arrangement, called the "Strategic Alliance," the terms of which were embodied in a March 23, 1990 Purchase Agreement among Cordant, Holdings and Moore (the "Purchase Agreement"). (Complaint at ¶ 14).

Moore is a manufacturer and supplier of business forms and related systems. Cordant is a provider of computer and communication systems integration services. The Strategic Alliance contemplated that Moore and Cordant would work together to identify and develop business opportunities and afford each other a first right of refusal with respect to certain client requirements. (Complaint at ¶ 18). The Strategic Alliance would last a minimum of four and a quarter years, i.e., until June 30, 1994. (Complaint at ¶ 19). After that, the parties would be entitled to terminate the Strategic Alliance in accordance with the terms of the Purchase Agreement. (Complaint at ¶¶ 20-21).

Under the Purchase Agreement, the Preferred Stock becomes convertible into Holdings common stock in specified circumstances. The Preferred Stock also becomes callable by Holdings at fair market value if Holdings or Cordant decide to terminate the Strategic Alliance. (Complaint at ¶¶ 16, 20). All Preferred Stock that is not either converted or repurchased by December 31, 2004 must be redeemed at par value. (Complaint at 16). As the holder of all of the outstanding Preferred Stock, Moore was entitled to designate a director to serve on the boards of directors of both Holdings and Cordant. Moore appointed Mr. Ronald D. Rogers ("Rogers") as its representative on those boards. (Complaint at 17).

Under Section VII.F. of the Purchase Agreement, if Holdings or Cordant decide to terminate the Strategic Alliance, Holdings must repurchase all of the outstanding Preferred Stock. Holdings and Cordant are entitled to terminate the Strategic Alliance on 60 days notice to Moore. In that event, Section VII.F. requires that:

> . . . promptly upon giving of such notice . . . [Holdings] shall repurchase all of the [Preferred Stock] . . . owned by Moore . . . for cash at a price equal to . . . the per share value set forth in a fair market value appraisal of the common stock of [Holdings], made as of the end of [Holding's] most recent fiscal quarter, by an accounting firm selected from among those firms formerly known as "the big eight" or their successors by a majority of the directors of [Holdings] other than directors who are executives of [Holdings] or affiliated with Moore, provided that the accounting firm selected will not be one which has audited the financial statements of either Moore or [Holdings] for

> the most recent three (3) years then ended, . . . Moore hereby irrevocably agrres [sic] to the repurchase by [Holdings] provided for by this Section F., subject only to the conditions set forth in this Section F.

Purchase Agreement, Section VII.F.

If, on the other hand, Moore elects to terminate the Strategic Alliance, then Holdings loses its right to repurchase the Preferred Stock and Moore retains its Preferred Stock investment. Section IX.E. of the Purchase Agreement permits Moore to terminate the Strategic Alliance upon 60 days notice, and "[u]pon such termination, . . . [the provisions of the Purchase Agreement entitling Holdings to repurchase the Preferred Stock] shall also terminate and be of no further force or effect."

This action arises out of Holdings' election to terminate the Strategic Alliance and repurchase Moore's Preferred Stock. That dispute was triggered by the events now described.

On February 23, 1994, Holdings' board of directors met to decide upon certain stock options and bonus stock to be awarded to key employees. (Complaint at ¶ 26). In that connection, the board considered a valuation of Holdings as at December 31, 1993 that KPMG Peat Marwick ("KPMG") had previously prepared. (Id.). KPMG had valued the Preferred Stock at between $4.27 million and $4.72 million, assuming that the Preferred Stock was not converted to Holdings common stock; and at between $4.36 million and $4.84 million, assuming that there was conversion (Complaint at ¶ 25).

That same day, Messrs. Jeffers and Decker (two directors of Holdings who were neither executives of Cordant nor affiliated with Moore) decided to engage KPMG to conduct a fair market value appraisal of Holdings as at March 31, 1994. (Complaint ¶ 31). The complaint alleges that Jeffers and Decker advised Kusek, in a March 8, 1994 memorandum, that they had selected KPMG "for purposes of purchasing the [Holdings] preferred and/or common stock owned by Moore."[3]

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[3]The complaint quotes only that specific excerpt from the March 8, 1994 memorandum, thereby implying that Holdings had already formed an intention to purchase the Preferred Stock. However, the implication is misleading because the quoted excerpt is incomplete. The complete quote is that Decker and Jeffers selected KPMG "for purposes of purchasing the [Holdings] preferred and/or common stock owned by Moore . . . in the event that Cordant at any time in the future terminates [the Strategic Alliance]." (March 8, 1994 Memorandum from Jeffers and Decker to Kusek, incorporated by reference in ¶ 31 of the Complaint; emphasis added). Under Section VII.F. of the Purchase Agreement, a valuation of Holdings as of March 31, 1994 could not be used to repurchase the Preferred Stock, because (i) Holdings and Cordant may not terminate the Strategic Alliance until after the quarter ending June 30, 1994

(Complaint at ¶¶ 31-32). Soon thereafter, Holdings and Cordant entered into negotiations to obtain a commitment from Chase Manhattan Bank of Maryland to finance a potential repurchase of the Preferred Stock by Holdings. (Complaint at ¶ 33).

The defendants did not disclose these actions to Moore. (Complaint ¶¶ 31, 32, 35). Specifically, they did not reveal to Rogers (Moore's representative on the Holdings and Cordant boards) that they had engaged KPMG to value Holdings or that they had taken steps to obtain bank financing for the Preferred Stock repurchase. Nor did they furnish Rogers the March 31, 1994 valuation after it was received from KPMG. (Id.). The plaintiff alleges that in a May 9, 1994 meeting among representatives of Holdings and Moore's corporate parent, Mr. Kusek (Holdings' Board Chairman and Chief Executive Officer) remained silent about those actions, and affirmatively misrepresented that the defendants wanted to make the Strategic Alliance work and had no plans to terminate it. (Complaint at ¶¶ 36-39).

The Holdings board met on May 17, 1994. At that meeting, the directors (a) reviewed the KPMG valuation as of March 31, 1994, (b) voted to authorize Holdings' officers to terminate the Strategic Alliance after June 30, 1994, and (c) voted to obtain a valuation of Holdings as at June 30, 1994 for purposes of repurchasing the Preferred Stock in accordance with Section VII.F. of the Purchase Agreement.[4] (Complaint at ¶ 50). The board determined that Holdings and Cordant would not disclose their intention to terminate the Strategic Alliance until after certain current contract negotiations with Moore had been completed and approval from the United States Air Force regarding a substantial contract had been obtained. (Complaint at ¶¶ 48-49).

After the May 17, 1994 board meeting, the defendants continued to conceal their decision and the steps they had taken to terminate the Strategic Alliance. Two months later, in a telephone conversation, Mr. Reto Braun, the President of Moore's corporate parent, and Mr. Kusek discussed the Strategic Alliance and ways to improve relations among Holdings, Cordant and Moore. (Complaint at ¶ 51). They also exchanged letters on that subject on July 19 and August 2, 1994. (Complaint at ¶¶ 53-54). Although Mr. Kusek knew of KPMG's ongoing valuation of Holdings, he did not disclose the actions Holdings and

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and (ii) the repurchase of the Preferred Stock must be at a value determined by a fair market appraisal of Holdings "made as of the end of [Holdings'] most recent fiscal quarter." Thus, the earliest possible valuation date for purposes of repurchasing the Preferred Stock was June 30, 1994.

[4]Rogers was excluded from the discussions on this subject.

Cordant had taken to value Holdings or to terminate the Strategic Alliance. (Complaint at ¶¶ 52, 54, 56). However, in his August 2, 1994 letter, Kusek did tell Braun of his perception of a "worsening business relationship." He also communicated his belief that Cordant and Moore "should separate that business relationship from [their] equity relationship [and that] an appropriate business relationship can be implemented without an equity relationship but an equity position by a strategic investor should only exist in support of a solid, mutually-beneficial, business relationship." (August 2, 1994, Kusek letter at 3, incorporated by reference in ¶ 54 of the Complaint).

On August 11, 1994, KPMG submitted its valuation of Holdings as at June 30, 1994. (Complaint at ¶ 55). KPMG had valued the Preferred Stock at $4.62 million assuming no conversion into Holdings common stock, and at $4.48 million assuming conversion. (Complaint at ¶¶ 57, 61-62). On August 30, 1994, Cordant and Holdings formally notified Moore of their decision to terminate the Strategic Alliance, and disclosed KPMG's prior retention of Holdings common stock and its $4.48 million valuation of the Preferred Stock as at June 30, 1994. (Complaint at ¶ 61). Cordant and Holdings advised Moore that Holdings was prepared to repurchase the Preferred Stock for $4.48 million. (Id.).

One week later, on September 8, 1994, Mr. Kusek wrote a letter to Moore on Cordant stationery, enclosing a Cordant check for $4.48 million. (Complaint at ¶ 68). On September 20, 1994, Moore returned the check to Mr. Kusek, taking the position that the Preferred Stock had been undervalued in a flawed process that violated the requirements of the Purchase Agreement. (Id.). Moore also contended that the manner in which Cordant had attempted to repurchase the Preferred Stock violated both the Purchase Agreement and the rights of Moore's designee to the Holdings board of directors. (Id.).

On December 5, 1994, Moore, contending that Cordant and Holdings had never validly terminated the Strategic Alliance, advised the defendants that it (Moore) had decided to terminate the Strategic Alliance pursuant to Section IX.E of the Purchase Agreement. (Complaint at ¶ 70). Moore takes the position that its termination of the Strategic Alliance extinguished Holdings' repurchase option and that as a consequence, Moore continues to own the Preferred Stock.

II. CONTENTIONS OF THE PARTIES

Moore argues that the defendants (a) improperly concealed their intention to terminate the Strategic Alliance, (b) improperly selected KPMG to value the Preferred Stock, (c) unfairly excluded Moore from

participating in the valuation process; and (d) as a result, improperly selected a flawed valuation methodology that grossly undervalued the Preferred Stock.

That conduct is claimed, in Count I, to constitute a breach by the individual defendants of their duties of loyalty, good faith and fair dealing owed to Moore. Moore further claims that Cordant aided and abetted the individual defendants in that breach of fiduciary duty; and alleges in Count IV that the defendants' conduct amounted to constructive fraud.

In Count II, Moore claims that Holdings' and Cordant's conduct also constituted a breach of their contract with Moore. Specifically, Moore alleges Holdings and Cordant breached the express provision of Section VII.F. of the Purchase Agreement that required a "fair market value appraisal" of Holdings to determine the Preferred Stock repurchase price. Moore also contends that the manner in which Holdings and Cordant conducted the valuation process constituted a breach of their implied covenant of good faith and fair dealing.

Finally Moore claims, in Count III, that the defendants' concealment of and affirmative misrepresentation regarding their intention to terminate the Strategic Alliance, estops them from proceeding to terminate the Strategic Alliance and repurchase the Preferred Stock.

Moore claims that as a result of the alleged wrongdoing it suffered three harms. First, Moore asserts that because it was misled into believing that Holdings and Cordant did not intend to terminate the Strategic Alliance, it (Moore) continued to treat Holdings and Cordant preferentially in business dealings. Next, Moore claims that the defendants' concealment of their plans to terminate the Strategic Alliance excluded Moore from participating in the Preferred Stock valuation process. Third, Moore contends that the defendants' conduct caused it to refrain from exercising its own termination rights, which, if done, would have extinguished Holdings' option to repurchase Moore's Preferred Stock.

The defendants contend that Moore has failed to state an actionable claim, because (a) the duties owed by the defendants to Moore were contractual, not fiduciary, (b) the complaint does not state an actionable breach of any duty expressed in the Purchase Agreement or arising from the implied covenant of good faith and fair dealing, (c) no equitable estoppel claim is pleaded because the complaint fails (i) to identify any duty of disclosure owed by defendants, other than the 60 day notice period required by the Purchase Agreement; and (ii) fails adequately to plead that the defendants made affirmative misrepresentations upon which Moore justifiably relied.

* * *

I conclude, for the reasons next discussed, that the defendants' Rule 12(b)(6) motion to dismiss should be granted, except insofar as Count II claims that Holdings breached its contract by failing to tender payment for the Preferred Stock promptly after giving notice of the termination of the Strategic Alliance. The plaintiff's motion for judgment on the pleadings on that claim will be denied, because the defendants' averment that Holdings promptly tendered payment through its agent, Cordant, raises a litigable issue of fact.

Finally, because the plaintiff has not yet had an opportunity to conduct discovery, Chancery Rule 56(f) precludes granting the defendants' motion for summary judgment. Therefore, this Opinion addresses solely the defendants' Rule 12(b)(6) motion (including the defendants' challenges to in personam jurisdiction) and the plaintiff's motion for judgment on the pleadings.

III. THE DEFENDANTS' MOTION TO DISMISS

[1-2] A Rule 12(b)(6) motion to dismiss will not be granted except where, based on the allegations of the complaint and the documents incorporated therein by reference, "it appears with reasonable certainty that, under any set of facts which could be proven to support the claim, plaintiffs would not be entitled to relief." In re Tri-Star Pictures, Inc. Litigation, Del. Supr., 634 A.2d 319, 326 (1993). Reasonable inferences or conclusions of law in the complaint will be accepted if they are supported by specific allegations of fact. Id. Each Count of the complaint is evaluated in light of this standard.

A. The Fiduciary Duty Claim

[3-4] Count I claims a breach of fiduciary duties owed by a corporation's directors to a class of preferred stockholders. The rights of preferred stockholders are, in certain respects, both equitable and contractual. The relationship between a corporation and its preferred stockholders is "primarily . . . contractual in nature," involving "rights and obligations created contractually by the certificate of designation." HB Korenvaes Investments, L.P. v. Marriott Corp., Del. Ch., C.A. No. 12922, Allen, C. (June 9, 1993), Mem. Op. at 9. However, in limited circumstances fiduciary duties may be owed to preferred stockholders as well. A corporation's directors "are fiduciaries for the [p]referred stockholders, whose interests they have a duty to safeguard, consistent with the

fiduciary duties owed by those directors to [the corporation's] other shareholders and to [the corporation] itself." Eisenberg v. Chicago Milwaukee Corp., Del. Ch., 537 A.2d 1051, 1062 (1987).

[5] Whether or not a given claim asserted by preferred stockholders is governed by contract or fiduciary principles depends on whether the dispute arises from rights and obligations created by contract or from "a right or obligation that is not by virtue of a preference but is shared equally with the common." Jedwab v. MGM Grand Hotels, Inc., Del. Ch., 509 A.2d 584, 594 (1986). Determinations of this kind are highly fact-specific and contextual and do not easily lend themselves to a "bright line" rule. See, HB Korenvaes Investments, L.P., supra, at 9-11. What can be said, however, is that disputes that relate to obligations "expressly treated and rights [that are] created" by contract will be governed by contract principles. Id. at 13.

Moore claims that the individual defendants' conduct constituted a breach of their fiduciary duties of loyalty, good faith and fair dealing, but Moore provides no support for that assertion. Indeed, in advancing this position, Moore attempts to downplay its status as a preferred stockholder and to portray itself as a common shareholder, by referring to itself throughout Count I as a "minority shareholder." That characterization is inaccurate. Although the Holdings Preferred Stock is convertible into common shares in specified circumstances, nowhere is it alleged that that stock has been converted. Moore's rights flow from its status as a Preferred, not a common, stockholder.

The plaintiff's fiduciary duty argument boils down to an assertion that the claimed rights that are the subject of Count I -- specifically, Moore's right to a fair market valuation of the corporation and to a proper determination of the Preferred Stock repurchase price -- are common to all shareholders. But that is not so: the duties sought to be enforced have a clearly contractual source. This dispute among these parties relates to an event specifically anticipated and expressly provided for in their contract. The Purchase Agreement created, and Holdings issued, a class of stock having unique attributes designed to facilitate a smooth severance of Holdings' relationship with Moore if Holdings became dissatisfied with the Strategic Alliance. In that context the parties contractually created specific procedural guidelines for the valuation and repurchase of the Preferred Stock. What Moore challenges here is the manner in which those procedures were implemented.

The rights Moore seeks to have vindicated are contractual, not fiduciary, in nature. For that reason, Moore's claim for breach of fiduciary duty, as alleged, is legally deficient. Because no cognizable breach of fiduciary duty is stated, Moore's claim in Count I that Cordant

aided and abetted the individual defendants' breach of fiduciary duties must be dismissed as well.

B. The Constructive Fraud Claim

Count IV is a claim for constructive fraud. At oral argument Moore's counsel conceded that that claim is essentially a breach of fiduciary duty claim in a different form, that is substantively indistinguishable from the claims alleged in Count I. (Oral Argument, TR., 5/19/95 at 101). Because Count I is dismissible, so, too, is Count IV.

C. The Contract Claims

[6] At the heart of Moore's case are its contract claims. To survive a motion to dismiss, a complaint stating a claim for breach of contract must identify a contractual obligation, whether express or implied, a breach of that obligation by the defendant, and resulting damage to the plaintiff. Ch. Ct. R. 12(b)(6); See, Goodrich v. E.F. Hutton Group, Inc., Del. Ch., 542 A.2d 1200, 1203-4 (1988); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1235. Moore alleges, in Count II, that Holdings and Cordant breached an express provision of the Purchase Agreement as well as an implied covenant of good faith and fair dealing. Those claims are now addressed.

1. Express Contract Claim

Moore claims that Holdings and Cordant breached, in two distinct ways, Section VII.F. of the Purchase Agreement, which requires a "fair market value" appraisal of the Preferred Stock. First, Moore challenges the valuation process, claiming that KPMG conducted an inadequate inquiry and investigation. Second, Moore challenges the result of that process, claiming that KPMG's valuation did not yield a "fair market value" as the Purchase Agreement required. I conclude that the complaint fails to state an actionable breach of contract claim.

To ensure an adequate valuation inquiry and investigation, the process created by the Purchase Agreement relies upon the independence and professional competence of a "big eight" accounting firm. Section VII.F. requires Holdings to repurchase the Preferred Stock "at a price equal to . . . the per share value set forth in a fair market value appraisal of the common stock of [Holdings]." It also requires that the appraisal be "[1] made as of the end of [Holdings'] most recent fiscal quarter, [2]

by an accounting firm selected from among those firms formerly known as 'the big eight' or their successor by [3] a majority of the directors of [Holdings] other than directors who are executives of [Holdings] or affiliated with Moore. The foregoing is made subject to the proviso that ". . . the accounting firm selected will not be one which has audited the financial statements of either Moore or [Holdings] for the most recent three (3) years then ended . . . ."

Moore does not allege that Holdings or Cordant failed to comply with any of those express provisions. Nor does it cite any other provision of the Agreement that creates a contractual duty to conduct the valuation inquiry in a particular manner. For these reasons Moore's claim of inadequate inquiry and investigation is legally insufficient.

In the alternative, Moore argues that even if Holdings and Cordant fully complied with the foregoing procedural requirements, the averment that the valuation process did not yield "fair market value" suffices to state a claim for breach of the Purchase Agreement. However, Moore alleges no facts that support this claim. All the Purchase Agreement requires is that the repurchase price be equal to the ". . . value set forth in a fair market value appraisal . . . made . . . by an accounting firm selected from among those firms formerly known as 'the big eight' . . ." That is, the parties, mindful that the "fair market value" of a closely held company is a matter over which reasonable minds might disagree, contractually agreed that the "fair market value" repurchase price would be what the selected "big eight" accounting firm determines it to be. The complaint does not allege that the fair market valuation of Holdings was performed by someone other than a "big eight" accounting firm.

In support of its position, Moore argues that the term "fair market value" in the Purchase Agreement was intended to incorporate the "fair value" standard employed in Delaware's appraisal statute, 8 Del. C. § 262(a). According to Moore, § 262(a) requires a determination of a corporation's intrinsic or fair value as a going concern. Moore asserts that KPMG's valuation of the Preferred Stock violated Section VII.F. of the Purchase Agreement (as thus interpreted), because the valuation improperly included a discount to reflect the fact that the Preferred Stock is illiquid and does not represent a controlling interest.

The premise of that argument is wrong. Nothing in the Purchase Agreement supports a conclusion that the contracting parties intended for "fair market value" to mean "fair value" within the meaning of 8 Del. C. § 262(a). Because it rests upon an invalid premise, this claim is also legally insufficient.

2. Implied Contract Claim

Because Moore has failed to state a cognizable claim that Holdings or Cordant breached an express provision of the Purchase Agreement, for Count II to survive a motion to dismiss, it must allege an actionable breach of an implied contractual term. However, no such claim is alleged either.

In Count II, Moore contends that the manner in which Holdings and Cordant "initiated, controlled and directed" the valuation of the Preferred Stock constituted a breach of an implied covenant of good faith and fair dealing owed by Holdings and Cordant.

[7-9] To state a claim for breach of an implied covenant of good faith and fair dealing, a plaintiff must identify a specific implied contractual obligation. Goodrich, 542 A.2d at 1204. The cardinal guiding principle in adjudicating a contract claim is to give effect to the intention of the contracting parties. E.I. du Pont de Nemours v. Shell Oil Co., Del. Supr., 498 A.2d 1108, 1113 (1985). Thus, implied contractual obligations are terms that "clearly would have been included [in the contract] had the parties negotiated with respect to them." Price Organization, Inc. v. Universal Computer Consulting, Inc., Del. Ch., C.A. No. 12505, Allen, C. (Oct. 1, 1993), Mem. Op. at 16 (citing Katz v. Oak Industries, Del. Ch., 508 A.2d 873, 880 (1986)). By parity of reasoning, "courts will not readily imply a contractual obligation where the contract expressly addresses the subject of the alleged wrong," yet does not provide for the obligation that is claimed to arise by implication. Abex, Inc. v. Koll Real Estate Group, Inc., Del. Ch., C.A. No. 13462, Jacobs, V.C. (Dec. 22, 1994), Slip Op. at 22.

Moore complains that Holdings and Cordant acted in bad faith by hiring KPMG to value the Preferred Stock, because KPMG had previously valued Holdings in connection with stock option and bonus plans. Moore also claims that it should have been given notice when the defendants decided to conduct a valuation of the Preferred Stock and/or when their boards of directors decided to terminate the Strategic Alliance. Finally, Moore claims that the defendants were obligated to afford Moore the opportunity to provide KPMG with information that Moore considered pertinent to the valuation of Holdings.

The problem with these claims is that the obligations that Moore urges the Court to recognize (by implication) flow from matters expressly addressed by the Purchase Agreement. The conditions to which the Preferred Stock repurchase is made subject are limited to those expressly set forth in Section VII.F. That Section (i) imposes criteria to governing the selection of an accounting firm to conduct the valuation of the

Preferred Stock; (ii) establishes a 60 day notice period for the orderly termination of the Strategic Alliance, and (iii) rather than include Moore in the valuation process, specifically permits Holdings to repurchase the Preferred Stock without any notice to or involvement of Moore.[5]

Contrary to the duties Moore claims it is owed by virtue of the Purchase Agreement, Section VII.F. does not require that Holdings and Cordant give notice of their intention to terminate the Strategic Alliance within a period of time after that intention is formed. It merely imposes a 60 day period between the date that Holdings and Cordant announce their decision to terminate the Strategic Alliance, and the date upon which the termination of that Alliance becomes effective. Nor does Section VII.F. require notice to Moore before Holdings may exercise its right to repurchase the Preferred Stock after giving notice of the termination of the Strategic Alliance. All that Section requires is that Holdings repurchase the Preferred Stock, "promptly upon giving of such notice. . . ." (emphasis added). Thus, the "implied" duties Moore seeks to enforce are inconsistent with the scheme of express duties created by Section VII.F. Moore cannot, therefore, validly claim that the conduct complained of violated an implied covenant of good faith and fair dealing owed by Holdings and Cordant.

For these reasons, Count II must fail as a matter of law.

D. The Equitable Estoppel Claim

[10-11] Count III alleges equitable estoppel. To survive a Rule 12(b)(6) motion to dismiss, an equitable estoppel claim must allege inequitable conduct by the defendant that led the plaintiff to change its position, in justifiable reliance on that conduct, to its detriment. Wilson v. American Ins. Co., Del. Supr., 209 A.2d 902, 903-4 (1965). The defendants' conduct may be either an affirmative act or a failure to act when duty required. Welshire, Inc. v. Harbison, Del. Ch., 88 A.2d 121, 125 (1952), aff'd, Del. Supr., 91 A.2d 404 (1952). Some description of the plaintiff's state of mind is necessary to satisfy the requirement that the plaintiff's reliance be justifiable. Burge v. Fidelity Bond and Mortg. Co., Del. Supr., 648 A.2d 414, 420 (1994).

Here, Moore alleges that it relied to its detriment upon the defendants' omissions to disclose facts and affirmative misrepresentations concerning the status of the Strategic Alliance. With respect to the

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[5]The 60 day notice period required by Section VII.F. applies only to the termination of the Strategic Alliance. In contrast, Section VII.F. requires that Holdings repurchase the Preferred Stock "promptly upon giving of such notice . . . ." (emphasis added)

alleged omissions, the plaintiff claims that the defendants had a duty, arising from their contractual and fiduciary relationships with Moore, to disclose their intention to terminate the Strategic Alliance. I conclude, for the reasons previously stated in my discussion of Counts I and II, that the defendants owed no disclosure duty beyond the 60 day notice requirement prescribed by the Purchase Agreement. Thus, insofar as the claim for equitable estoppel rests upon a disclosure omission, it must fail.

Moore's "affirmative misrepresentation" estoppel claim rests solely upon the allegation that on May 9, 1994, Mr. Kusek ". . . affirmatively misrepresented Defendants' position by stating that they had no plans to terminate [the Strategic Alliance] . . ." (Complaint, ¶ 39). However, nowhere does Moore specifically allege that the defendants had decided to terminate the Strategic Alliance before Kusek made that statement. Moore asks the Court to infer that intent from its use of the word "misrepresented" in Paragraph 39 of the complaint.[6]

Given the alleged sequence of events leading to the termination of the Strategic Alliance, in my view no reasonable inference can be drawn that Holdings had decided to terminate the Strategic Alliance by May 9, 1994. Nowhere does the complaint straightforwardly allege that Holdings had already formed an intention to terminate the Strategic Alliance by that date. All the complaint specifically avers is that on May 17, 1994, the Holdings board met and voted to terminate the Strategic Alliance, and to authorize its officers to obtain a valuation of Holdings as at June 30, 1994 and effect the termination of the Strategic Alliance. (Complaint, Section F). For the Court to infer that Holdings had decided to terminate the Strategic Alliance by May 9, 1994, it must have a pleaded basis also to infer that (a) a majority of the individual members of Holdings' board had formed the intention to terminate the Strategic Alliance before they met and voted at the May 17, 1994 board meeting, and (b) despite having formed that intention, those directors refrained from recording their decision or authorizing Holdings' officers to act on that decision until the May 17, 1994 meeting. That is too much water for a single word ("misrepresented") to carry uphill.

To support the conclusory allegation that Kusek's May 9, 1994 statement was a misrepresentation, some minimal factual averments are needed. Here, the only reasonable inference that can be drawn from the

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[6]Moore alleges that "[w]hen asked by Braun at this [May 9] meeting whether, in light of the difficulties the companies were having, Holdings and Cordant wanted to terminate the Strategic Alliance, Defendant Kusek affirmatively misrepresented Defendants' position by stating that they had no plans to terminate it, but rather that Holdings and Cordant wanted to make the Strategic Alliance work." (Complaint, ¶ 39) (emphasis added).

complaint is that the Holdings board was actively exploring the possibility of terminating the Strategic Alliance, but did not decide to do that until its members collectively voted at the May 17, 1994 meeting. In short, Moore's allegation of an affirmative misrepresentation is not well pleaded. I therefore need not consider whether Moore has successfully pleaded the other elements essential to a claim of equitable estoppel. Because Count III fails to allege an actionable omission or affirmative misrepresentation by the defendants, it does not state an a valid claim for equitable estoppel.

As analyzed thus far, Counts I through IV state no actionable claim. However, Moore has stated a cognizable contract claim that is the subject of its motion for judgment on the pleadings. Moore alleges that Holdings breached the Purchase Agreement by failing to "repurchase Moore's stock . . . within sixty days of Holdings' and Cordant's notice to Moore" of the termination of the Strategic Alliance. (Complaint ¶ 69). That allegation states a claim sufficient to survive a motion to dismiss. However, it cannot be the basis for judgment on the pleadings, because, as set forth in Part IV below, the pleadings disclose a litigable dispute.

IV. THE PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Moore's final claim is that even if Holdings and Cordant did legally terminate the Strategic Alliance, Holdings did not validly repurchase the Preferred Stock in accordance with the Purchase Agreement, because payment for the stock was tendered in the form of a Cordant check accompanied by a letter on Cordant stationery, rather than by a check of Holdings, which was the only party contractually entitled to purchase the Preferred Stock. Therefore, Moore argues, Holdings did not validly repurchase the Preferred Stock and as a consequence, Moore continues to own the Preferred Stock as a matter of law.

[12] The pleadings are not sufficient to warrant judgment in Moore's favor, because the defendants have alleged in their Answer that "Holdings handles its financial and other transactions through Cordant." (Answer ¶ 68). That allegation raises the possibility that Cordant was acting as Holdings' agent. Because the pleadings allege a factual scenario inconsistent with Moore's version of the facts, that precludes judgment on the pleadings in Moore's favor. Ch. Ct. R. 12(c); Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., Del. Supr., 624 A.2d 1199, 1205 (1993). As previously noted, however, this claim is sufficient to survive the defendants' motion to dismiss.

V. CONCLUSION

For the foregoing reasons, (a) the defendants' motion for summary judgment and the plaintiff's motion for judgment on the pleadings are denied; (b) the defendants' motion to dismiss pursuant to Rule 12(b)(6) is granted, except with respect to Moore's claim (against Holdings) that Holdings did not repurchase the Preferred Stock in accordance with Section VII.F. of the Purchase Agreement. As to that claim, the motion is denied.[7] **IT IS SO ORDERED.**

NEBEL v. SOUTHWEST BANCORP, INC.

No. 13,618

Court of Chancery of the State of Delaware, New Castle

July 5, 1995

Plaintiffs, minority shareholders of M.C. Bancorporation, challenged the merger of the corporation into its 91.68% stockholder parent, Southwest Bancorp, Inc. In this cash-out merger, the plaintiffs did not seek appraisal of the value of their shares but instead sought compensatory and/or rescissory damages. The plaintiffs allege that appraisal was not an appropriate remedy since the directors: (1) violated their duty of fair dealing in fixing the merger price unilaterally without the use of a special committee of independent directors, and without input from the minority shareholders; (2) breached their duty of fair dealing by fixing a merger price without regard to whether it was a fair price; and (3) violated their duty of disclosure by misstating information and omitting to disclose information material to the stockholders' decision to accept the merger consideration or demand an appraisal.

The court of chancery, per Vice-Chancellor Jacobs, granted the defendants' motion to dismiss in part and denied it in part. In so holding, the court stated that there is no requirement for a board of directors to obtain input from a special committee or the minority stockholders when

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[7]These rulings render moot the individual defendants' motion to dismiss on jurisdictional grounds, for which reason, those grounds are not addressed.

setting a merger price. In addition, the fair dealing claims only challenge the fairness of the price and can therefore adequately be addressed in an appraisal. The court found that the directors violated their duty of disclosure, but the statutory violation did not justify rescissory damages. The court held that the appropriate remedy for the directors' violation of their duty to disclose would be to permit the plaintiffs to commence an appraisal proceeding or to pursue a "quasi-appraisal" remedy.

1. Corporations ⇐ 584

Where a merger eliminates the minority for cash and the dispute is essentially one of value, appraisal is the exclusive remedy.

2. Corporations ⇐ 581, 584

The appraisal remedy is commonly exclusive in "short-form" mergers since the purpose of the short-merger statute is to provide a method for a parent corporation that owns ninety percent or more of a subsidiary's stock, to eliminate the minority stockholders' interest by unilateral act of the parent corporation's board of directors. DEL. CODE ANN. tit. 8, § 253 (1991).

3. Corporations ⇐ 320, 584

Appraisal will not be adequate where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved because they present issues which an appraisal cannot address.

4. Corporations ⇐ 320, 584

Disclosure-based claims based upon fraud or breach of the fiduciary duty of disclosure are claims that appraisal cannot adequately address, because misdisclosures or nondisclosures of material facts may warrant injunctive relief which would prevent a merger from taking place.

5. Corporations ⇐ 320, 584

Where the challenged merger has already occurred, disclosure claims might warrant rescission of the merger.

6. Corporations ⇐ 584

Where a challenged merger has already occurred, disclosure claims may warrant a recovery of the monetary equivalent of rescission where rescission is impractical or other circumstances warrant.

7. Corporations ⇐ 584

Disclosure-based claims are beyond the capability of appraisal to resolve, because the remedies appropriate to such claims would be inconsistent with the relief available in a statutory appraisal.

8. Corporations ⇐ 182.4(2), 310(1), 584

Certain types of unfair dealing, although not involving fraud or deception, may be so egregious as to make it inequitable to relegate the minority shareholders to the appraisal remedy, even though the unfair dealing impacts only the merger price.

9. Corporations ⇐ 584
Pleading ⇐ 8(3)

Courts are not bound by, and may look behind, any conclusory allegations or characterizations of the complaint to determine whether the unfair dealing claims are truly of that egregious character, or whether they are simply claims that question judgmental factors of valuation.

10. Corporations ⇐ 182.3, 585

There is no requirement under section 253 for directors to obtain input from minority stockholders or to form a committee of independent directors when fixing a merger price. DEL. CODE ANN. tit. 8, § 253 (1991).

11. Corporations ⇐ 581

The purpose of section 253 is to provide a mechanism to enable a ninety percent majority stockholder to effectuate a merger unilaterally. DEL. CODE ANN. tit. 8, § 253 (1991).

12. Corporations ⇐ 182.3, 584

The board of directors has a duty to disclose all facts material to the minority stockholders' decision whether to accept a short-form merger consideration or seek an appraisal.

13. Corporations ⇐ 519(1), 584

The burden of demonstrating materiality rests with the plaintiffs.

14. Statutes ⇐ 181(2)

Delaware law requires that substantive statutory mandates be strictly observed, and any nonobservance will give rise to an appropriate remedy.

15. Corporations ⇐ 320(12)

To be entitled to pursue rescissory damages, the plaintiffs must allege facts that, if true, would justify invalidating the merger.

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JACOBS, *Vice-Chancellor*

In this class action, certain minority shareholders of M.C. Bancorporation, a Delaware corporation ("Bancorporation"), challenge the merger of Bancorporation into its 91.68% stockholder-parent, Southwest Bancorp, Inc. ("Southwest") on November 17, 1993. The named defendants are Southwest and its directors as of the merger date. Because the merger was a "short form," "cash-out" merger effected pursuant to 8 Del. C. § 253, appraisal rights were available to the minority stockholders who held the remaining 8.32% interest in Bancorporation. Some of those

shareholders elected appraisal; the plaintiffs, however, did not. One plaintiff (Mr. Rudolph) tendered his shares, accepted the merger price, and thereafter brought this action.

The defendants have moved to dismiss the amended complaint ("complaint") on the grounds that (i) its allegations fail to state claims upon which relief can be granted and (ii) to the extent the complaint does allege cognizable claims, appraisal is the exclusive remedy.

This is the opinion of the Court on the defendants' motion to dismiss.

I. PERTINENT FACTS

The pertinent facts are based solely upon the well-pleaded allegations of the complaint and documents incorporated therein by reference. The complaint alleges three categories of fiduciary duty violations: (1) "fair dealing" claims in connection with the fixing of the merger price, (2) claims alleging the unfairness of the merger price, and (3) claims of misdisclosure of, or omissions to disclose, material facts in the Notice of Merger and Information Circular ("Notice") sent to Bancorporation's shareholders following the merger.[1]

In the merger, each share of Bancorporation's common stock was converted into a right to receive $41 cash, subject to the minority shareholders' entitlement to seek appraisal. The alleged fair dealing violations are based on claims that the merger price was unilaterally fixed by the defendants without the use of a special committee of independent directors, and without input from the minority shareholders or anyone authorized to represent the minority's interests. The claim that the $41 price was substantively unfair rests upon the allegation that that price was fixed without regard to whether it was a "fair price." In that connection, the plaintiffs claim that the fair value of Bancorporation's shares far exceeded the $41 merger price (Compl. at ¶ 12), and that in fixing the merger price, the defendants' only concern was to pay the "fair market value" of the shares, which value improperly included a minority discount and/or a discount for lack of marketability.

As for the disclosure claims, the complaint alleges that the defendants "misstated information and omitted to disclose information material to the stockholders' decision to accept the merger consideration or demand an appraisal." (Id.) Specifically the complaint alleges that:

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[1]The Notice is attached as an exhibit to the complaint, and is incorporated therein by reference.