Howard v. Tanium, Inc.

2023 | Cited 0 times | N.D. California | February 17, 2023

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

DANIEL HOWARD,

Plaintiff, v. TANIUM, INC.,

Defendant.

Case No. 21-cv-09703-JSC

ORDER RE: MOTION FOR SUMMARY JUDGMENT Re: Dkt. No. 44

Daniel Howard filed suit against his former employer, Tanium, alleging Tanium fraudulently induced Plaintiff to join Tanium as an employee. Defendant moves for summary judgment. After carefully reviewing the papers submitted and having had the benefit of oral argument on February 16, 2023, the Court GRANTS Because Plaintiff fails to provide sufficient evidence Defendant knew its representation was false (or made the representation recklessly), is granted.

BACKGROUND I. Factual Background

A. Plaintiff is a law school graduate and a member of the California Bar. (See Dkt. No. 44-8 at 6-7.) 1

Between 1996 and 2016, Plaintiff at seven technology companies. (Id.) Some of these companies were publicly traded. (Dkt. No. 45-2 at 109.) Others were private. (Id. at 110.) At previous employers, Plaintiff received equity as compensation Dkt. No. 44-3 at 16.)

Between 2014 and 2016, Plaintiff worked at Fortinet, a publicly traded technology company. (Dkt. No. 44-8 at 6.) During his time at Fortinet, Plaintiff was offered 3,900 RSUs.

1 ECF-generated page numbers at the top of the documents. (Dkt. No 45-2 at 27.) As of early 2016, Plaintiff had an annual cash salary of $154,500, (id. at 32), received an additional 10 to 20 percent bonus each year, and had an opportunity to purchase more Fortinet stock (worth up to 15 precent of his salary) at a low price Employee Stock Purchase Plan id. at 40). In March 2016, r RSUs were unvested, which he estimates comprised $90,000 in value. (Id.)

B. to Plaintiff In March 2016, Plaintiff received a LinkedIn notification informing him he was a match for a role at Tanium. (Id. at 28.) Plaintiff then applied for a technical writer position at Tanium. (Id.) At his deposition, Plaintiff asserted he was not looking to leave Fortinet prior to the LinkedIn notification. (Id.) But he applied because he had heard of Tanium. (Id.)

Plaintiff then began the formal interview process. Plaintiff told a Tanium recruiter he expected to be paid [he 45-2 at 32.) Plaintiff then interviewed with James Evans, an Engineering Manager at Tanium who served as the hiring manager for the technical writer position. (Dkt. No. 44-16 ¶ 2.) Plaintiff says Evans told him -2 at 36.) Evans invited Plaintiff for an on-site interview. (Id. at 38.) There, Plaintiff interviewed with -founder, David Hindawi. (Id. at 39.) Plaintiff remembers telling Hindawi about his salary, bonus structure, and the ESPP at Fortinet. (Id.) current value or stock price. (Id.) He later gave the same salary information to Evans and Evans promised to confer with Hindawi regarding a job offer. (Id. at 49.) That night, Evans extended an offer to Plaintiff via telephone. According to Plaintiff, the offer was as follows:

$165,000. 25 percent of the [Technical Account Manager] bonus. [Technical Account Manager] bonus last year was s of stock vesting over four years.· Stock has a current fair market value of $5 a share. 30,000 times five (Dkt. No. 45-2 at 50.) The shares were RSUs, not stock options. (Id. at 51.) Plaintiff understood the difference between RSUs and stock options namely, unlike options, the cost basis for an RSU is zero, so Plaintiff is entitled to the full value of a vested RSU when an opportunity to liquidate arises. (Id. at 17.) Thus, Plaintiff understood the offer to mean he was receiving 30,000 shares worth $5.00 a share at that moment. (Id. at 52.) But Plaintiff knew this current value did not guarantee he would receive $5.00 per share when a sale event occurred after the vesting period. (Id.) Plaintiff accepted. (Id.) He testified he accepted the $150,000 March 2016 share value Tanium allegedly represented and $90,000 represents the value of unvested RSUs Plaintiff forwent from Fortinet (as of March 2016). (Id. at 62.) Evans does not remember the terms of his offer to Plaintiff. (Dkt. No. 44-16 ¶ 3.)

After Evans made Plaintiff the oral offer, Evans emailed Eric Brown, COO n. (Dkt. No. 45-3 at 1.) The email states:

Proposed Tanium Compensation OTE: N/A

Base: $165,000.00 Bonus Program: TAM @ 25% Start Date: No later than 4/18/16 Having closed on these figures with Eric and David, I verbally prep an offer letter and send it over. Plaintiff then received an offer letter. The offer letter lists a $165,000 salary, a grant of 30,000 RSUs vesting over four years, and the promised bonus of 25 percent of the Technical Account Manger bonus. (Dkt. No. 44-4 at 2-3). The offer letter does not include any valuation for the 30,000 RSUs. (Id.) (Dkt. No. 44-5.) unknown, indeterminable and cannot be -5 at 8.)

1. in March 2016 Tanium is a private, closely held corporation. (Dkt. No. 44-14 ¶ 2.) In August 2015,

private investors purchased Tanium shares for $15/share. (Dkt. No. 44-14 ¶ 3.) Tanium split its shares on a 3-to-1 basis, providing each shareholder with 3 shares for every 1 share held. (Id.) Tanium executives claim the company was, thus, valued at roughly $5.00 per share in March 2016 when Plaintiff signed his offer. (Id.)

On February 19, 2016, however, Grant Thornton LLP delivered a memorandum to

was valued at $2.01 as of December 31, 2015. (Dkt. No. 45-9 at 1.) The Id.) It ck Id.)

2. Evans declares he did not know about the 409A valuation at $2.01 when he offered Plaintiff 30,000 RSUs valued at $5.00 per share. (Dkt. No. 44-16 ¶ 3.) Rather, Evans relied on -4 at 21.) Evans typically Id.) , also states he was not privy to a specific 409A value. (Dkt. No. 45-10 at 28.) Curren testified Tanium conducted no formal training for hiring managers on how to value stock options. (Id. , id. at 26-27)

focused on what was the last time somebody Id. at 31.)

A recruiter, Melissa Villalobos, testified Curren told her to communicate the $5.00 per share price with prospective employees rather than the 409A value. (Dkt. No. 45-11 at 17-18.) According to Villalobos, Curren instructed recruiters the last transaction value was a better marker of Tan sales occurred in the past, the 409A value was lower than the sale price. (Dkt. No. 45-11 at 18.) So, by giving candidates the last transaction price rather than the le have a good understanding Id. at 18.) At oral argument, after Plaintiff was hired, and Villalobos recruitment.

D. Subsequent Events Plaintiff signed the offer letter and RSU agreement. (Dkt. Nos. 44-4; 44-5.) Plaintiff then began working at Tanium and vesting RSUs. (See Dkt. No. 44-9.) In June 2018, Tanium made a formal offer to (Dkt. No. 44-3 at 44.) Plaintiff declined to sell. (Id. at 45.) A few months later, Tanium implemented a new portal to allow employees to manage stock options. (Dkt. No. 45-2 at 81.) When Plaintiff logged into the portal, he learned his initial shares had been listed at $2.01 per share for 409A purposes as of March 2016. (Id. at 82.)

Tanium then role and compensation formula in 2019. (Dkt. No. 44-6.) As of April 2019, his annual salary remained $165,000, but his bonus target was changed to 15 percent of his base salary. (Id.) Tanium also granted Plaintiff an additional 3,000 RSUs. (Dkt. No. 44-8 at 16.) In August 2019, Tanium again offered to purchase shares from employees for $12.95 per share. (Id.) Plaintiff again declined to sell. (Dkt. No. 45-2 at 90.)

Eventually, Plaintiff quit Tanium in 2020, shortly after his initial grant of 30,000 RSUs fully vested. (Dkt. No. 44-7 at 3.) As of March 2022, 409A valuation was $10.31 per share. (Dkt. No. 44-9 at 3.) II. Procedural History Plaintiff sued Tanium for fraud in San Mateo County Superior Court. Tanium removed this matter to this Court based on 28 U.S.C. § 1332. Plaintiff alleges Tanium misrepresented

the value of the RSUs in March 2016 to induce Plaintiff to join Tanium and leave Fortinet. As a result of this alleged misrepresentation, Plaintiff claims he was damaged because he would have made more money had he remained with Fortinet.

DISCUSSION

Under Federal Rule of depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because Plaintiff fails to provide any evidence Defendant knew its representation was false (or made the representation recklessly), the Court GRANTS motion for summary judgment. I. Plaintiff alleges the following offer, from James Evans, forms the basis for his fraud claim:

Stock has a current fair market value of $5 a share. 30,000 times five (Dkt. No. 45-2 at 50) (emphasis added). Had Plaintiff known the 409A value of $2.01 per share in offer. And, had Plaintiff remained at Fortinet instead of joining Tanium, Plaintiff claims he would have made more money than he made at Tanium. To establish a claim for deceit based on intentional misrepresentation, Plaintiff must prove:

(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff s reliance on the defendant s representation was a substantial factor in causing that harm to the plaintiff. Manderville v. PCG&S Grp., Inc., 146 Cal. App. 4th 1486, 1498 (2007); See also CACI 1900. The Court addresses each element in turn.

A. Factual Representation or Opinion? There is evidence in the record that Evans told Plaintiff the RSUs were worth $5 per share in March 2016. (See Dkt. No. 44-13 at 7 n.1.) The parties dispute, however, whether such a statement is actionable as fraudulent misrepresentation. Defendant argues statement of value was opinion, not fact.

Statements of value are typically , fact. See Kahn v. Lischner, 128 Cal. App. 2d 480, 487 (1954). But there are exceptions to this general rule. For example, if the opinion is rendered under circumstances such that it may be regarded as amounting to a positive affirmation of fact, it will be treated as a representation of fact for purposes of a deceit action. Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells, 86 Cal. App. 4th 303, 307 (2000) (cleaned up). Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise

regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant s representation may be treated as one of material fact. Id. he line between opinion and fact is not a distinct one Id.

A jury could find valuation statement was a factual representation. Evans represented the $5.00 per share price as a current valuation, not a prediction of future value. Brakke v. Econ. Concepts, Inc., 213 Cal. App. 4th 761, 769 (2013) misrepresentation must be of an existing fact, not an opinion or prediction of future events. Moreover, the parties held unequal access to valuation information. While valuation statements are typically considered opinions, that general rule holds parKahn, 128 Cal. App. 2d at 487. Tanium was a private, closely held corporation.

from a public market or alternative bidder. See S. Cal. Etc. Assembles of God v. Shepherd of Hills etc. Church, 77 Cal. App. 3d 951, 960 (1978) (peculiarly within defendants knowledge. (emphasis added).

The evidence multiplied the 30,000 RSU offer by the share price supports this finding. An opinion may also be actionable when a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion. Brakke, 213 Cal. App. 4th at 769. Here, a reasonable jury could find Evans presented his opinion as an existing fact when he as a comparison to $90,000 unvested equity interest at Fortinet. See also Willson v. Mun. Bond Co., 7 Cal. 2d 144 (1936) (finding representation bonds were worth 100 cents-on-the-dollar, coupled with statement that a bank would loan money based on the bonds, could serve as basis for fraud claim).

Defendant argues Plaintiff was highly educated and neither Tanium nor Evans held themselves out as specially qualified as to stock value. This argument is unpersuasive. While education is relevant to whether his reliance was reasonable, see Part I.E.2 infra, his background does not affect the fact versus opinion analysis. particular qualifications are similarly irrelevant. Evans represented access to not special expertise. Neu-Visions Sports, 86 Cal. App. 4th at 307. Evans did not explain the basis for his opinion, nor did he specify the value was based on the last transaction price. So, as explained above, a reasonable juror could find Evans represented access to non-public valuation information when he stated the market of Tanium a private, illiquid company while presenting Plaintiff with the offer.

In sum, the Court cannot say statement was opinion as a matter of law because he stated a value, the parties had unequal access to information, and calculation (30,000 multiplied by $5.00 a share) could raise an inference the representation was factual. So, taking all disputed factual inferences in favor, a reasonable juror could decide Defendant made a statement of fact to Plaintiff that the share value was $5.00 in March 2016. See Willson, 7 Cal. 2d at 151 The cases also indicate that where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts.

B. Misrepresentation was true as a matter of law because the most recent stock sale to investors

valued shares at $15 per

share, Tanium subsequently performed a 3-for-1 stock split, and $15 per share divided by three equals $5 per share. (Dkt. No. 46 at 6. (or at least misleading) because the 409A value, which Grant Thornton assessed after the $5 per share sale but prior , pegged the stock at $2.01 per share. (Dkt. No. 45 at 11.) And Tanium never disclosed the 409A value when providing the job offer. (Id. at 12.)

This is a disputed question of material fact. covers statements beyond outright lies:

A representation need not be a direct falsehood to constitute fraud. It may be a deceptive answer or other indirect but misleading language. []. Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to express or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure. Brady v. Carman, 179 Cal. App. 2d 63, 68 (1960) (cleaned up) (emphasis in original). Here, inaccurately stated the stock price in March 2016. For example, the Grant Thornton report states plans to use this report solely for the purpose of granted employee stock reports, Grant Thornton

Valuation report. (Dkt. No. 45-9 at 1.) As Defendant acknowledges in its brief, the 409A value is calculated

for tax liability. Thus, if the grant was 30,000 stock options rather than RSUs, the 409A value would represent for tax purposes the value of the shares he received on the day he received them. Put differently, if the grant were options rather than RSUs, Plaintiff would have to pay the 409A value to secure the option to sell the shares and would realize only the gain between the eventual sale price and the 409A value. jury could find the $5.00 per share price was not the value of the RSUs at the time of the grant

because the Grant Thornton Report presents a different valuation.

no evidence that the fair market value of Tanium was not $5.00 per share in March 2016. (Dkt. No. 46 at 6.) But, absent any expert testimony explaining the difference between a 409A value a reasonable juror could view valuation with skepticism given the Grant Thornton report common shares. (Dkt. No. 45-9 at 1.) Second, Defendant argues the last transaction price is the correct fair market value as a matter of law, notwithstanding the 409A value, because 409A valuations are only calculated for the purposes of tax liability. But again, Defendant fails to provide evidence or authority that a valuation for tax purposes is different than a fair market value as a matter of law As a private closely held company that does not trade its stock on the public market, it is completely reasonable for Tanium to look to private investor sales, rather than a Section 409A valuation, as a basis for the true value of its stock. Id.) a jury might agree. But that argument speaks more to good faith basis supporting representation, rather than the truth or falsity of his representation.

At bottom, Defendant cites no authority supporting the proposition that the last transaction true , where an intervening assessment (which, admittedly, relied on different considerations) assessed a different value for tax purposes. 2

Thus, disputes remain regarding whether was accurate.

C. Plaintiff must also prove Tanium knew the representation was false when Tanium made it, or Tanium made the representation recklessly and without regard for its truth. Manderville, 146 Cal. App. 4th at 1498. Defendant argues Tanium lacked the requisite knowledge because Evans did not know about the 409A value and, in any event, Tanium had a good faith belief the last transaction price was an accurate assessment of fair market value. (Dkt. No. 44-13 at 17.) The nd focuses only on (Dkt. No. 45 at 18.) But knowledge of falsity is a separate element from intent for fraud claims under California law. See 1 CACI § 1900 (2023). No reasonable trier of fact could find Tanium knew its $5 representation as to the value of shares was false.

First, it is undisputed Evans the only person who made the representation to Plaintiff had no knowledge of the 409A value when he represented the $5.00 price to Plaintiff. (Dkt. No.

44-16 ¶ 3.) solely on the existence of the 409A report, it follows that Evans could not have known the $5.00 value was false. Instead, he testified that when talking to recruits he wou

No. 45- event suggested a value of $5 per share.

2 In re Marriage of Hewitson, 142 Cal. App. 3d 874 (Ct. App. 1983)(describing two methods of calculating fair market value for closely held shares as: (1) recent sales of the unlisted stock, which were made in good faith and at arm's length, within a reasonable period either before or after the valuation date; and (2) the price-earnings ratio method to determine fair market value

for federal tax purposes). cites no case holding an employer liable for representations made by an employee when the employee thought the representations were accurate. To put it another he does not cite any caselaw suggesting a corporation can be found liable for fraud if a managing

agent makes a statement he believes is true, but a different managing agent possesses knowledge the statement is not true. the representation was false when the representation was made. See, e.g., Lazar v. Superior Ct., 12

Cal. 4th 631, 636 (1996) knew

Second, to hold Tanium liable for fraud an intentional tort when Evans had no reason to believe he was making a misrepresentation would take something more significant, such as evidence Tanium knew the $5.00 share value was false and communicated that value to its hiring managers anyway.

But no evidence exists that supports a finding Tanium thought the $5.00 per share value was false or misleading when Evans communicated that number to Plaintiff. Some employees at Tanium did know about the Grant Thornton report. But the mere existence of the

was false. Plaintiff offers no evidence that using the last equity price is improper when valuing shares of private companies, and no evidence that any company ever uses the 409A report to value s for prospective employees or investors.

Third, the only record evidence addressing why Tanium used the last equity event price rather than the 409A report, evidence which stems from events after Tanium hired Plaintiff, supports the contrary inference: Tanium thought the $5.00 value was more accurate as a fair market value for prospective employees than the 409A value because $5.00 represented what a buyer had actually paid for the shares. (Dkt. No. 45-11 at 17.) For example, Villalobos testified to a conversation with an employee candidate, in which the candidate raised the 409A value and Tanium told the candidate that was an inaccurate value and, indeed, that shares had been purchased through a buyback for more than the 409A valuation. (Id. at 18.) She also testified management told her to share with prospective employees that share value was based upon the last equity event. (Id. at 11.) So, all available evidence supports the inference Tanium had good reason to believe market value should not be tied to 409A value and instead to the last equity event.

to disclose the 409A value to Plaintiff and thus its failure to do so supports an inference of knowledge is unpersuasive. Plaintiff cites no evidence or law that Tanium was under a special fiduciary duty to disclose all information during the employment negotiations. See 1 CACI 1901 (2023) (discussing fiduciary duty). And, even if a duty to disclose material facts arose outside of a fiduciary relationship, no evidence supports an inference Tanium or Evans intentionally concealed a material fact. See Roddenberry v. Roddenberry, 44 Cal. App. 4th 634, 666 (1996) (the hope that the first Mrs. Roddenberry would accept . . . payments and never discover she was

operations is not the same as intentionally concealing a material fact to induce reliance.

In sum, no evidence supports PlaintiffTanium knew the $5.00 value was incorrect value recklessly.

Tanium communicated the $5.00 price because Tanium thought the price was accurate. 3

Because Plaintiff fails to provide sufficient evidence supporting an inference Tanium knew the $5.00 share price was inaccurate (or communicated the share price to Evans with reckless disregard for the truth)

D. A reasonable jury could find Defendant intended Plaintiff rely on the representation when making his employment decision. To prove fraud, Plaintiff must show Defendant intended Plaintiff to take an action (to his own risk) based on the misrepresentation. See Gagne v. Bertran,

3 represented a different form of stock than the common stock Plaintiff was offered. But the record only states private investors paid $15.00 share before the 3-for-1 split. (Dkt. No. 44-14 ¶ 3.) Id.) Plaintiff provides no evidence that sale referred to a different form of stock. 43 Cal. 2d 481, 488 (1954) (collecting cases).

Defendant argues it intended Plaintiff rely on the valuation to induce his future employment at Tanium, not to induce Plaintiff to leave Fortinet. But that argument rests on a distinction without a difference. To take the Tanium offer was to forgo the Fortinet job. Indeed, Plaintiff he made at Fortinet. And he told Defendant what he made at Fortinet. So, a reasonable juror could find Defendant represented the RSU value Fortinet. Put differently, a reasonable juror could find Defendant intended Plaintiff to change jobs, not just to accept the Tanium job. See Lovejoy v. AT & T Corp., 92 Cal.App.4th 85, 93 94 (2001) (e reliance. Moreover, liability is affixed not only where the plaintiff s reliance is intended by the prong also fails.

E. Causation The final elements of fraud require Plaintiff (1) actually relied on the misrepresentation, (2) Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1062 (2012). Because material factual disputes remain, the Court cannot determine Plaintiff did not suffer detrimental reliance. 1. Actual Reliance

Actual reliance occurs when a misrepresentation is an immediate cause of [a plaintiff s] conduct, which alters his legal relations and when, absent such representation, the plaintiff would not, in all reasonable probability, have entered into the contract or other transaction. Id. at 1062- ore than

2. Justifiable Reliance In addition to actual reliance, Plaintiff must also set actual reliance on the representations was justifiable, so that the cause of the damage was the defendant Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1066 (2012). difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of

All. Mortg. Co. v. Rothwell, 10 Cal. 4th 1226, 1239 (1995)

, (Dkt. No. 46 at 11- 14), and analogizes this case to Hinesley v. Oakshade Town Center, 135 Cal. App. 4th 289 (2005). There, the California Court of Appeals affirmed summary judgment against the plaintiff because the plaintiff failed to show reasonable reliance on the def The plaintiff claimed he signed a lease agreement because the defendant represented three restaurant chains would commence tenancy in the same shopping center within a year. Id. at 292. But the lease agreement stated: ssee does not rely on the fact nor does Lessor represent that any specific Lessee of [sic] type or number of Lessees shall during the term of this Lease occupy any space in Id. at 300. According to the California Court of Appeals, this language ff. Id. at 302. The plaintiff admitted he had reviewed that provision; after reviewing the lease with a lawyer, the plaintiff requested changes to the agreement but never challenged that provision, and the plaintiff never asked other potential tenants about alleged lease agreements. Id. at 291-292. Thus, the court affirmed based on of other co-tenants in a shopping center. Id. at 303. See also Orozco v. WPV

San Jose, LLC, 36 Cal. App. 5th 375, 393 (2019) (denying summary judgment where the plaintiff asked clarifying questions regarding other tenants under similar circumstances to those in Hinesley).

Despite some factual similarities between Hinesley and this matter, reasonable minds could come to more than one conclusion here. As Defendant notes, Plaintiff had legal knowledge; Plaintiff had industry experience with equity compensation; Plaintiff did not ask human resources to confirm the RSU value; and Plaintiff waited five years to raise the issue with Tanium. But, unlike in Hinesley, the contractual disclaimer here does not precisely cover the alleged misrepresentation. There, the defendant represented certain business would sign leases and then disclaimed representations regarding future co-tenants in the contract. Here, Plaintiff complains Defendant misrepresented current RSU value in March 2016; but Defendant cites a provision in the RSU agreements requiring Plaintiff to acknowledge future value of the underlying Shares is unknown, indeterminab (Dkt. No. 44-5 at 8.) (emphasis added). The contract does not disclaim any representation as to the current value. The current value and the future value are separate issues. A disclaimer as to the latter, does not give rise to the former. 4

Thus, Hinesley carries little force because its critical fact the scope of the disclaimer does not apply here.

In sum, this is not the rare case where the undisputed facts leave no room for a reasonable difference of opinion. Rothwell, 10 Cal. 4th at 1239. favor,

3. Resulting Harm Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages. Beckwith, 205 Cal. App. 4th 1064. In California, See Vestar Dev. II, LLC v. General Dynamics Corp., 249 F.3d 958, 961 (9th Cir.2001) (contract action); Mann v. Jackson, damages may be awarded for loss of profits where such profits can be shown with a reasonable degree of certainty, whe

The parties dispute the form of damages available here. California Civil Code § 1709 One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. Separately, § 3333 provides:

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

4 The RSU agreement also stated: the entire agreement of the parties with respect to the subject matter hereof and supersede in their (Dkt. No. 44-5 at 6.) But that provision is even less explicit than the provision disclaiming future value. Such a clause, alone, does not prohibit allegations of fraudulent inducement to contract. See, e.g., Distribs., Ltd., 902 F.Supp. 1141, 1147 (N.D. Cal. 1995) (merger clause does not preclude evidence of fraudulent inducement). Cal. Civ. Code § 3333. Two

traditional measures of damages emerged from these statutes: out-of-pocket damages and benefit-of-the-bargain damages. See City Sols., Inc. v. Clear Channel Commc ns, Inc., 242 F. Supp. 2d 720, 726 (N.D. Cal. 2003) (reviewing the history of damages for fraud in California), aff d in part, rev d in part on other grounds, 365 F.3d 835 (9th Cir. 2004). Out-of-pocket damages restore a plaintiff to the financial position he or she enjoyed prior to the fraudulent transaction awarding the difference between what the plaintiff gave and what the plaintiff received. Fragale v. Faulkner, 110 Cal. App. 4th 229, 236 (2003). The benefit-of-the-bargain measure places a defrauded plaintiff in the position he or she would have enjoyed had the false representation been true awarding the difference in value between what the plaintiff actually received and what the plaintiff was fraudulently led to believe he or she would receive. Id. California courts have also recognized damages for lost income opportunities in employment scenarios. See Lazar v. Superior Ct., 12 Cal. 4th 631, 646 (1996). But courts have been unclear as to whether lost income damages are a form of out-of-pocket damages, a form of benefit of the bargain damages, or some third category such as lost profits beyond those standard definitions. Compare Lazar, 12 Cal. 4th at 648-649 with Helmer v. Bingham Toyota Isuzu, 129 Cal. App. 4th 1121, 1130 (2005). See also Clear Channel Commc ns, Inc., 242 F. Supp. 2d at 724-734 (discussing lost profit damages as different from other damage categories). This case fits uncomfortably in the traditional damages scheme under California law. Defendant asserts Plaintiff suffered no damages here because it is undisputed the RSUs are currently worth more than $5.00 a share. So, benefit of the bargain damages do not apply here because Plaintiff received the benefit-of-the-bargain (and more). The Court agrees. Plaintiff cannot recover benefit-of-the-bargain damages. But anything less than he expected to receive when the vesting period ended. Rather, his alleged damage stems from appreciating more did. But for the representation of $5.00 per share as of March 2016, Plaintiff claims he would have stayed at Fortinet and made more money than he made at Tanium. 5 This theory does not fit squarely as traditional out-of- The out-of- pocket measure of damages is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. All. Mortg. Co. v. Rothwell, 10 Cal. 4th 1226, 1240 (1995) (emphasis added). Here, Plaintiff gave up his salary at Fortinet, his unvested options, and the opportunity to participate in the ESPP. Taking just the unvested options as an example, the evidence shows the Fortinet RSUs were worth roughly $90,000 at the time of the transaction. So, Plaintiff gave up $90,000 worth of unvested RSUs (at the time of the transaction) for roughly $60,000 worth of unvested RSUs at Tanium, (assuming, for the purposes of argument, the $2.01 409A price was correct valuation in March 2016). Again, Plaintiff profit on his Tanium stock far outstrips the roughly $30,000 difference between those two values (as of 2016).

Plaintiff seems to request a different version of damages: lost potential income had the representation not been made. Plaintiff wants the value of his Fortinet RSUs and anticipated compensation at Fortinet as of when he quit Tanium, less what he made at Tanium. In a sense, -of- Plaintiff forwent is timestamped as of his last day at Tanium, rather than his first. Or, put

misrepresentation.

Two cases are instructive here. In Lazar v. Superior Court, the defendant induced the plaintiff to leave stable employment in New York for a job in Los Angeles. 12 Cal. 4th at 469. But, despite giving assurances of secure employment, the defendant fired the plaintiff shortly

5 have stayed at Fortinet, I was a director of technical documentation at Fortinet where I received annual increases in salary, bonus, stock, participation in ESPP, and that would have been a lot -2 at 113). He estimated the differences was $1.4 million, based on the RSUs given up, future anticipated RSU grants, and participation in ESPP. (Id. at 115-116.) thereafter. Id. The plaintiff was able to prove the defendant always intended to fire plaintiff and presented evidence he was unable to re-obtain employment in New York. Thus, the California Supreme Court held:

[A]s to his fraud claim Lazar may properly seek damages for the costs of uprooting his family, expenses incurred in relocation, and the loss of security and income associated with his former employment in New York. On the facts as pled, however, Lazar must rely on his contract claim for recovery of any loss of income allegedly caused by wrongful termination of his employment with [the defendant]. Lazar, therefore, may proceed with his claim for fraud in the inducement of employment contract, properly seeking damages for as well as appropriate exemplary damages (Civ. Code, § 3294). Id. In a sense, Lazar recognizes an expansive version of out-of-pocket damages. The plaintiff gave up future steady income in New York and uprooted his family based on a representation he would have steady employment in Los Angeles. That representation was not true. For his fraud cause of action, the plaintiff could receive what he gave up in New York (including the future anticipated income from the job forsaken). But his fraud claim did not cover recovery of the income he lost from the defendant because the representation was untrue (benefit-of-the-bargain damages). Rather, his breach of contract claim covered that remedy. Helmer v. Bingham Toyota Isuzu addressed similar circumstances but discusses the damages as the benefit-of-the-bargain struck. 129 Cal. App. 4th at 1130. There, the defendant promised a prospective employee a higher income than he received at his current, stable job. Id. at 1124. When the prospective employee joined th money than he was promised and he was unable to return to his old position. Id. at 1125. The

compensable as Id. at 1130. The Court wrote:

Here, the employer made a false promise to induce an act by an employee who otherwise would have stayed in his former job. The d steady employment with another company. It is only fair to compensate the employee for the damages he suffered as a result of leaving that steady employment. Id. The former approach, espoused in Lazar, is on point here. What Plaintiff seeks is not the benefit-of-the-bargain struck. Rather, Plaintiff seeks to be placed in the position he would have occupied had the alleged misrepresentation never occurred. Just as Lazar sought the income associated with his forgone New York employment, Plaintiff seeks the income associated with his Fortinet employment that he allegedly forwent Defendant argues this damages theory could open the flood-gates to litigation when employees regret switching employers and despite making money make less than they might have otherwise made. That fear is not unreasonable. But the other

elements of fraudulent inducement such as knowledge of falsity, intent, and reliance protect against this slippery slope. Statutory interpretation supports this approach. Under California Civil Code § 3333,

So, [i]n a fraud case, we must always return to the key question how did the victim actually rely to its detriment on the false promise. Or, put differently, how would the outcome have differed had the false promise not been made or relied upon. Clear Channel Commc ns, Inc., 242 F. Supp. 2d at 732. Here, Plaintiff presents evidence (via his own testimony) that he would have made $1.4 million more had Defendant told him the 409A value. That is damage. Thus, prong fails as well.

CONCLUSION

whether the representation was deceptive, whether Defendant intended Plaintiff rely on the representation, and whether Plaintiff reasonably relied on that representation to his detriment. But

claim fails as a // // //

IT IS SO ORDERED. This Order disposes of Dkt. No. 44 Dated: February 17, 2023

JACQUELINE SCOTT CORLEY United States District Judge