253 F.Supp.3d 342 (2017)

Keisuke SUZUKI, Plaintiff, v. ABIOMED, INC., Defendant.

United States District Court, D. Massachusetts.

Filed May 19, 2017.

MEMORANDUM AND ORDER
CASPER, *J.*

I. Introduction
Plaintiff Keisuke Suzuki ("Suzuki") has filed this lawsuit against Defendant Abiomed, Inc. ("Abiomed") alleging a breach of the implied covenant of good faith and fair dealing and claims for promissory estoppel or quantum meruit. Defendant has moved to dismiss. For the reasons stated below, the Court DENIES the motion.

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III. Factual Background
Abiomed is a publicly traded company that is a leading provider of temporary mechanical circulatory support devices — also known as "heart pumps." D. 1 ¶ 7. The specific line of heart pumps that Abiomed develops, manufactures and markets is called "Impella." Id. In the years relevant to this complaint, Abiomed sought to expand the use of, and gain regulatory approval for, its Impella line of products and was particularly interested in obtaining regulatory approval for Impella's sale in Japan. Id. ¶ 8.

Suzuki has worked as a manager or director in the medical device field since 1998. Id. ¶ 6. From 1998 until 2006, he worked in Japan at Guidant Japan, K.K. ("Guidant"), a Japanese subsidiary of a large medical device company. Id. In or about January 2007, Suzuki left Guidant and established Kaye Suzuki Device Consulting, LLC ("Suzuki Consulting"), which provided consulting services to companies seeking to introduce medical devices the Japanese market. Id. ¶ 9. One of Suzuki Consulting's clients was Abiomed and Suzuki provided consultation services relating to its seeking approval in Japan of its Impella line of heart pumps. Id. ¶ 10. As the principal of Suzuki Consulting, Suzuki alleges that he earned approximately $500,000 per year. Id. ¶ 12.

In 2009, Suzuki and Abiomed's CEO Michael Minogue ("Minogue") and its Vice President of Healthcare Solutions Andrew Greenfield ("Greenfield") began discussing the possibility of Suzuki shutting down his consulting business and becoming a full-time employee at Abiomed. Id. ¶ 13. At the time, Abiomed was not particularly profitable and both Minogue and Greenfield had made clear that they wanted to minimize Abiomed's expenses. Id. Although Suzuki informed

Minogue and Greenfield that he made $500,000 per year at his consulting company, he indicated that he would be willing to sacrifice his short-term base salary for long-term incentive compensation. Id.

On April 1, 2010, Abiomed made a written offer of employment ("Offer Letter") to Suzuki for the position of Vice President of Asia with an annual salary of $250,000, an annual bonus of up to $100,000 and a commission opportunity of up to $1 million. Id. ¶ 14. Additionally, the Offer Letter reflected that Suzuki would be awarded up to 45,000 shares of Abiomed common stock which would be contingent on meeting three benchmarks. Id. ¶¶ 14, 17. Specifically, (1) a performance share of 10,000 shares of Abiomed's stock would issue upon the successful submission of an application to Japan's Pharmaceutical and Medical Device Agency ("PMDA") for Impella use in Japan; (2) a performance share of 20,000 shares of Abiomed's stock would issue when Japan's Ministry of Health, Labor, and Welfare approved Impella for general use; and (3) a performance share of 15,000 shares of Abiomed's stock would issue "when Approval for targeted reimbursement level of Impella is gained." Id. ¶ 17. The Offer Letter further stated that the performance share awards "require that you continue to be employed by the Company on the date that any of these milestones are achieved ..." and that "[o]nce approval is gained for Impella General Use in Japan and provided that you remain and are qualified to be employed in the Commercial leadership role, we will present to you a commission structure." Id. ¶ 16. On or about April 9, 2010, Suzuki terminated his consulting business and moved from Japan to Massachusetts to begin working as Vice President at Abiomed. Id. ¶¶ 18-22. On April 10, 2010, Suzuki signed an Employment, Nondisclosure, and Non-Competition Agreement (the "Nondisclosure Agreement"). Id. ¶ 23. The Nondisclosure Agreement stipulated that after six months of employment, Abiomed could terminate Suzuki without cause upon 28 days' written notice or with cause at any time. D. 1-4 at 1.

On April 29, 2010, in accordance with the Offer Letter, Abiomed granted Suzuki three awards of performance shares, none of which would vest or issue until the achievement of the specific goals outlined in the letter. D. 1 ¶ 27. By March 31, 2011, Suzuki had met the first milestone under the Offer Letter and Abiomed issued him 10,000 shares of common stock. Id. ¶ 39. At the time, the stock was trading at $14.53 per share and the total value to Suzuki was $145,300. Id.

Suzuki alleges that while he continued working on getting the Impella line of devices approved for general use in Japan, Abiomed refused to devote the resources necessary to achieve such a result. Id. ¶¶ 40-43. For example, PMDA invited Abiomed to a "kick-off" meeting in June 2011 where it presented Abiomed with hundreds of questions that it wanted answered by September 2011. Id. ¶ 40. Despite this deadline, Abiomed failed to answer the questions until a year later. Id. ¶ 41. Moreover, Abiomed continued to be consumed by fixing various problems identified in the Impella device. Id. ¶ 42. Because no other Abiomed employees, with the exception of Minogue, had compensation incentives tied to gaining approval in Japan, expansion to the Japanese market was not a priority. Id. Nonetheless, Suzuki continued working on obtaining regulatory approval and also worked on preparing the Japanese market for entry of the Impella line. Id. ¶ 44. By March or April 2015, Suzuki's continued work in Japan paid off and he was able to secure a meeting between Abiomed's representatives and officials at the PMDA. Id. ¶ 46. While Abiomed originally

had concerns that Impella would not be approved without being required to first conduct a costly and time-consuming human study in Japan, PMDA made clear that no such study would be mandated. Id. ¶ 47. Furthermore, PMDA informed Abiomed that it was inclined to approve the Impella line for general use once it received updated reports addressing four modifications that the company had made to the device since it had submitted the original application. Id.

At this point, Suzuki alleges that his value to Abiomed decreased precipitously. Id. ¶ 49. Indeed, following the meeting with PMDA, Abiomed regarded it as a near certainty that Japan would approve Impella for general use. Id. ¶ 48. Suzuki's work had largely paved the path toward regulatory approval — especially his shepherding of the application through Japanese regulatory authorities — and he had also established Abiomed's new Japanese subsidiary and staffed its office in Japan. Id. ¶ 50. Abiomed realized that Suzuki's continued employment through the time of Japan's eventual approval of Impella's general use would thereby require it to issue Suzuki the 20,000 shares called for in the Offer Letter. Id. ¶ 51. Because Abiomed's stock value had significantly increased since the time of the original offer, the 20,000 shares would be equivalent to a $1.3 million value, a value that Suzuki alleges was much greater than Abiomed had planned on paying Suzuki. Id. Suzuki further contends that, once approval and reimbursement issued, Abiomed realized he would be entitled to an additional 15,000 shares of common stock and eligible for future commission rights as outlined in the Offer Letter. Id. ¶ 52. Rather than follow through with the terms outlined in the Offer Letter, Suzuki alleges that Abiomed decided to give him a falsely negative job performance review to lay the groundwork necessary to avoid the mandatory contractual terms outlined in the letter. Id. ¶ 55. Furthermore, Abiomed decided to deny Suzuki his annual bonus and diminish his role in the company. Id. Prior to this point, Suzuki had never had a negative job performance review and he always received annual bonuses of between $80,000 and $90,000 per year. Id. ¶ 56. He had also consistently been given salary raises each year. Id.

On May 14, 2015, Greenfield met with Suzuki and discussed changing his duties and compensation structure. Id. ¶ 57. Several days later, Greenfield provided Suzuki a proposed amendment to the Offer Letter in the form of a letter entitled "Amendment to Offer Letter Dated April 1, 2010" (the "Proposed Amendment"). Id. ¶ 58. The Proposed Amendment would have limited Suzuki's duties to Japan, rather than all of Asia, and would have cancelled the remaining 35,000 performance shares that would be owed to him under the terms of the original Offer Letter. Id. ¶ 60. Instead, Suzuki would receive Restricted Stock Units ("RSUs") in lower amounts and at significantly less value than the performance shares originally promised in the Offer Letter. Id. Moreover, under the Proposed Amendment, the change to RSUs would be coupled with a stipulation stating that Suzuki would not be granted the shares, but instead would simply have the right to purchase them in an amount later determined by Abiomed's Compensation Committee. Id. Lastly, the Proposed Amendment provided that Suzuki's entitlement to future commissions following Japan's approval of Impella would be cancelled. Id. Suzuki rejected the Proposed Amendment. Id. ¶ 61.

On May 22, 2015, Abiomed presented Suzuki with another proposal (the "Revised Proposed Amendment"). Id. ¶ 62. The Revised Proposed Amendment was allegedly even more unfavorable to Suzuki as it kept the majority of the terms of the Proposed Amendment, but lowered the potential

award of RSUs. Id. On May 26, 2015, Suzuki submitted a written statement to Abiomed rejecting the proposed changes. Id. ¶ 63. He noted that the "whole purpose is not about needing to change after 5 years, but more about not wanting to keep the original deal between [him] and [Abiomed], as the value of the equity have risen far beyond what the company foreseen (sic) at that time." Id. Moreover, he expressed that Abiomed's reasoning for altering the terms of the Offer Letter was obvious "as the company does not want to change [his] salary but only the equity and commission portion only." Id.

Suzuki was terminated from his position on June 18, 2015, without cause. Id. ¶ 64. At the time of Suzuki's termination the price of Abiomed's common stock was $67.16 per share. Id. ¶ 67. Suzuki alleges that following his termination, Abiomed did not devote the necessary resources to promptly obtaining regulatory authority in Japan. Id. ¶ 68. Had he continued working there, approval would likely have been granted within six to nine months. Id. Instead, approval occurred on September 27, 2016, fifteen months after Suzuki was terminated. Id. ¶ 69.

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V. Discussion

A. Suzuki Has Adequately Pled a Breach of the Implied Covenant of Good Faith and Fair Dealing Claim (Count I)

Suzuki brings a claim against Abiomed for breach of the implied covenant of good faith and fair dealing. D. 1 at ¶¶ 72-88. "Under Massachusetts law, "[e]very contract implies good faith and fair dealing between the parties to it."' Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 237 (1st Cir. 2013) (quoting T.W. Nickerson, Inc. v. Fleet Nat. Bank, 456 Mass. 562, 569, 924 N.E.2d 696 (2010)). The implied covenant provides "that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471, 583 N.E.2d 806 (1991). This "guarantee[s] that the parties remain faithful to the intended and agreed expectations of the parties in their performance." Uno Rests., Inc. v. Bos. Kenmore Realty Corp., 441 Mass. 376, 385, 805 N.E.2d 957 (2004).

Traditionally, an at-will employment contract is one that, by its express terms, may be terminated by either party without reason. Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 100, 364 N.E.2d 1251 (1977). Nevertheless, an employer may be liable for a breach of the implied covenant of good faith and fair dealing when it terminates an at-will employee in certain circumstances. See id. at 104, 364 N.E.2d 1251. Where termination occurs for the purpose of depriving the employee of benefits or compensation due or forthcoming at the time of discharge, the termination is considered to have been rendered in "bad faith" and the covenant is, therefore, considered to have been breached. Id. (the "Fortune doctrine"). Additionally, a breach of the covenant may occur where an employer terminates an employee without "good cause" thus "depriv[ing] the employee of clearly identifiable future compensation reflective of the employee's past services." Gram v. Liberty Mut. Ins. Co., 391 Mass. 333, 335-36, 461 N.E.2d 796 (1984) (the "Gram doctrine"). Fundamentally,

in an employment contract terminable at-will, the purpose of the implied covenant is to "to prevent an employer from being unjustly enriched by depriving the employee of money that he had fairly earned and legitimately expected." Kravetz v. Merchs. Distribs., Inc., 387 Mass. 457, 463, 440 N.E.2d 1278 (1982). Thus, a motion to dismiss can be defeated where a plaintiff has plausibly alleged the "unfair leveraging of the contract terms to secure undue economic advantage." Robert Reiser & Co. v. Scriven, 130 F.Supp.3d 488, 496 (D. Mass. 2015).

Here, Suzuki alleges that during his employment with Abiomed, his primary role consisted of getting the Impella line of heart pumps approved for general use in Japan and preparing for Japanese market entry. Through his efforts over a course of years — including lobbying Japanese officials, arranging meetings with important Japanese authorities, requesting product testing and organizing presentations for Japanese cardiologists — Suzuki, as he alleges, was able to secure a promise from Japanese regulators that they were prepared to approve the Impella for general use once Abiomed submitted updated reports addressing a few modifications to the device which had occurred since the initial application. According to Suzuki, Abiomed recognized that under the employment contract, approval by Japanese regulators for Impella's general use would necessarily trigger the issuance of 20,000 shares of common stock to Suzuki. Rather than follow through with the agreement outlined in the Offer Letter, Abiomed attempted to change the terms of Suzuki's compensation so as to take away his stock rights and future commission rights and, when Suzuki rejected those changes, Abiomed terminated his employment and Impella's approval for general use was later secured.

Abiomed argues that Suzuki's claim must be dismissed because at the time of his termination, Suzuki had done nothing more than "lay[] the groundwork" for eventual approval by Japanese authorities authorizing Impella's general use. D. 11 at 11. Relying upon the premise that "[t]he Fortune doctrine does not protect interests contingent on an event that has not occurred," Harrison v. NetCentric Corp., 433 Mass. 465, 475, 744 N.E.2d 622 (2001), Abiomed maintains that Suzuki cannot plausibly allege his claim where Japanese approval did not occur for another fifteen months after he was let go. Moreover, the implied covenant of good faith and fair dealing cannot be breached where the compensation sought is not "reflective of past services." McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 234-35, 471 N.E.2d 47 (noting that in Gram, the Supreme Judicial Court had "held that, while the employee could recover renewal commissions on past sales because they constituted an "identifiable, future benefit ... reflective of past services," he could not recover "career credits" because they constituted "future compensation for future services'"). Consequently, according to Abiomed, Suzuki had not earned any of the incentive shares stipulated in the Offer Letter at the time he was released from the company and, therefore, he was ineligible to receive the 20,000 shares of stock. D. 11 at 9; see King v. Mannesmann Tally Corp., 847 F.2d 907, 908 (1st Cir. 1988) (explaining that plaintiff "failed to show that the commissions were earned, even though not yet payable at the time of his termination").

But Abiomed's argument ignores the "bad faith" component of Suzuki's claim. While the Supreme Judicial Court never expressly defined the term "bad faith," it did explain that bad faith exists, for example, where the "principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale."

Fortune, 373 Mass. at 104-05, 364 N.E.2d 1251. It further explained that courts apply the doctrine "to prevent overreaching by employers and the forfeiture by employees of benefits almost earned by the rendering of substantial services." Id. at 105, 364 N.E.2d 1251.

Thus, while Abiomed cites Harrison v. NetCentric Corp., 433 Mass. 465, 744 N.E.2d 622, to support its motion to dismiss, its reliance on that case is not persuasive in light of Suzuki's allegations in this case. In Harrison, the plaintiff was an at-will employee whose employee stock options were subject to a periodic vesting schedule. Id. at 473, 744 N.E.2d 622. At the time the plaintiff's employment was terminated, forty-five percent of his shares had vested and the remaining fifty-five percent were contingent on him continuing to provide his employer services. Id. at 473-4, 744 N.E.2d 622. The plaintiff sued for breach of implied covenant of good faith and fair dealing, arguing that he had accepted the position for a lower salary than he otherwise would have without the stock options and that he had fully expected to be retained at least until his stock had fully vested. Id. at 472-73, 744 N.E.2d 622. The Harrison court affirmed the lower court's dismissal of the claim, holding that the employer "did not deprive the plaintiff of any income that he reasonably earned or to which he was entitled." Id. at 473, 744 N.E.2d 622. Rather, "shares vested over time only if he continued to be employed; thus, the unvested shares [were] not earned compensation for past services, but compensation contingent on his continued employment." Id. In sum, the court determined that the plaintiff's unvested shares did not represent compensation that he had earned. Id.

The facts in Harrison, however, are distinguishable from the facts that Suzuki alleges. While the plaintiff in Harrison was subject to a periodic vesting schedule that issued a percentage of his stocks at discrete intervals pursuant continued employment, Suzuki's shares were to be issued upon meeting specified benchmarks that he worked toward. The First Circuit has explained that there is a difference between these two stock option set-ups, noting that "ordinarily, a colorable periodic vesting schedule crudely delineates the line between past and future services." Sargent v. Tenaska, Inc., 108 F.3d 5, 9 (1st Cir. 1997). In other words, "[w]here benefits such as shares of stock are subject to a vesting schedule over time and vest only if the employee continues to be employed, such benefits are contingent on the employee providing future services for the employer and thus are generally not compensation for past services." Aggarwal v. Nexabit Networks, Inc., No. CIV.A. 99-6174, 2001 WL 34032503, at *8 (Mass. Super. May 30, 2001). Here, the Court declines to apply Harrison to the facts alleged here given that the Harrison court was presented with a periodic vesting schedule that provided a defined line between past and future services. Suzuki's allegations here differ as they amount to an argument that, at least as alleged, Suzuki was coming to the brink of effectuating the events that would have triggered the additional share issuance and Abiomed, anticipating same and the great value those shares would hold, terminated him in bad faith so those events would not be realized.

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Here, ... there exists at least a plausible link between Suzuki's past work and his expectation of receiving the shares promised to him under the Offer Letter. Suzuki's work was performed with the goal of getting Japanese regulatory authorities to approve Impella for general use, which was eventually granted following his termination and, as he alleges, would have occurred earlier if he had not been terminated.

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In sum, Abiomed may be accountable to Suzuki for unpaid compensation if it turns out he was terminated in bad faith and the compensation is connected to work already performed. Suzuki has pled sufficient facts to make out at least a plausible claim that Abiomed attempted to sidestep the contractual terms of the Offer Letter by firing Suzuki as soon as it became apparent that he would likely be entitled to a significant share issuance. As such, the motion to dismiss Count I is DENIED.

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VI. Conclusion

For the foregoing reasons, the Court DENIES Abiomed's motion to dismiss, D. 10.

So Ordered.