

**Cobb v Chubb Corp.**

2007 NY Slip Op 30638(U)

January 25, 2007

Supreme Court, New York County

Docket Number: 0601081/2006

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----X  
DAVID COBB and JAYME LAURASH,

Plaintiffs,

-against-

THE CHUBB CORPORATION and  
CHUBB FINANCIAL SOLUTIONS, INC.,

Defendants.  
-----X

INDEX NO. 601081/2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

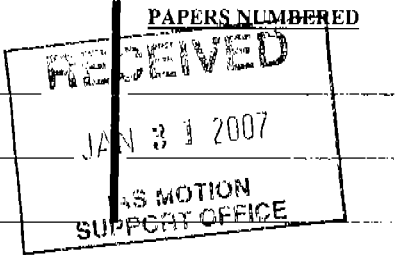
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

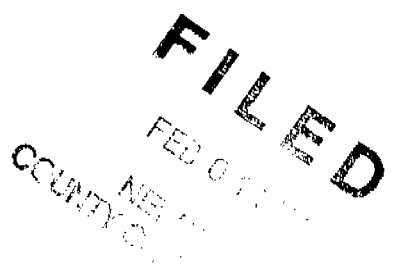


Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: January 25, 2007



KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

*Handwritten signature/initials*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
DAVID COBB and JAYME LAURASH,

Plaintiffs,

Index No. 601081/06

-against-

THE CHUBB CORPORATION and  
CHUBB FINANCIAL SOLUTIONS, INC.,

**Decision and Order**

Defendants.  
-----X

**KARLA MOSKOWITZ, J.:**

Plaintiffs David Cobb (“Cobb”) and Jayme Laurash (“Laurash”), former employees of defendants, seek compensation from defendants pursuant to employment agreements that allegedly entitle them to shares from Chubb Financial Solutions, Inc.’s (“CFS”) Embedded Value program as well as to additional bonuses and stock options. By this motion (sequence number 001), defendants the Chubb Corporation (“Chubb”) and CFS move to dismiss the complaint, pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), on the basis of documentary evidence, the statute of frauds or the doctrines of res judicata, collateral estoppel or payment, and failure to state a cause of action. For the reasons stated below, the court grants defendants’ motion to dismiss.

**BACKGROUND**

Cobb and Laurash worked as at-will employees for defendants between 2000 and 2003. (Complaint ¶ 3). Defendant Chubb is an insurance organization and defendant CFS is its wholly owned subsidiary that provides customized financial products to corporate clients. Cobb and Laurash worked for CFS in its New York offices. (*Id.* ¶ 9). Plaintiffs claim that, for their role in “originating and executing profitable credit derivative transactions,” defendants had promised

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them “an annual salary, an annual bonus, annual Chubb stock option awards, and a percentage share of CFS’s income.” (*Id.* ¶ 2). Both defendants state that the compensation package induced them to leave their former employers: Cobb left AIG in August 2000 and Laurash left J.P. Morgan in January 2001. (*Id.* ¶¶ 22, 28).

Defendants structured CFS to have a 20% interest, called “Embedded Value,” in its own total pre-tax net income (i.e., a 20% interest in CFS profits). CFS then created a compensation plan for any CFS employees who contributed to the profitability that generated CFS’s Embedded Value. Specifically, an employee could earn a percentage interest in CFS’s Embedded Value in correlation to that employee’s contribution to Embedded Value. This right to any Embedded Value would be compensation in addition to annual bonuses and other annual compensation. (Complaint ¶ 10). CFS formally adopted this Embedded Value program in the CFS Incentive Compensation Plan on July 29, 2002 (Transcript of Oral Argument, dated September 29, 2006, at 5) and gave it retroactive application to June 1, 2000 (CFS Incentive Compensation Plan ¶ 2 in Notice of Motion to Dismiss Plaintiffs’ Complaint, Exh. G). In addition to incentive compensation from CFS in the form of Embedded Value, defendants offered employees a second type of bonus exclusively from Chubb that consisted of stock option awards and annual bonuses. (Transcript of Oral Argument, dated September 29, 2006, at 27).

At their time of hire, plaintiffs allege defendants only made oral promises about their right to Embedded Value (Complaint ¶¶ 20, 30) but committed to pay annual bonuses and stock options, at their discretion, in employment letters. Plaintiffs claim defendants omitted the Embedded Value terms “to give Defendants more flexibility in determining such interest” so as to enhance the ultimate benefit to plaintiffs. (*Id.* ¶¶ 20, 30). Plaintiffs further protest the

retroactive application of the 2002 CFS Incentive Compensation Plan to supplant oral promises defendants made to plaintiffs about Embedded Value in late 2000 and early 2001. (Transcript of Oral Argument, dated September 29, 2006, at 5-6). Regarding annual bonuses and stock options, the employment letters guarantee only an eligibility for awards and reserve the actual allocation of awards to the discretion of a committee.

For example, Cobb's employment letter states, "You will be eligible for a cash incentive compensation payment . . . . [But] incentive payments are subject to the approval of the Organization and Compensation Committee and depend on the Corporation's performance as well as your own personal contributions and performance." (Cobb Employment Letter, dated July 21, 2000, p 1, in Notice of Motion to Dismiss Plaintiffs' Complaint, Exh. D). For awards of stock options, Cobb's employment letter contains the additional limitations of the Long-Term Stock Incentive Plan. "The Plan shall be administered by the Committee [the Organization and Compensation Committee of the Chubb Board of Directors]. The Committee shall have sole and complete authority to adopt, alter and repeal such administrative rules, guidelines and practices governing the operation of the Plan . . . ." (Long-Term Stock Incentive Plan § 3 in Notice of Motion to Dismiss Plaintiffs' Complaint, Exh. F). The Committee also has the right to determine an employee's eligibility for stock options and awards only those who "have the capacity for contributing in a substantial measure to the successful performance of the Corporation." (*Id.* § 4). Specifically, "the Committee shall have sole and complete authority to determine the Employees to whom Options shall be granted . . . ." (*Id.* § 6[a]). Finally, the Committee determines when and how employees may exercise options. (*Id.* § 6[c]).

Unlike Cobb's employment letter, Laurash's letter refers to incentive compensation plans

from both Chubb (stock options and annual bonuses) and CFS (the Embedded Value bonus). (See Laurash Employment Letter, dated January 17, 2001, p 1, in Notice of Motion to Dismiss Plaintiffs' Complaint, Exh. E). Although the letter does not specify the terms, Laurash's employment letter does mention the possibility of incentive compensation from CFS, that plaintiffs agree is absent from Cobb's letter and refers to the CFS Embedded Value. (Transcript of Oral Argument, dated September 29, 2006, at 29). The letter states, "In March of each subsequent year, you will be eligible to receive bonuses from both plans [the incentive plans from Chubb and from CFS] depending, of course, on the performance of Chubb and your own personal contributions and performance." (Laurash Employment Letter at 1).

Laurash's letter also addresses stock options: "The value of the stock options for the Chubb common stock to be granted to you (if any) will again be dependent upon the performance of the Company and your individual contribution." (*Id.* at 1-2). The letter specifically identifies the Organization and Compensation Committee of Chubb's Board of Directors as the body responsible for "recommend[ing]" and "approv[ing]" awards of stock options. (*Id.* at 2).

Defendants terminated plaintiffs on or about June 27, 2003 (Complaint ¶ 60), and plaintiffs voice two major concerns about their compensation at termination. First, they allege that defendants later changed plaintiffs' entitlement to Embedded Value, in direct contradiction of defendants' promises to plaintiffs. For example, plaintiffs claim that the CFS Incentive Compensation Plan, that defendants adopted in 2002, changed the division of awards among employees. (Transcript of Oral Argument, dated September 29, 2006, at 6). Plaintiffs contend defendants made numerous oral promises to them about their right to Embedded Value, both at the time of hire and throughout the course of their employment. (Complaint ¶ 44).

The CFS Incentive Compensation Plan states, “The Chief Executive Officer of the Company shall select key officers (which may include members of the Board) of the Business Unit to receive Incentive Compensation awards under the Plan (“Participants”) and recommend individual participation percentages for each such Participant, subject to approval of the Board.” (CFS Incentive Compensation Plan, dated July 29, 2002, ¶ 4 in Notice of Motion to Dismiss Plaintiffs’ Complaint, Exh. G). The CFS Incentive Compensation Plan also clarifies that “[s]ubject to the provisions of the Plan, the Board shall be authorized to interpret the Plan, to establish, amend and rescind any rules and regulations relating to the Plan and to make all other determinations necessary or advisable for administration of the Plan.” (*Id.* ¶ 3).

In April 2003, Chubb sent a memo to all CFS employees that informed them of its intentions to wind up CFS and absorb part of its Financial Products business into Chubb. (Complaint ¶ 46). At the same time, Chubb sent a memo to Tobey Russ (“Russ”), CFS Chief Executive Officer, that stated, “although not legally obligated to do so, we are prepared to enter into agreements providing for specified shares [of Embedded Value] to be paid to specified members of current CFS management, in each case to be proposed by Tobey Russ, subject to approval by the CFS Board.” (Memo to Russ, dated April 24, 2003, at 3 in Notice of Motion to Dismiss Plaintiffs’ Complaint, Exh. I). Plaintiffs claim this memo amounts to a promise that they would receive their percentage of CFS Embedded Value pursuant to allocations that only Russ would decide. (Complaint ¶¶ 47-48). The memo to Russ, however, explicitly said, “We do not agree that members of CFS management have any legal right to any ‘embedded value’ in CFS.” (Memo to Russ at 3).

Plaintiffs explain that defendants changed the Embedded Value program in yet another

regard by requiring all CFS employees to execute a Financial Portfolio Contingent Rights Agreement. (Complaint ¶ 55). This Agreement, contrary to oral promises defendants made plaintiffs, provided that awards of Embedded Value would occur in December 2008, at the earliest, and that defendants could manage Embedded Value in their own interest without any obligation to maximize its value. (*Id.* ¶ 56). Cobb and Laurash refused to execute the Financial Portfolio Contingent Rights Agreement. (*Id.* ¶ 57).

Second, plaintiffs contend that defendants informed them only at termination that CFS, in accordance with CFS policy, would withhold consent to exercise stock options unless plaintiffs signed a Release and Confidentiality Agreement. (Complaint ¶¶ 32, 61). Plaintiffs refused to sign the Agreement but assert their right to exercise the stock options because defendants did not disclose the terms at the time of hire. (*Id.* ¶¶ 33, 62-63). They also assert entitlement to higher percentages of Embedded Value because of their performance in numerous profitable transactions. (*Id.* ¶¶ 50, 68). Regarding Embedded Value, plaintiffs additionally allege Russ allocated them lower percentages because they would not continue with the company Russ had organized for the entity that he spun off from CFS. (*Id.* ¶ 49). Plaintiffs claim that higher percentages went to employees who would continue with Russ. (*Id.*).

The complaint contains six causes of action: breach of express contract and implied covenant of good faith and fair dealing (first cause of action); breach of implied contract (second cause of action); quantum meruit (third cause of action); promissory estoppel (fourth cause of action); fraud (fifth cause of action); and negligent misrepresentation (sixth cause of action). For Cobb, the relief sought includes compensatory damages for additional bonus compensation in the years 2000, 2001, 2002 and 2003 (along with an appropriate award of Chubb stock options for

2003); compensatory damages for the value of Chubb stock options that defendants had already awarded Cobb; and compensatory damages for his alleged 18.57% interest in CFS's Embedded Value. Laurash seeks identical relief, except that his bonuses are from 2001, 2002, and 2003 (along with an appropriate award of Chubb stock options for 2003) and his alleged interest in CFS's Embedded Value amounts to 13.71%.

### DISCUSSION

Defendants move to dismiss this action on three different grounds: (1) "a defense is founded upon documentary evidence" (CPLR 3211[a][1]); (2) the statute of frauds or the doctrines of res judicata, collateral estoppel or payment bar one or more causes of action (CPLR 3211[a][5]); and (3) "the pleading fails to state a cause of action" (CPLR 3211[a][7]).

On a motion to dismiss for failure to state a claim, "the court should accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [citations omitted]). In addition, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference and the criteria becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Id.*, quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). Specifically, a court may grant a motion to dismiss on documentary evidence "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Ladenburg Thalmann & Co. v. Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000] [citation omitted]).

I. Breach of Express Contract and Implied Covenant of Good Faith and Fair Dealing (first cause of action)

Plaintiffs' first cause of action involves plaintiffs' alleged right to CFS Embedded Value. Plaintiffs claim defendants deprived them of their share of Embedded Value by breaching employment agreements with plaintiffs and by breaching another "contract – separate and apart from the aforementioned employment agreements – for the payment of an interest in CFS's Embedded Value based on [plaintiffs'] respective contributions to the creation of the same (the 'Embedded Value Contracts.')" (Complaint ¶ 79). Related to these alleged breaches of express contract, plaintiffs plead breaches of the implied covenant of good faith and fair dealing. (*Id.* ¶¶ 76, 82).

Defendants move for dismissal of the first cause of action on the basis of documentary evidence, namely plaintiffs' employment letters, the CFS Incentive Compensation Plan, memos from Chubb regarding the winding up of CFS and the statute of frauds. (Memorandum in Support of Defendants' Motion to Dismiss the Complaint, p 4). Defendants further argue failure to state a cause of action because any alleged oral agreements about Embedded Value are too vague to be enforceable. (*Id.* at 5). Defendants also argue failure to state a cause of action "because there is no cause of action independent of breach of contract for breach of covenant of good faith and fair dealing." (*Id.*). Defendants explain that governing documents show how Embedded Value is "simply another discretionary bonus program affording no right or entitlement to anything." (*Id.* at 1).

The court agrees with defendants because (1) the statute of frauds requires a writing for

plaintiffs' view of Embedded Value as an express contractual right to prevail; (2) despite the alleged oral agreements on Embedded Value, later written agreements (i.e., the CFS Incentive Compensation Plan and the Chubb memos about the winding up of CFS), that explicitly identify Embedded Value as discretionary, supersede any previous agreements; and (3) the CFS Embedded Value program is discretionary.

A. The Statute of Frauds and Plaintiffs' Alleged Oral Agreements on Embedded Value

General Obligations Law, § 5-701(a)(1) provides:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged . . . if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof . . .

(General Obligations Law § 5-701[a][1]). Thus, a promise or agreement for compensation that cannot be performed within one year must be memorialized in writing and signed by the party to be charged. To avoid the writing requirement of the statute of frauds, “both parties must be able to complete their performance of the contract within one year.” (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 [2004] [citations omitted]).

In the context of at-will employment, “we have typically held that employment agreements of this type are without the proscription of the Statute of Frauds concerning one-year performance” because either employee or employer can terminate the relationship and fulfill performance of the contract within one year. (*Cron v Hargo Fabrics, Inc.*, 91 NY2d 362, 367 [1998] [citations omitted]). In addition, payment of bonuses after passage of year does not usually trigger the statute of frauds (*id.*), and “when the employment relationship is terminable

within a year and the measure of compensation has become fixed and earned during the same period, the sole obligation to calculate such compensation will not bring the contract within the one-year proscription of the Statute of Frauds” (*id.* at 370 [finding that statute of frauds does not apply in these “particular circumstances” of an employer orally promising an employee a bonus equal to 20% of pre-tax profits that employer calculated after the passage of one year because employment was still terminable within one year and the parties had fixed the alleged bonus compensation at 20%]). Thus, a writing is not necessary if the employment is at will and if the employer and employee have agreed on a fixed measure of bonus compensation even if the employer will calculate the bonus after a period of one year.

Plaintiffs here describe defendants’ oral promise about Embedded Value as “a percentage share of CFS’s income.” (Complaint ¶ 2). As defendants orally explained to plaintiffs at their *time of hire*, their right to Embedded Value would be “based on [their] contributions to the creation of CFS’s Embedded Value.” (*Id.* ¶¶ 18, 25). Plaintiffs claim that, during their employment, defendants repeated these promises of entitlement to Embedded Value based on their individual contributions. (*Id.* ¶ 44). Defendants allegedly made only oral promises about Embedded Value because they wanted “more flexibility in determining such interest” and to potentially increase the ultimate benefit to plaintiffs. (*Id.* ¶¶ 20, 30).

This “flexibility” in determining plaintiffs’ exact share of Embedded Value engendered debate at oral argument about the calculation of plaintiffs’ interest. Defendants claim it is 3.9% for Cobb and 3.5% for Laurash, but plaintiffs claim it is 18.57% and 13.71%, respectively. (Transcript of Oral Argument, dated September 29, 2006, at 7; *see also* Complaint ¶¶ 50, 69, 71). This discrepancy, according to defendants, arises because “you can’t tell what this is [oral

promises about Embedded Value], when it was to be calculated, how it was to be determined.” (Transcript of Oral Argument, dated September 29, 2006, at 12). Although courts find the statute of frauds does not generally apply to employment at-will contracts, like those of plaintiffs (*Cron*, 91 NY2d at 367), *Cron* instructs that, to avoid a statute of frauds problem with bonus compensation, the calculation of the bonus payable after one year must “become fixed and earned during the same [one-year] period” (*id.* at 370). In *Cron*, the court held that the statute of frauds did not apply to the plaintiff who had orally agreed with his employer on a fixed percentage (20%) of profits for his bonus. (*Id.*). Unlike the plaintiff in *Cron*, plaintiffs’ oral agreements for their CFS bonus of Embedded Value did not include a fixed percentage of CFS profits because defendants and plaintiffs agreed to give defendants “flexibility” in this calculation. Moreover, plaintiffs and defendants continue to dispute the exact percentage to which plaintiffs are entitled.

The oral agreements between defendants and plaintiffs are not the type of oral bonus compensation arrangement that *Cron* allows to escape the statute of frauds. Specifically, because defendants’ alleged promises about Embedded Value lack a “fixed” measure of bonus compensation for plaintiffs’ at-will employment, these promises run afoul of the statute of frauds. (*See Cron*, 91 NY2d at 370). The statute of frauds therefore bars plaintiffs’ first cause of action for breach of express contract. The court also agrees with defendants’ statement that the oral promises about Embedded Value are vague, for, as discussed in the preceding statute of frauds analysis, neither party can explain the exact calculation of Embedded Value. And, as the court discusses in the next section, these oral promises about Embedded Value are “superseded by the offer letters and the terms and conditions of the written Plans those letters implicate.” (Defendants’ Reply Memorandum, p 10). The court now turns to these written agreements.

## B. Later Modifications and Subsequent Writings on Embedded Value

Even if the statute of frauds did not prevent plaintiffs from alleging breach of contract on the basis of oral agreements with defendants, the existence of later writings on Embedded Value would still warrant dismissal of plaintiffs' breach of contract claim. Although the complaint refers to "Embedded Value Contracts," that are allegedly distinct contracts from plaintiffs' employment agreements (Complaint ¶ 79), the court has found no writings in the record and assumes that these "Embedded Value Contracts" are actually the alleged oral contracts that the statute of frauds prohibits (*see supra* pp 9-11). The court therefore identifies the following as writings subsequent to the oral agreements on Embedded Value: a reference to CFS incentive compensation in the Laurash employment letter, the 2002 CFS Incentive Compensation Plan and the memos about the winding up of CFS.

Subsequent writings supersede any prior agreements, including oral agreements. "It is well established that a subsequent contract regarding the same matter will supersede the prior contract." (*Barnum v Millbrook Care Ltd. Partnership*, 850 F Supp 1227, 1236 [SDNY 1994], citing *College Auxiliary Servs. of State Univ. College, Inc. v Slater Corp.*, 90 AD2d 893, 894 [3d Dept 1982]). Moreover, with employment contracts, "[c]ase law dictates that when parties have an employment contract terminable at will, the contract can be modified and different compensation rates fixed without approval of the other party since the dissatisfied party has a right to leave his employment." (*Gen. Elec. Tech. Servs. Co. v Clinton*, 173 AD2d 86, 88 [3d Dept 1991] [holding plaintiff could enforce modifications of at-will employment when plaintiff gave defendant a handbook that outlined the modifications of plaintiff's employee tax policies]; *see also Berger v Roosevelt Inv. Group Inc.*, 28 AD3d 345, 345 [1st Dept 2006] [finding

employer “had the right to impose any terms it chose on plaintiff’s continued employment”] [citations omitted]; *Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 835 [1st Dept 1983] [“if the contract was terminable at will, it followed that the contract was subject to modification at any time as a condition of its continuance”]).

Plaintiffs argue that the retroactive application of the CFS Incentive Compensation Plan, that defendants issued in July 2002 and made retroactive to 2000, is “illogical” because defendants had already made promises to plaintiffs in late 2000 and early 2001 regarding their entitlement to Embedded Value. (Transcript of Oral Argument, dated September 29, 2006, at 6). In light of the case law above, this argument fails, for employers retain the right to modify the terms of at-will employment contracts, and subsequent contracts generally supersede prior ones. Thus, contrary to plaintiffs’ assertions that defendants’ later writings on Embedded Value, like the CFS Incentive Compensation Plan, “cannot serve as basis for dismissing [the Embedded Value] claims” (Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, p 8), the court finds that these writings can provide a basis for dismissing plaintiffs’ first cause of action for breach of express contract. These later writings provide documentary evidence that defendants retain discretion over the distribution of Embedded Value and that plaintiffs therefore have no contractual right to it.

If the terms and conditions of an incentive compensation award allow an employer to determine an employee’s eligibility for the award, the court cannot find a breach of contract when an employer refuses to make an award. “If a written agreement ‘unambiguously contradicts’ a plaintiff’s claim that the defendant breached it, the agreement constitutes ‘documentary evidence’ that warrants dismissing the complaint under CPLR 3211(a)(1). ‘This follows from the bedrock

principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms.'" (*SportsChannel Assocs. v Sterling Mets, LP*, 7 Misc 3d 1007A [Sup Ct, NY County 2005, Freedman, J.], quoting *150 Broadway NY Assocs. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; see also *Freeman v DL Rothberg & Assocs.*, 814 NYS 2d 561, 561 [1st Dept 2005] [denying recovery of a bonus based on breach of contract because bonus agreement made payment "purely discretionary" and "it should have been enforced according to the plain meaning of its terms"). An employee may never assume entitlement to an award because "an 'employee's entitlement to a bonus is governed by the terms of the employer's bonus plan.'" (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 225 [2000], quoting *Hall v United Parcel Serv.*, 76 NY2d 27, 36 [1990]; see also *Brennan v J.P. Morgan Secs., Inc.*, 7 Misc 3d 1013A [Sup Ct, NY County 2004, Lowe, J.] ["The rule with respect to bonuses is that an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan."]).

All of defendants' subsequent writings on Embedded Value allow for a discretionary allocation of an employee's share in Embedded Value. Cobb's employment letter does not mention incentive compensation from CFS at all. Laurash's employment letter does mention CFS compensation but does not in any way provide a guaranteed right to CFS's Embedded Value because it states, "In March of each subsequent year [after March 2002], you will be eligible to receive bonuses from both plans [the incentive plans from Chubb and from CFS] depending, of course, on the performance of Chubb and your own personal contributions and performance." (Laurash Employment Letter at 1). In addition, although Cobb's letter contains no explicit references to CFS compensation in the form of Embedded Value, it does state generally, "incentive payments are subject to the approval of the Organization and Compensation

Committee and depend on the Corporation's performance as well as your own personal contributions and performance." (Cobb Employment Letter at 1). These letters clearly show defendants' intention to exert their discretion over incentive compensation awards of any kind.

In 2002, once defendants did have a plan in place, that defendants called the CFS Incentive Compensation Plan and made retroactive to 2000, this plan formalized defendants' authority and discretion in granting CFS Embedded Value shares. Not only would the selection of recipients and the determination of shares be "subject to approval of the Board" (CFS Incentive Compensation Plan ¶ 4), "the Board shall be authorized to interpret the Plan, to establish, amend and rescind any rules and regulations relating to the Plan and to make all other determinations necessary or advisable for administration of the Plan" (*id.* ¶ 3). An April 2003 memo to Chief Executive Officer Russ further specifies, "although not legally obligated to do so, we are prepared to enter into agreements providing for specified shares [of Embedded Value] to be paid to specified members of current CFS management, in each case to be proposed by Tobey Russ, subject to approval by the CFS Board." (Memo to Russ at 3). Because numerous written agreements grant defendants the right to determine the employees and the percentages of Embedded Value those employees receive, this documentary evidence shows that plaintiffs cannot maintain a claim that defendants breached an express contract by not awarding them their alleged percentages of Embedded Value. Accordingly, the court grants defendants' motion to dismiss the express breach of contract claim.

### C. Covenant of Good Faith and Fair Dealing

Defendants argue that plaintiffs fail to state a cause of action in pleading breach of the covenant of good faith and fair dealing. (Memorandum in Support of Defendants' Motion to

Dismiss the Complaint, p 10). Plaintiffs respond that this allegation is “implicit in the contracts into which they entered with Defendants, and that Defendants breached that covenant in connection with their breach of the underlying contracts.” (Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, p 8 n 10).

“Under New York Law, parties to an express contract are bound by an implied duty of good faith, ‘but breach of that duty is merely a breach of the underlying contract.’” (*Fasolino Foods Co., Inc. v Banca Nazionale Del Lavoro*, 961 F2d 1052, 1056 [2d Cir 1992], quoting *Geler v National Westminster Bank USA*, 770 F Supp 210, 215 [SDNY 1991]). Thus, “it is well-settled New York law that a claim alleging breach of the implied covenant must be dismissed as duplicative when the conduct constitutes the breach of the underlying contract.” *Nornberg v Thai Magic Co., Inc.*, 10 Misc 3d 1076A, 4 [Sup Ct, NY County 2006, Fried, J.], citing *Horn v New York Times*, 100 NY2d 85 [2003]).

Because the breach of contract claim fails and plaintiffs have not indicated that breach of the covenant of good faith and fair dealing involves conduct different from the underlying contract claim, the breach of the covenant of good faith and fair dealing must fail as well.

## II. Breach of Implied Contract (second cause of action)

Plaintiffs cite industry custom and practice to establish payment of annual cash bonuses and stock options as part of total compensation. Plaintiffs then allege defendants followed this practice and therefore breached an implied contract to pay plaintiffs their “bonuses and Chubb stock option awards that accurately reflected their respective contributions to Chubb and CFS for each of their years of service . . . .” (Complaint ¶¶ 89, 91, 95, 98). In citing “industry custom and practice” to pay annual cash bonuses and stock options, defendants’ “policy/practice of

paying [them]” and an alleged “course of dealing” between plaintiffs and defendants to award cash bonuses and stock options (*id.* ¶¶ 89, 91, 96), plaintiffs overlook the terms of their employment letters.

“An implied contract arises in the absence of an express agreement and is inferred from the conduct of the parties and the surrounding circumstances.” (*Berardi v Fundamental Brokers, Inc.*, 1990 WL 129174, \*6 [SDNY Aug. 30, 1990], citing *Bloomgarden v Cover*, 479 F2d 201, 208 [DC Cir 1973] [stating an implied contract “differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt”). To establish an implied contract, a plaintiff must allege conduct or a course of dealing that “evinces an implied promise.” (*Mirchel v RMJ Secs. Corp.*, 205 AD2d 388, 390 [1st Dept 1994]). “An implied contractual relationship may be established by conduct of the parties, as well as by express agreement.” (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926, 931 [Sup Ct, NY County, Fried, J.]).

The court does not understand how plaintiffs assert, “the Employment Letters do not constitute employment contracts that govern the obligations of Defendants to compensate Mr. Cobb and Mr. Laurash with bonus and stock option compensation.” (Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Complaint, p 13). Plaintiffs do attempt to argue that these employment letters provide compensation only for the first year of employment. These letters, however, address both the first year of employment and succeeding years. More importantly, the existence of these letters demonstrates that defendants did have an express agreement with plaintiffs regarding cash bonuses and stock options, and, consequently, plaintiffs cannot plead or

maintain a cause of action for implied contract. (*See Berardi*, 1990 WL 129174 at \*6).

Defendants guaranteed only Cobb a bonus in the first year, and this was a signing bonus. Cobb does not contest payment of this signing bonus. (Memorandum in Support of Defendants' Motion to Dismiss the Complaint, p 12). Thus, defendants guaranteed only the signing bonus for Cobb, and the letters reveal that future bonuses and stock options are discretionary.

As explained in section I(B), discretionary incentive compensation never confers an automatic right to bonuses or stock options. (*See supra* pp 13-15). Cobb's employment letter identifies eligibility for incentive payments, such as bonuses, "subject to the approval of the Organization and Compensation Committee . . . ." (Cobb Employment Letter at 1). Laurash's employment letter also speaks only of eligibility for bonuses and does not provide any guarantees. "In March of each subsequent year, you will be eligible to receive bonuses from both plans [the incentive plans from Chubb and from CFS] depending, of course, on the performance of Chubb and your own personal contributions and performance." (Laurash Employment Letter at 1). The court therefore reads these employment letters as offering only eligibility for bonuses.

The Long-Term Stock Incentive Plan ("LTSIP") governs stock options. Cobb's letter explicitly refers to LTSIP, but it applies equally to Laurash because, as also explained in section I(B) (*see supra* pp 12-13), employers retain the right to apply other policies to employees at will, who can easily leave employment if unhappy with these policies (*see Gen. Elec. Tech. Servs. Co. v Clinton*, 173 AD2d at 88). Similar to the annual bonuses defendants offered plaintiffs, awards of stock options are discretionary. The LTSIP states, "the Committee shall have sole and complete authority to determine the Employees to whom Options shall be granted . . . ." (LTSIP § 6[a]). In addition, "[e]ach option shall be exercisable at such times and subject to such terms

and conditions as the Committee may, in its sole discretion, specify in the applicable Award or thereafter . . . .” (*Id.* § 6[c]). Thus, plaintiffs must accept defendants’ determination of their rights to, and exercise of, any stock options.

The court does not understand plaintiffs’ argument that section 10(d) “precludes its application to agreements made outside of the LTSIP,” such as plaintiffs’ employment letters. (Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, p 6). Section 10(d) reads:

*No Right to Employment.* No person shall have any claim or right to be granted an Award, and the grant of an Award shall not be construed as giving a Participant the right to be retained in the employ of the Employer. Further, the Employer expressly reserves the right at any time to dismiss a Participant free from any liability, or any claim under the Plan, except as provided herein or in any agreement entered into with respect to an Award.

(LTSIP § 10[d]). Because section 10(d) recites that “[n]o person shall have any claim or right to be granted an Award,” if anything, its language reinforces defendants’ discretion over the awards and thus refutes plaintiffs’ alleged right to cash bonuses and stock options. Accordingly, the court grants defendants’ motion to dismiss the second cause of action for implied breach of contract.

### III. Quantum Meruit (third cause of action)

Under the theory of unjust enrichment/quantum meruit, plaintiffs seek additional bonus compensation, stock option awards and their alleged interest in CFS Embedded Value.

(Complaint ¶¶ 109-10). Plaintiffs argue that “Defendants do not contest that Mr. Cobb and Mr. Laurash provided services to Defendants in good faith, that Defendants knew that Mr. Cobb and

Mr. Laurash were performing and rendering such services, and that Defendants accepted those services and received attendant benefits. In short, Defendants do not contest any of the factual allegations that form the basis of the unjust enrichment/*quantum meruit* claims.” (Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, p 16).

To state a claim for unjust enrichment, a party must establish “the performance of services in good faith; the acceptance of those services by the entity to which they were rendered; an expectation of compensation therefor; and the reasonable value of the services.” (*Lehrer McGovern Bovis, Inc. v. New York Yankees*, 207 A.D.2d 256, 259 [1st Dept 1994] [citation omitted]). However, an employee may not bring a claim based on quantum meruit when the parties have a written contract for the matter in dispute. For example, for a bonus that a company’s handbook clearly labeled “discretionary,” the court would not allow a plaintiff “to recover bonus compensation in quantum meruit . . . [because] the company policy that the payment of bonus compensation was purely discretionary” made this theory unviable. (*Kaplan v. Capital Co. of Am. LLC*, 298 A.D.2d 110 [1st Dept 2002]. Indeed, “it is impermissible to seek damages under a quantum meruit theory where . . . there is an express written contract between those parties.” (*Tierny v Capricorn Investors L.P.*, 189 AD2d 629, 632 [1st Dept 1993]; *see also Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003] [“[A] claim for quantum meruit generally will not lie where a contract between the parties governs the dispute.”] [citations omitted]).

In this case, several written documents control the disposition of incentive compensation to plaintiffs: the employment letters, the LTSIP, the CFS Incentive Compensation Plan and the memo to Russ. All of these documents, in one way or another, give defendants discretion over

incentive compensation to employees. Plaintiffs therefore do not qualify for the compensation they seek, either by right of contract or under quantum meruit. Accordingly, the court grants defendants' motion to dismiss the third cause of action for unjust enrichment.

#### IV. Promissory Estoppel (fourth cause of action)

Plaintiffs' fourth cause of action for promissory estoppel involves only their alleged right to CFS Embedded Value. The complaint states, "As detailed herein, Defendants made clear and unambiguous promises and representations to Mr. Cobb and Mr. Laurash that, in return for structuring and executing profitable structured credit derivative transactions on behalf of CFS, they would be entitled to an interest in CFS's Embedded Value related and proportional to their respective contributions to the creation of CFS's Embedded Value." (Complaint ¶ 113).

According to New York law, a successful promissory estoppel claim contains "(1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained by the party asserting estoppel." (*D'Accord Fin. Servs., Inc. v Metsa Serla Oy*, 1999 WL 58916, \*4 [SDNY 1999] [citation omitted]). But, if a written contract exists, a plaintiff cannot have reasonably relied on a defendant's alleged promises. (*See id.* [citations omitted]). In addition, "New York does not recognize promissory estoppel as a valid cause of action when raised in the employment context." (*Van Brunt v Rauschenberg*, 799 F Supp 1467, 1473 [SDNY 1992], citing *Dalton v Union Bank of Switzerland*, 134 AD2d 174 [1st Dept 1987]).

Because defendants provide both the CFS Incentive Compensation Plan and the Russ memo as documentary evidence of employment agreements on Embedded Value, plaintiffs' promissory estoppel claim fails. Accordingly, the court dismisses the fourth cause of action.

V. Fraud (fifth cause of action) and Negligent Misrepresentation (sixth cause of action)

Plaintiffs plead fraud and negligent misrepresentation for their stock options claims. (Complaint ¶¶ 128, 136). Defendants respond that the doctrines of res judicata and collateral estoppel bar the fraud and negligent representation claims. (Memorandum in Support of Defendants' Motion to Dismiss the Complaint, pp 20-21).

In the federal court action for violation of federal securities law, Judge Owen of the Southern District of New York stated that “plaintiffs acknowledge that reference to the subsection of the alleged sign-on stock option refers to the LTSIP was made known to them at the respective times they accepted employment, by signing their offer letters. Had they engaged in reasonably diligent [*sic*] pursuant of the information provided to them, *i.e.*, had they *read them*, such would have disclosed that awards of stock options by defendants were subject to terms and conditions, including that the employer expressly reserved the right to forfeit unexercised options upon termination of employment or dismissal.” (*Cobb v Chubb Corp.*, 2005 WL 2875329, \*2 [SDNY Nov. 2, 2005] [emphasis in original]). That court then dismissed the federal securities law claim because, given that plaintiffs were on inquiry notice at the time they signed their employment letters, the one-year discovery period for securities fraud actions had already expired. (*Id.*).

This court cannot give res judicata effect to the federal court's ruling. “The doctrine of res judicata or claim preclusion prohibits a party from relitigating any claim that could have been or that should have been litigated in a prior proceeding.” (*Trisingh Enters., Inc. v Kessler*, 249 AD2d 45, 46 [1st Dept 1998]). Under the doctrine of res judicata, New York courts do not permit litigation of other claims that arise from the same transaction if a court has already resolved the

initial claim. It does not matter if the other claims are “based upon different theories or if [they seek] a different remedy.” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [citation omitted]; *see also Coney Island Resorts, Inc. v City of New York*, 4 AD3d 211, 211 [1st Dept 2004]). Because Judge Owen dismissed only the federal securities law claim, he never reached the state law claims currently before this court. In fact, Judge Owen “decline[d] to exercise supplemental jurisdiction over the remaining claims” (*Cobb*, 2005 WL 2875329 at \*3), so the federal court did not make a ruling to which res judicata would apply here.

Nor does collateral estoppel require this court to respect the federal court’s finding on the issue of plaintiffs’ inquiry notice. Related to res judicata, collateral estoppel bars relitigation of issues, instead of claims, and “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same.” (*Leather v Eyck*, 180 F3d 420, 425 [2d Cir 1999], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). Because the federal court never decided the state fraud and negligent misrepresentation claims, it did not reach the issues these claims raise. The federal court action does not collaterally estop the plaintiffs’ fraud and negligent misrepresentation claims.

Although the doctrines of res judicata and collateral estoppel do not allow the court to dismiss the fifth and sixth causes of action, the court nevertheless does dismiss these claims for the reasons the court states in the next two sections.

#### A. Fraud (fifth cause of action)

To plead fraud, a plaintiff must allege “the defendant made material representations of existing fact that were false and known by the defendant to be false when made, for the purpose

of inducing plaintiff's reliance, justifiable reliance by the plaintiff, and damages.” (*Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc 3d 1242(A), 14 [Sup Ct, NY County 2006, Fried, J.], citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319 [1995]). If, instead of false material representations, a plaintiff alleges material omissions, “the general rule is that no duty to disclose exists in the absence of a confidential, fiduciary relationship or statutory duty between two parties to a contract.” (*Id.*, citing *George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 114 AD2d 930, 931 [2d Dept 1985]).

Plaintiffs base their fraud claims on an omission. Specifically, they contend defendants failed to disclose company policy that employees could retain, and eventually exercise, stock options after termination only if they executed releases to forego any law suits against defendants. (Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, p 20). Plaintiffs, however, overlook the fact that fraud based on omission requires a fiduciary relationship and that one does not exist here because “an employer owes an employee at will no fiduciary duty.” (*Budet v Tiffany & Co.*, 155 AD2d 408, 409 [2d Dept 1989], citing *Ingle v Glamore Motor Sales, Inc.*, 140 AD2d 493, 494 [2d Dept 1988], *affd* 73 NY2d 183). Plaintiffs therefore cannot plead fraud because there is no fiduciary relationship as a matter of law in the context of employment at will. Accordingly, the court dismisses the fifth cause of action.

#### B. Negligent Misrepresentation (sixth cause of action)

“A claim for negligent representation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given.”

(*Hudson River Club v Consolidated Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000] [citations omitted]). A court properly dismisses a cause of action for negligent misrepresentation “on the ground that the employer-employee relationship alleged [is] not one of special confidence and trust.” (*Rivas v AmeriMed USA, Inc.*, 824 NYS 2d 41, 41 [1st Dept 2006], citing *Glanzer v Keilin & Bloom, L.L.C.*, 281 AD2d 371, 371-72 [2002] [concluding that plaintiffs, recruited by defendant investment banking firm with alleged “false promises of substantial compensation consistent with industry standards for senior investment advisors,” did not have a cause of action for negligent misrepresentation “there being no showing of a special relationship of trust or confidence”).

Plaintiffs cannot establish a special relationship with defendants because one does not exist in the employment at will context. “[A]n employer owes an employee at will no fiduciary duty.” (*Budet*, 155 AD2d at 409, citing *Ingle*, 140 AD2d at 494). Further, an employer-employee relationship does not provide a basis for the special relationship that negligent misrepresentation requires. (*See Rivas*, 824 NYS 2d at 41 ). As with plaintiffs’ fraud claim, the negligent misrepresentation claim likewise fails. Plaintiffs contend that they do successfully plead a special relationship here, but they offer only two cases to justify the existence of a special relationship. (Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, p 25). Because one of these cases is from the Fifth Circuit and the other from the Eastern District of New York, these cases do not bind this court, and, more importantly, they are distinguishable from the case before this court.

Plaintiffs cite *Becker v PaineWebber Inc.* as evidence that New York law, as interpreted by the Fifth Circuit, allows a finding that plaintiff “provided evidence to present a jury question

on the first element [of negligent misrepresentation] because he showed that he had a special relationship with PaineWebber, his employer . . . .” (*Becker v PaineWebber Inc.*, 962 F2d 524, 526 [5th Cir 1992]). The Fifth Circuit, however, permitted this finding only on the unique facts of that case in which the defendant security firm repeatedly assured the plaintiff employee that he would receive board approval for his oil trading unit but never did because the unit would require the formation of a separate subsidiary. (*Id.*). In *Malinguez v Joseph*, the other employment case that plaintiffs cite, the court itself found a special relationship because the defendant had employed plaintiff in Malaysia and then brought her to the United States. (*Malinguez v Joseph*, 226 F Supp 2d 377, 391 [EDNY 2002]). The court did not base its finding on the employer-employee relationship but on the lack of an arms-length relationship between plaintiff and defendant because they lived together and plaintiff cared for defendants’ children. The court explained, “a plaintiff must establish that the relationship with the defendants involved a closer degree of trust or confidence than an ordinary buyer-seller relationship involving arms-length business transactions.” (*Id.* at 390, citing *Pappas v Harrow Stores, Inc.*, 140 AD2d 501 [1988]).

Plaintiffs also repeatedly assert that a fact-finder should determine if a special relationship exists, but none of these cases addresses the fact-finder in the employment context. (*See Kimmel v Schaefer*, 89 NY2d 257, 264 [1996] [finding special relationship between attorney, who was also the CFO and chairman of company selling investment projects, and investors because this commercial context conferred upon defendant a special duty to speak with care in presenting projects]; *Polycast Tech. Corp. v Uniroyal, Inc.*, 792 F Supp 244, 269 [SDNY 1992] [in buyer-seller context, stating jury “would be permitted in law to find the existence of that special relationship” between defendant corporation that sold its subsidiary to plaintiff

corporation]; *AFA Protective Sys., Inc. v Am. Tel. and Tel. Co., Inc.*, 57 NY2d 912, 914 [1982] [leaving to fact-finder the issue of a special relationship when defendants made misrepresentations about the equipment they would use in plaintiff's security alarm system]).

New York state courts, on the other hand, do not find a fiduciary relationship in the employment at will context (*Budet*, 155 AD2d at 409, citing *Ingle*, 140 AD2d at 494) and therefore decline to find a special relationship (*Rivas*, 824 NYS 2d at 41). Moreover, plaintiffs do not indicate that their relationship with defendants exceeded the "arms-length business transaction[]" that would allow them to allege a special relationship. (*Malinguez*, 226 F Supp 2d at 391). Accordingly, the court grants defendants' motion to dismiss the sixth cause of action.

#### VI. Plaintiffs' Request to Replead

At oral argument, plaintiffs requested the "opportunity to correct anything . . . defective." (Transcript of Oral Argument, dated September 29, 2006, at 39). "Although leave to amend a pleading should be freely given (CPLR 3025[b]), an amendment which is devoid of merit should not be permitted." (*Goldstein v Barco of California, Inc.*, 109 AD2d 817, 818 [2d Dept 1985]). Because, as discussed above, the court does not find any basis for plaintiffs' claims in the documentary evidence before the court, any amendments plaintiffs might seek would necessarily be "devoid of merit." Accordingly, the court denies plaintiffs' request for leave to replead.

#### CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss, motion sequence 001, is granted; and it is further


ORDERED that plaintiffs' request for leave to replead the complaint is denied; and it is

further

ORDERED, the Clerk is directed to enter judgment dismissing the complaint accordingly.

Dated: January 25, 2007

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J.S.C.

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