

## IN THE IOWA DISTRICT COURT FOR LINN COUNTY

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KARIM A ABDEL-MALEK,

Plaintiff,

v.

MALUM INC,  
GREG CARSTENSEN,  
SCOTT KEPLINGER,  
RICHARD FERGUSON,

Defendants.

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Case No. 06571 LACV099329

ORDER DENYING BOTH  
CROSS-MOTIONS FOR  
TEMPORARY INJUNCTION

Before the Court are the Cross-Motions for Temporary Injunction filed by the Plaintiff, Dr. Karim A. Abdel-Malek (“Dr. Malek”), and the Defendant, Malum Inc. (“Malum”). A hearing was held via GoToMeeting on June 8, 2022. Plaintiff appeared and was represented by Jason O’Rourke and Joshua McIntyre. Malum was represented by Samuel Jones. Defendant Scott Keplinger was represented by Jonathan Kramer. Defendant Greg Cartensen was represented by William McCartan. Defendant Richard Ferguson was represented by Amy Reasner.

The Cross-Motions for Temporary Injunction are now fully briefed and submitted. Having reviewed the exhibits and having listened to counsel’s arguments, the Court enters this Order.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Malek is a co-founder of Malum. Richard Ferguson is an additional co-founder and Malum’s Chairman of the Board. Scott Keplinger is Malum’s Chief Executive Officer. Greg Carstensen is a Member of Malum’s Board of Directors.

Malum was created to commercialize technology invented by Dr. Malek, who is a renowned engineer in the fields of robotics and human simulation. As a co-founder of Malum, Dr. Malek received shares in the corporation. Malum purportedly redeemed Dr. Malek's *unvested* shares. In response, Dr. Malek filed this lawsuit on February 22, 2022. He also filed a renewed Motion for Temporary Injunction on March 1, 2022, seeking to prevent Malum from taking steps to redeem his *vested* shares.<sup>1</sup> Malum filed its own Motion for Temporary Injunction on April 20, 2022. Malum asks the Court to Order Dr. Malek to turn over the stock certificates corresponding to his unvested shares that the corporation previously redeemed.

#### LEGAL STANDARD

A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation. *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985). "The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case." *Kent Prods. v. Hoegh*, 61 N.W.2d 711, 714 (1953).

A temporary injunction may be issued when the moving party seeks to restrain an act that would cause that party irreparable harm. Iowa Rule of Civil Procedure 1.1502(1). When evaluating a temporary injunction "courts consider the 'circumstances confronting the parties and balance the harm that a temporary injunction may prevent against the harm that may result from its issuance.'" *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001) (quoting *Kleman*, 373 N.W.2d at 96). "The standards considered in granting temporary injunctions are similar to those for permanent injunctions, except temporary injunctions require a showing of the likelihood of success on the merits instead of actual success." *Id.*

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<sup>1</sup> Dr. Malek asserts that Malum took steps to redeem his vested shares after this action was filed.

LEGAL ANALYSIS

Malum's purported ability to redeem Dr. Malek's shares is based on the Founder Stockholder Agreement (the "Agreement"). Petition Exhibit 1. The Agreement has an effective date of February 25, 2019. It is signed by Dr. Malek, Mr. Ferguson, and four other individual stockholders. Pursuant to its terms, the Agreement is to be interpreted using Delaware law. Exhibit 4 p. 9.

The parties agree that the operative provision is Section 7 titled: "Transfers Upon Termination of Services to the Corporation." It reads in relevant part as follows:

(a) Redemption and Re-Purchase Rights.

(1) Unvested Stock. If Stockholder is no longer actively providing Services to the Corporation (whether voluntarily, involuntarily or for any reason whatsoever as Stockholder agreed to provide (the services to be provided by each Stockholder as mutually agreed to by each Stockholder and the Corporation, shall be referred to herein as the "Services"), the Corporation and the Stockholders, shall have the irrevocable option (but not the obligation) to purchase all or any of the "Unvested Stock" of each Stockholder (as defined in Exhibit B attached hereto) by paying the Unvested Repurchase Price (as defined herein) within One Hundred Eight (180) days of the Termination Date (as defined herein).

(2) Vested Stock. If a Stockholder is no longer actively providing the Services to the Corporation, the Corporation or the other Stockholders shall have an irrevocable option, but not an obligation, to purchase and redeem the "Vested Stock" by paying the Vested Repurchase Price (as defined herein) within One Hundred Eight (180) days of the Termination Date.

(b) Determination of Whether Services Have Been Terminated. Any determination of whether Services of a Stockholder are being provided or have been terminated shall be made by the Corporation, in its sole discretion. The date such Services are determined to be terminated shall be referred to herein as the "Termination Date."

Exhibit 1 pp. 4-5. The key language is "actively providing Services to the Corporation."

On November 19, 2021, Malum purportedly redeemed Dr. Malek's unvested shares based on its assertion that Dr. Malek was no longer providing services. Dr. Malek claims that this notice was factually incorrect. His affidavit represents that he was still providing services at

this time. He also cites to evidence in the record illustrating that, as of the day before the attempted redemption, Malum anticipated that he would “continue” providing services. Exhibit 3 (“Given Karim will still retain significant equity exposure, we expect his continued involvement regarding technologies, best efforts to assist the organizations efforts to secure future business...”).

Malum counters with assertions that Dr. Malek was removed from the Board and his shares were redeemed because he was engaging in conduct harmful to the corporation. More importantly, Malum cites to the language in the Agreement that states: “Any determination of whether Services of a Stockholder are being provided or have been terminated shall be made by the Corporation, in its sole discretion.” Exhibit 1 p 5 (Founder Agreement ¶ 7(b)).

*Dr. Malek’s Motion for Injunction*

Malum has already purportedly redeemed Dr. Malek’s unvested shares. Dr. Malek’s Motion for Injunction seeks to prevent Malum from redeeming his vested shares or otherwise precluding him from acting as a stockholder of Malum. To receive this remedy, Dr. Malek must show that, among other things, he is likely to succeed on the merits at trial in this matter. That would require showing that Malum had no right to redeem his shares.

There is no contract or agreement that allows Dr. Malek to provide services to Malum when Malum does not want them. It appears undisputed that, as of November 19, 2021, Malum determined it no longer wanted his services. Thus, the Court finds it immaterial whether Dr. Malek was attempting to provide services at this time. It is similarly immaterial whether such services were helpful or harmful. Malum had the right to terminate services, and it exercised that right. The Court notes that the Agreement defines “Services” as “services to be provided by each Stockholder as **mutually agreed to by each Stockholder and the Corporation.**” Exhibit 1 p. 4

(emphasis added). If Dr. Malek's unilateral decision to continue providing services could thwart Malum's right to "mutually agree" on services and Malum's sole discretion to determine when services are terminated, it would render those contractual provisions meaningless.

In its Reply Brief, Dr. Malek switches gears and argues that even though Malum had discretion to determine whether services had been terminated, Delaware law requires such discretion must be exercised in good faith. Malum resists that argument, asserting that the doctrine of good faith cannot be used to trump existing contract language. Having reviewed the cases cited by the parties, the Court finds Malum's argument to be more persuasive.

Contracts governed by Delaware law do have an implied covenant of good faith and fair dealing. *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985). This implied covenant exists even when a contract grants a party sole discretion on an issue. Of course, the existence of such a covenant does not mean that it was violated.

The implied covenant is a limited and extraordinary remedy that does not apply when the contract addresses the conduct at issue. *Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 506–07 (Del. 2019). Here, there does not appear to be a gap that must be filled in by an implied covenant. The Agreement explicitly grants Malum the "sole discretion" to determine whether services are terminated. Dr. Malek is unlikely to be able to prove a breach of good faith and fair dealing when Malum has only done what the contract explicitly contemplates.

Further, the implied covenant "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract." *Wilgus*, 498 A.2d at 159 (citing Restatement (Second) of Contracts § 205 (1981)). Dr. Malek is not being denied the fruits of the contract. He

will still receive the fruits of the contract: the contractually agreed-upon price for his vested and unvested shares. Whether that price presents full value for his contributions to the corporation is a different question, and one the Court cannot address at this time. *Oxbow Carbon*, 202 A.3d at 507 (“Delaware’s implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract.”).

In sum, Dr. Malek has not shown a likelihood of success on his claims that Malum breached the Agreement or that the implied covenant of good faith and fair dealing prohibits Malum’s conduct. Accordingly Dr. Malek’s Motion for Temporary Injunction must be denied.

*Malum’s Motion for Injunction*

Although the Court finds that Malum is, based on the existing record, likely to succeed on the merits, the Court does not find it appropriate to grant Malum’s Motion for Temporary Injunction. Malum is currently operating as if it has successfully redeemed Dr. Malek’s unvested shares. The asserted benefit to Malum of requiring Dr. Malek to turn over the stock certificates at issue is twofold. First, it would ensure that the certificates are not transferred to a third party or used as collateral. Second, physical control of the certificates would help Malum put at ease the minds of third parties (including investors).

As to the first point, the Court finds that the goal can be accomplished by requiring Dr. Malek to provide the stock certificates to his attorneys, who shall secure the certificates for the duration of this litigation. Dr. Malek’s counsel has represented that Dr. Malek has no objection to this course of action.

As to the second point, the benefit to Malum comes results from creating the impression that there is no dispute as to the rightful ownership of Dr. Malek’s shares. That impression would

be false. There is active litigation. Although the Court has, as it must, expressed its current view as to each party's ultimate likelihood of success, that opinion is based on an incomplete record. Indeed, no witness testimony has been taken at this time. Additionally, the Court does not find that the present failure to return the physical certificates would cause Malum irreparable harm.

Malum will be entitled to permanent injunctive relief regarding the return of the stock certificates if and when it fully prevails in the litigation. *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 701 (Iowa 2020), reh'g denied (Feb. 26, 2020). However, to grant that relief now does not preserve the status quo. It puts the cart before the horse.

#### ORDER

For the foregoing reasons, both parties' Motions for Temporary Injunction are DENIED. Notwithstanding the denials, the Court hereby ORDERS Dr. Malek to promptly turn over the stock certificates at issue to his legal counsel who shall retain the certificates until further order of the Court.

IT IS SO ORDERED.



State of Iowa Courts

**Case Number**  
LACV099329  
**Type:**

**Case Title**  
KARIM ABDEL MALEK PHD VS MALUM INC ET AL  
Other Order

So Ordered

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David Nelmark, District Judge  
Fifth Judicial District of Iowa

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