague's behest. Given the relationship between Vague and Walker, any misrepresentation involving the Lindsay-Walker conversations must be measured at that point and not as Walker conveyed the information to either Eppes or Vague. Although employed by Bank One, Walker was acting under the direction of, and for the benefit of, Vague in pursuing not only information about the exercise date for options, but also in seeking to define better the scope of Vague's non-competition obligations.

The Court need not, and, thus, does not, determine if Walker was acting as Vague's attorney in this context. He was definitely acting on Vague's behalf—that is evidenced most clearly by his discussions with Lindsay regarding the scope of Vague's non-

second telephone conversation with Walker was a misrepresentation of fact, albeit an unintentional one.

2. Moen's Promise of an Information Package Explaining His Rights

The second misrepresentation cited by Vague is the promise set forth in Moen's October 25 letter to provide a packet of information regarding his employment benefits, including information about the exercise of his options. Vague has failed to prove that Moen's statement was untrue when it was made. To the contrary, it was Moen's intent and expectation at that time to forward the packet to Vague. Bank One's concerns about Vague's potential competitive conduct (a concern that also probably existed to some extent at the time of Moen's letter) intervened. Whether that constitutes justification for withholding the information is, of course, not the question; the existence of the competitive concerns provides a plausible reason as to why the packet was not sent at that time.

3. EquiServe's December Summary

The December Summary can hardly be characterized as a misrepresentation either. It is not that the expiration dates for the Disputed

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competition obligation—something more than a mere factual inquiry. Indeed, Vague comes close (if he does not arrive there) to conceding that Walker was acting as an attorney for his benefit. Vague's Op. Post-Trial Br. at 13 ("Vague was concerned about the complexity of the Plans and related agreements . . . [and] therefore asked Walker [to contact Moen].").

Options were accurate in all possibilities (they likely were not), but, instead, any expiration date was likely to be inaccurate at the time. Vague—at last with the benefit of available hindsight—was not about to remain without another job longer than the year of salary continuation. Thus, the expiration dates for the Disputed Options, as shown on the summary, were not likely to be correct. On the other hand, Vague, as of December 2000, remained on the payroll and, technically, the expiration dates would not change until he left the Bank's employment. In that sense, the December Summary was accurate. The most likely date—one year plus six months from his resignation in October 1999—could have been used, but would also have turned out to be wrong because Vague took other employment in the interim. Thus, as of December 1999, no date for expiration of the Disputed Options could have been predicted with any confidence. The only correct insertions in the column under expiration date for the Disputed Options would have been "unknown," "to be determined," or the equivalent. In short, as of December 2000, there was sufficient uncertainty as to when the options would expire—uncertainty that was partly the product of Vague's own actions. Bank One (or EquiServe) addressed that uncertainty, which to some extent would be present in any executive's departure, with a note to the effect that if one's employment status had recently changed, care should be

taken before relying upon the information set forth in the summary.[64] Thus, the expiration dates given for the Disputed Options in the December Summary, while they turned out ultimately not to be accurate, do not qualify as misrepresentations.[65]

D. *Justifiable Reliance*

It is Vague's burden to prove by a preponderance of the evidence that his reliance upon the Bank's misrepresentation(s) was (and continued to be) reasonable. The inquiry requires consideration of the information known to him (or that would have been known to him if he had acted reasonably).

1. As of the Time of the Misrepresentation(s)

a. *The Walker-Lindsay Conversation*

Vague's reliance on the information garnered by Walker was reasonable, but barely so. The Walker-Lindsay conversation was brief; expecting Lindsay to know the terms of the FUSA plan was optimistic. Walker did not confirm with Lindsay the information he understood that she had provided. Nonetheless, the source of the information was a high-

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[64] The disclaimer is significant not only as to the question of whether there was a misrepresentation, but also as to the question of whether reliance was reasonable under the circumstances.

[65] The December Summary was not inconsistent with Vague's understanding, gained from the second Lindsay/Walker conversation, that the exercise of the Disputed Options was not a near term event. To that extent, the December Summary may be viewed as reinforcing Vague's misperceptions (even if it did not contain misrepresentations as such).

ranking Bank One officer and lawyer responsible for human relations matters.[66]

b. *The Promise of a Package*

If one assumes that the Bank misrepresented material facts to Vague with its promise of a package replete with severance information, Vague's reliance on those promises, when they were made, would have been reasonable. The promise was in writing; it was the Bank's standard practice; and the promise was from multiple sources.

c. *The December Summary*

Vague's reliance on the expiration dates for the Disputed Options set forth in the December Summary was unreasonable under the circumstances. A specific disclaimer informed the option holder that changes in employment status could render the information inaccurate. At approximately the time when he received the December Summary, Vague was only a few days shy of submitting his notice of taking employment with

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[66] The Bank, citing, if not venerable, then old authority, invokes the principle that one is charged with knowledge of the terms of one's written contracts. *N. Assurance Co. of London v. Grand View Bldg. Ass'n*, 183 U.S. 308, 337 (1902). Putting aside the questions of whether it is reasonable for employees to remember in detail (and fully understand) the requirements of employee benefit or stock option plans and whether such a view would allow an employer to refuse to respond to inquiries from its employees regarding such agreements, the simple answer is that the Bank, in this instance, could have unilaterally (although only favorably from Vague's perspective) changed certain terms governing the Disputed Options.

another entity; he had only a few months earlier taken leave from the Bank.[67] His evolving status presents a compelling example of why such a disclaimer is used (and must be given heed).[68]

2. On a Continuing Basis

This case ultimately is not about whether Vague's reliance was reasonable at the time certain information was reported to him.[69] Instead, it depends upon how one assesses the accurate information which Bank One, through its agent, EquiServe, provided Vague on two occasions, both of which afforded him ample opportunity to exercise the Disputed Options.

The March and June Summaries clearly, unambiguously, and accurately set forth the expiration date for the Disputed Options. The

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[67] Lindsay (Tr. at 631) testified that Vague could have relied on the December Summary when it was received. Vague seeks to gain too much from that testimony. The December Summary, only if one factors in the disclaimer warning of the potential consequences of any changes in employment status, could be relied upon as a complete document.

[68] In addition, and this is entitled to only minimal weight, some of the exercise dates shown on the December Summary were beyond the "three to five years" reported by Walker, thus providing another basis for questioning the reliability of the information provided.

[69] Vague contends that after receipt of Lindsay's communications regarding the expiration dates, as confirmed by the December Summary, he was under no duty to continue to investigate the question of when the Disputed Options would expire. He may be correct in that argument, but a continuing duty to investigate is very different from the reasonable and prudent act of reading one's mail. That Vague may have been under no duty to investigate does not allow him to ignore information reaching him in the normal course of events. Perhaps there are instances when critical information has been provided with such formality and certainty that it is reasonable to consider the "case closed." The nature of the Lindsay-Walker conversation and the other circumstances here do not allow such confidence to be held reasonably.

information was readily accessible; the reader did not need to dig through any notable quantity of extraneous data or text.[70]

Vague did not read or look at the March Summary or the June Summary. He did not even open the envelopes in which they arrived. He simply sent them on to Falcidian. Because of Vague's failure to read his mail, it will never be known if, had he read either of the summaries, he would have acquired an understanding that the time for exercise of the Disputed Options was short. The better inference, however, because of the direct presentation of the important information in the March and June Summaries, is that he would have gained the critical information on a reasonable review (and likely on the most cursory of reviews)—not a searching and pain-staking scrutiny—of the documents.[71]

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[70] Vague acknowledges that, if he had read the March Summary or the June Summary, he would have received sufficient notice to investigate further the status of the Disputed Options and their expiration date.

> Q. [by Mr. Saunders]: If you had read either the March quarterly option summary or the June quarterly option summary, if you had read either of them, you would have seen the August 21st, 2000, expiration date, and you would have followed up with some inquiry or investigation at that point; correct?
>
> A. [Mr. Vague]: That's probably right, absolutely.

Tr. at 143.

Thus, Vague, as a factual matter, has conceded that the March and June Summaries would have been sufficient to render unreasonable his continuing reliance if he had bothered to read either of them. The question, thus, becomes one of whether Vague was justified in not reading the March and June Summaries because of the quality and nature of the information regarding the expiration date of the Disputed Options which had been previously provided to him by the Bank.

[71] *See also* note 70, *supra*.

One could take the view that Vague should have read his mail; he did not read his mail; the consequences of that choice are for him to suffer. It may not be that simple, however. Two related arguments must also be considered: (1) that the information provided to Vague by Bank One justified that level of confidence in the wrong information which he had acquired such that it was reasonable for him to ignore any subsequent routine transmittals from Bank One (or its agents); and (2) that, in light of the inaccurate information previously provided by Bank One, a more conspicuous method of conveying the correct information was required in order to dispel the misapprehension as to the expiration dates of the Disputed Options that Bank One may have created.

The information which Vague obtained from Walker was, as set forth above, the product of a short and informal telephone call, which addressed as its primary topic Vague's obligations under his non-competition agreement. The information was not provided in writing; it was not provided with any formality.[72] These questions involve an assessment of reasonableness and context. Vague, following his discussions with Walker, may have formed a reasonable opinion as to when the Disputed Options would expire, but he should not have (and could not have reasonably) drawn

[72] Indeed, the source of the information—Lindsay—harbors serious doubts as to whether she even provided the information as Walker asserts.

his conclusions with such confidence that he could ignore any subsequent transmittals from the Bank or its agents.[73] In short, however one views the various communications from Bank One regarding Vague's options, there was nothing about any of them (or all of them collectively)[74] that would support a decision not to bother reading subsequent transmittals.

Similarly, the March and June Summaries were sufficient to clear up any misapprehension that Vague may have had. They were simple, and they were clear.[75] No undue burden was involved in extracting the necessary

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[73] For example, if, after Vague's formal departure had been established, Moen or Lindsay had sent him a detailed description of his benefits in writing and had informed him of the specific dates for the exercise of his options, then his reliance might have been reasonable, even on an ongoing basis and in the face of the March and June Summaries. This, of course, did not occur.

[74] The information available to Vague before his receipt of the March Summary never rose to a level sufficient to engender such confidence that he could reasonably ignore subsequent information provided to him—if such is ever possible. *Cf. In re Ledford*, 970 F.2d 1556, 1560 (6th Cir. 1992) ("Whether a creditor's reliance was reasonable is a factual determination to be made in light of the totality of the circumstances."). Even the most optimistic view of Walker's second informal (and ambiguous) conversation with Lindsay, in concert with the December Summary and its explicit disclaimer with respect to the precise situation in which Vague then found himself, could not reasonably merit a person's shutting his eyes and ears to subsequent communications (especially when those communications are so easily understood). Moreover, even assuming, *arguendo*, that the above could be said to have provided Vague with a high level of confidence, analysis of the totality of the circumstances requires the consideration of the conspicuous absence of the promised package, another factor undermining the reasonableness of Vague's decision to exclude further communications.

[75] Vague correctly points to instances when merely providing accurate information will not be sufficient to "cure" prior false statements. *See, e.g.*, *In re Digi Int'l, Inc. Sec. Litig.*, 6 F. Supp. 2d 1089, 1102 (D. Minn. 1998) (federal securities decision observing that any "corrective disclosures" must "counterbalance the misleading effect of [the] earlier statements" (citing *Marksmen Partners, L.P. v. Chantal Pharmaceutical Corp.*, 927 F. Supp. 1297, 1306 (C.D. Cal. 1996))), *aff'd*, 14 Fed. App'x 714 (8th Cir. 2001); *Rohm & Haas Co. v. Crystal Chem. Co.*, 722 F.2d 1556, 1572 (Fed. Cir. 1983) (in patent law context, the "cure" of misrepresentations in prosecution of patent must be shown "by

information. It follows that, the May and June Summaries, after their receipt by Vague, caused the end of any justifiable reliance that he might have had with respect to any of the information that had previously been supplied to him.[76] In summary, because Vague has not proved that his continued reliance on the Bank's representation was justified, his misrepresentation (or equitable fraud) claim fails.[77]

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clear, unequivocal, and convincing evidence"). *But see Marksmen Partners, L.P.*, 927 F. Supp. at 1306 ("If both the "true" and the "false" information are transmitted to the market with "roughly equal intensity and credibility," then the market will be presumed to have received complete and accurate information." (citing *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114 (9th Cir. 1989))). The inquiry into the sufficiency of such subsequent disclosures, perhaps a necessarily imprecise one, is contextual and involves an assessment of the reasonable likelihood that the "correct" information will be revealed to its intended recipient in a fashion that the recipient can reasonably be expected to acquire the accurate information. A duty to provide "conspicuous" notice of accurate information in order to dispel a misapprehension attributed to a party is not likely to arise when the recipient could reasonably appreciate receipt of accurate information without prominent identification.

[76] With respect to Moen's promise of a package of materials detailing his benefits, it is not clear how reliance on that promise helps Vague. Vague may have expected it, and he may, for some period of time, have conducted no additional inquiries because he assumed that the full information would be forthcoming. Vague's complaint, however, is not about any inducement to delay exercise for a few months beginning in October 1999. By the end of 1999, or at least shortly into 2000, when he had not received the packet, he could have inquired about it. He did not. Thus, the absence of the packet must not have caused him any concern. Moreover, the notion that the December Summary, provided by EquiServe, was the packet that Moen had promised makes little sense when the December Summary's listing of options is all that is provided and there is no information about the multitude of other benefits that Vague received (or was to receive) as the result of his separation from Bank One. In any event, at some point, any reliance upon the promise that a packet would be provided became unreasonable simply because it had not been provided. That point was certainly no later than January or February 2000. If anything, the absence of the packet should have suggested that further inquiry was appropriate, not only for information regarding options but also for information regarding other benefits.

[77] The Bank argues that Vague failed to prove one of the key elements of a misrepresentation claim: damages. Vague did not prove the amount of the damages that

E. *Application of Other Equitable Principles*[78]

Vague also seeks to apply equitable concepts—beyond negligent misrepresentation or perhaps even innocent misrepresentation—to secure relief.[79] In one such effort, Vague argues that the Court should find a fiduciary relationship between Vague and Bank One.

Imposing general fiduciary duties on relationships, governed by employment contracts, benefit plans, and an extensive collection of case law,

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he suffered—no proof was offered of the price of a share of the Bank's stock. There is, however, evidence that the Disputed Options were "in the money" and that is sufficient to demonstrate that some damage was suffered. Thus, the principal shortcoming in Vague's proof is not that he failed to prove that his failure to exercise the Disputed Options caused him damage; instead, it is that he was unable to demonstrate that his failure to exercise the Disputed Options was the product of his justified reliance on misrepresentations from the Bank.

[78] The Bank, in its Answering Post-Trial Br. at 51-54, in the context of questioning how the Court could formulate any remedy, raises an indirect challenge to the Court's jurisdiction. In light of the Court's assessment of the merits of Vague's claim, detailed consideration of this issue is not warranted. Briefly, the Court's traditional equitable jurisdiction encompasses actions seeking to vindicate equitable rights and actions to achieve equitable remedies. Vague has asserted equitable claims—negligent and innocent misrepresentation—sufficient to confer subject matter jurisdiction even if his claims could be remedied by an award of money damages. *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2-3[b], at 2-30 to -32 (2005). He also pursues specific performance, a traditional equitable remedy, of the option agreements—indeed, in the pretrial order, that is the only relief identified. Pretrial Order, Part IV at § A(1). Perhaps, even if Vague were to prevail on the merits, specific performance would not be available, but that is a question that the Court need not resolve. In any event, if Vague had prevailed on the merits of an equitable claim or had demonstrated entitlement to an equitable remedy, a remedy could have been formulated. *See, e.g.*, *Collins v. Am. Int'l Group, Inc.*, 1998 WL 227889 (Del. Ch. Apr. 29, 1998), *aff'd*, 719 A.2d 947 (Del. 1998) (TABLE).

[79] Any claim grounded in misrepresentation must be supported by a showing of reasonable reliance on the misrepresentations. *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 156 (Del. Ch. 2004). As set forth above, Vague's continuing reliance on any misrepresentation by the Bank (or its representatives or agents) was not reasonable.

is a step that requires caution.[80] McCoy told Moen to take care of Vague and to assist him in acquiring the benefits to which he was entitled as a result of his separation from the Bank. That does not establish a fiduciary relationship. Indeed, it is normal (or so one would hope) for an employer to provide an employee (regardless of his status in the corporate hierarchy) with the information useful or necessary for his departure. Simply charging an individual with responsibility to meet such a commitment does not create a fiduciary relationship.[81] The characterization of Vague's relationship with the Bank is not critical to the outcome. If the Bank has a greater duty to Vague, Vague may be relatively more justified in relying on what the Bank tells him. Even if he was somehow "more justified" in relying on the second

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[80] *See, e.g.*, *Wal-Mart Stores, Inc.*, 872 A.2d at 625. Fiduciary relationships are traditionally understood to "include those arising from express and implied trusts, corporations, general partnerships, limited partnerships, decedents' estates, and dealings between principal and agent." WOLFE & PITTENGER, § 2-3[b], at 2-26. The reference to "principal and agent" is best understood as depending on the unique nature of that relationship and not as encompassing the employment relationship as such.

[81] Vague invokes the Bank's practice of providing special help to departing executives. This is a fair argument that supports his expectation to have been helped by Moen (and perhaps by others). However, such a promise of assistance and cooperation does not establish a fiduciary relationship; instead, it is a promise of help. It is a promise that the Bank did not fully honor, but it became (or should have become) clear to Vague—no later than January or February 2000—that the Bank had failed to provide the package of information that he had been promised. *See* note 76, *supra*. Vague cannot claim the benefit of lack of knowledge that may have resulted. Instead, because he had not received the materials that he was reasonably expecting, his reasonable conduct would have been to inquire about what had happened to the information packet. He simply could not sit passively and take advantage of the Bank's failure of which he was well aware (or of which he should have been well aware). Indeed, Vague has not asserted a breach of contract claim, as such, based on the Bank's failure to meet its commitment to provide the expected package.

Walker-Lindsay conversation, the nature of his relationship with the Bank, nevertheless, does not make such reliance "reasonable" or "justified" in light of the March and June Summaries.

Although not characterized as such, Vague's arguments evoke thoughts of equitable estoppel.[82] They are arguments that appeal to equity's concepts of fairness and play upon equity's dislike of forfeiture—to which the expiration of options may be compared. Once Vague could no longer reasonably rely upon whatever misinformation Bank One may have previously given (because he had been reasonably informed of the accurate information), he was confronted with the difficult burden of formulating (or piecing together) a theory of equitable relief that would overcome the terms of the parties' express agreement. That, he did not achieve.

In addition, Vague argues for a comparative fault analysis, but comparative fault is not a cause of action in itself. His claim here ultimately is that he was misled, but he cannot prevail under that approach because he did not prove that continued reliance after the March and June Summaries

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[82] One impediment to application of equitable estoppel is that it requires proof by clear and convincing evidence. *See* WOLFE & PITTENGER, § 11.1, at 11-3. Vague's proof of the substance of the second Walker-Lindsay telephone conversation could not survive that level of scrutiny. Moreover, to succeed with an equitable estoppel claim, the "person's lack of knowledge of the true state of affairs and reliance on the other party's actions or conduct must be reasonable." *Id.* Thus, any claim under this rubric would also fail because Vague's reliance ceased to be reasonable.

was justified or reasonable. Instead, he is left with a somewhat appealing set of facts,[83] but one that does not carry any entitlement to relief.[84]

Other arguments presented by Vague also fail. For example, he invokes the principle that "contributory negligence by a plaintiff will not bar recovery if a defendant is guilty of intentional or reckless conduct."[85] The principle may be sound, but the Bank's (primarily Lindsay's) conduct does not merit characterization as intentional or reckless.

The conceptual difficulties that Vague encounters arise from the following unavoidable facts: (1) the right to exercise the Disputed Options is established by an unambiguous contract between the parties; (2) the terms of that contract resulted in the establishment of a date by which the options had

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[83] One may perceive his "punishment" as not commensurate with his mistake or oversight. That, however, is a consequence of the contracts governing his rights to the Disputed Options. It is not within the Court's power to rewrite the contracts solely in order to achieve a subjectively more reasonable result.

[84] Vague's theory in this context may be viewed as a corollary of unclean hands doctrine. In essence, he offers this argument as a means of precluding the Bank's defense that the period for the exercise of his options had expired. The conduct of the Bank, while perhaps less than desirable, does not evidence "unclean hands." Moreover, invoking the doctrine of unclean hands, one traditionally asserted to deny a party equitable relief to which it might otherwise be entitled, does not fairly provide a basis for affirmative relief in this context. *See also* note 78, *supra*.

Relatedly, Vague also contends that Bank One intended to deceive him, or at least hinder his timely exercise of the Disputed Options. Vague's Opening Post-Trial Br. at 42. With that as a foundation for employing the equitable maxim of "unclean hands," Vague contests the Bank's right to enforce the six-month option exercise period. Vague has proved only that Lindsay gave Walker ambiguous and incorrect information and that Walker's misapprehension was understandable. The Bank (and EquiServe) provided information without any intent to deprive Vague of any rights.

[85] *Id*. No party treated the inquiry as one of comparative negligence.

to be exercised or they would lapse; (3) he was reasonably informed of the expiration date by the March Summary and the June Summary; and (4) he did not exercise the options timely. Eventually, it becomes apparent that Vague cannot escape the hole that he dug for himself when he chose not to read his mail. I am satisfied that, if he had taken the brief time required to look at the March Summary or the June Summary, he would have readily realized the true expiration date of the Disputed Options and he would have been able to exercise them. Although he may not have been relying on Falcidian to exercise his options (or even advise him as to when to exercise his options), by his actions, Vague effectively delegated to Falcidian his personal responsibility to read his mail.[86] Falcidian failed in that test and Vague cannot, through equitable principles, shift the consequences of his representative's failure onto Bank One.

Accordingly, I find that Vague has not established any right to relief from Bank One with respect to the expired Disputed Options. Judgment will be entered accordingly.

F. *Bank One's Third-Party Claim*

Bank One and its subsidiary, First USA Bank, N.A., asserted a third-party claim against Walker. That claim arises out of Walker's

[86] Bank One was entitled to presume that Vague would read his mail.

communications with Lindsay, his reporting to Vague or his other representatives that he would have at least three years to exercise the Disputed Options, and the consequences which his conduct may have had for Bank One in this litigation. The third-party claim is dismissed for two reasons. First, because Bank One is not liable to Vague, it has no claim against Walker. Second, Walker accurately reported his conversations with Lindsay. Whether Walker was attempting the impossible—seeking to satisfy two masters with different agendas at the same time—is the not issue. In short, the Bank questions whether Walker met his duties to the Bank but, ultimately, the Court need not resolve that challenge. The Bank may have had a claim if Walker had lied about his conversation with Lindsay or if he had negligently conveyed the information provided by Lindsay. With the conclusion that he did neither, the Bank's claim against him must be dismissed. Accordingly, judgment will also be entered in favor of Walker on the third-party complaint.

IV. CONCLUSIONS

For the foregoing reasons, judgment will be entered in favor of Bank One and against Vague with respect to Vague's claim against Bank One. In addition, judgment will be entered in favor of Walker and against Bank One

and First USA Bank, N.A. with respect to the third-party claim. An order will be entered to implement this memorandum opinion.