class representative; (2) ordering the Individual Defendants to carry out their fiduciary duties they owe to the Athlone stockholders;[2] (3) granting the class members rescissory damages; (4) ordering Defendants to account to the class for all damages the class sustained as a result of Defendants' alleged breaches of fiduciary duty; (5) ordering Defendants to account to the class for profits Defendants obtained from the sale of Reynolds, an Athlone subsidiary; and (6) granting any additional relief this Court sees fit.

Defendants moved to dismiss the *Complaint*. This opinion addresses *Defendants' Motion to Dismiss*.

II. FACTUAL BACKGROUND

After reviewing the *Amended Complaint*, I adopt Vice Chancellor Hartnett's analysis of the facts in ***Nebenzahl v. Miller***, Del. Ch., C.A. No. 13206, Hartnett, V.C. (Nov. 8, 1993), Letter op. at 1-5. Although his decision denied a *Motion for a Preliminary Injunction*, there is no indication the facts plead have changed in any way meaningful to the resolution of *Defendants' Motion to Dismiss*. Moreover, most of the facts are undisputed. However, I have also reviewed the *First Amended Complaint* and *Second Amended Complaint* which did not exist when Vice Chancellor Hartnett denied Plaintiff's application for a preliminary injunction. To the extent these later amendments are relevant to *Defendants' Motion to Dismiss*, I discuss them *infra*. Morgan Stanley's appearance as a defendant is the *single* material addition.

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[2]This prayer for relief resembles one for a declaratory judgment or a request for a mandatory injunction. Essentially, Plaintiff merely restates her earlier request for a permanent injunction abandoned years ago. An injunction is an extraordinary form of relief. A court will not grant a permanent injunction in any form unless the plaintiff can prove: (1) actual success on the merits, (2) irreparable harm, and (3) the harm resulting from failure to issue an injunction outweighs the harm befalling the opposing party if the court issues the injunction. ***Draper Communications, Inc. v. Delaware Valley Broadcasters, L.P.***, Del. Ch., 505 A.2d 1283, 1288 (1985).

The analysis for a mandatory injunction is even more stringent than that for a permanent injunction. ***State of Del. v. Simpson***, Del. Ch., C.A. No. 899, Hartnett, V.C. (Sept. 20, 1988), Letter op. at 4. A court will not grant a mandatory injunction unless a party can clearly establish the legal right that party seeks to protect. ***Id.***

III. CONCLUSIONS OF LAW

A. Standard of Review for Motion to Dismiss

[1-4] On a motion to dismiss, Delaware courts only consider those matters which the parties refer to in the pleadings. *James River-Pennington Inc. v. CRSS Capital, Inc.*, Del. Ch., C.A. No. 13870, Steele, V.C. (Mar. 6, 1995), Mem. op. at 9 (*citing Hart Holding v. Drexel Burnham Lambert*, Del. Ch., 593 A.2d 535, 538 (1991)). Delaware courts consider all plead facts true and draw all inferences in the light most favorable to the nonmoving party. *James River-Pennington*, Mem. op. at 10 (*citing Grobow v. Perot*, Del. Supr., 539 A.2d 180, 187 n.6 (1988)). The courts will not accept conclusory allegations as true. *James River-Pennington* at 10. Delaware courts will not dismiss a complaint unless it appears to a reasonable degree of certainty the plaintiff would not be entitled to relief under any set of facts which the plaintiff could prove in support of the claim. *Id. (citing Rabkin v. Philip A. Hunt Chem. Corp.*, Del. Supr., 498 A.2d 1099, 1104 (1985); *In re USACafes, L.P. Litig.*, Del. Ch., 600 A.2d 43, 47 (1991)).

B. Plaintiff's Allegations the Director Defendants Breached their Fiduciary Duties

I dismiss the claim against Athlone and its individual directors - Harold Miller, Daniel J. Lyons, Alan Shaw, Stanley Harris, Walter J. Roper, Theodore W. Kheel, Guy F. McCracken, and Carl R. Moulton.

1. The General Law

[5-6] Delaware law requires directors to exercise due care in carrying out their

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fiduciary duties and to act in the best interest of the shareholders and the corporation. *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 634 A.2d 345, 360 (1993) ("*Cede II*"). The business judgment rule generally protects the actions of directors, affording them the presumption directors act on an informed basis and in the honest belief they acted in the best interest of the corporation. *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984).

[7-8] A plaintiff has the burden of rebutting this presumption. *Id.* The plaintiff must show the directors breached their duty of loyalty or duty of due care in reaching the allegedly improper decision. ***Cede II***, 634 A.2d at 361 (*citing* ***Citron v. Fairchild Camera & Instrument Corp.***, Del. Supr., 569 A.2d 53, 64 (1989); ***Smith v. Van Gorkom***, Del. Supr., 488 A.2d 858, 872 (1985); ***Aronson***, 473 A.2d at 812). If the plaintiff fails to meet this burden, the business judgment rule insulates the directors from liability. ***Cede II***, 634 A.2d at 361 (*citing* ***Citron***, 569 A.2d at 64; ***Van Gorkom***, 488 A.2d at 872; 8 *Del.C.* § 141).
[9] If the plaintiff meets this burden, the burden shifts to the defendant directors to prove the "entire fairness" of the challenged transaction. ***Cede II***, 634 A.2d at 361 (*citing* ***Nixon V. Blackwell***, Del. Supr., 626 A.2d 1366, 1376 (1993); ***Mills Acquisition Co. v. Macmillan, Inc.***, Del. Supr., 559 A.2d 1261, 1279 (1988);

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Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701, 710 (1983). "Under the entire fairness standard of judicial review, the defendant directors must establish to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price." ***Cede II***, 634 A.2d at 361 (*emphasis in original, citing* ***Nixon***, 626 A.2d at 1376, ***Mills***, 559 A.2d at 1279, ***Weinberger***, 457 A.2d at 710.

2. Plaintiff's Contentions

Plaintiff insists the *Amended Complaint* adequately alleges a sufficient factual basis for rebutting the application of the business judgment rule, shifts the burden to the Defendant Directors to establish the entire fairness of the transaction, and ultimately demonstrates unfair self-dealing resulting in an unfair price for the transaction.

Plaintiff contends fifty percent of the Athlone Board were self-interested thereby mandating those directors adequately disclose their self-interest in detail to the other disinterested directors and to the shareholders whose consent the Board required to consummate the transaction.

Plaintiff argues the court must necessarily infer the self-interested directors dominated the equal number of interested directors merely because of their "influential" presence.

3. The Director Defendants' Self-Interest

[10] *Cinerama, Inc. v. Technicolor, Inc.*, Del. Supr., 663 A.2d 1156 (1995), ("*Cede III*"), clarifies circumstances which might, when supported by plead facts, cause a court to agree the business judgment rule has been rebutted and the analysis should shift to "entire fairness." According to the Supreme Court,

> a material interest of 'one or more directors less than a majority of those voting' would rebut the application of the business judgment rule if the plaintiff proved that 'the interested director controls or dominates the board as a whole or [that] the interested director faile[ed] to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction.

Cede III, 663 A.2d at 1168. On page 23 of *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss*, she states, "When the positions and shareholdings of Miller, Lyons, Shaw and Moulton are thrown into the mix, it is logical to conclude that these four dominated the Athlone Board."

[11-12] Plaintiff here fails to produce in the pleadings any facts to support her attenuated statement. The statement stands alone as a merely conclusory allegation which cannot be considered in the context of a motion to dismiss. Conclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them.

Frankly, all of the facts Plaintiff has plead suggest the Director Defendants acted in good faith and may avail themselves of the benefit of the business judgment rule despite the role played by the interested directors.

4. The Role of 12 *Del.C.* § 144

[13] The provisions of 12 *Del.C.* § 144 ("Section 144") may force a plaintiff to plead more than boilerplate allegations designed to rebut the business judgment rule. If the Director Defendants' actions, under the facts plead by Plaintiff, demonstrate the applicability of the "safe harbor" created by the Delaware General Assembly, Plaintiff must then bear the burden of pleading facts which allege the transaction to be unfair.

[14] Section 144 may provide the protection of the business judgment rule to self-interested directors who approve a transaction shareholders later challenge. This "safe harbor" prevents a potential, disclosed conflict of interest from voiding corporate action and imposing liability on the interested directors. Section 144 protection is available if the self-interested directors (1) disclosed the conflict to the majority of disinterested directors and the latter approved the transaction, even though the disinterested directors are less than a quorum; or (2) the directors disclose the self-interest to the stockholders, and the stockholders approve, *or* (3) a court finds the transaction fair to the corporation. Compliance with Section 144 provides the protection of the business judgment rule and removes the taint of director self-interest in a transaction. *See, e.g.,* ***Cede II***, 634 A.2d at 364-66 and n.34; ***Oberly v. Kirby***, Del. Supr., 592 A.2d 445, 466 (1991); ***Marciano v. Nakash***, Del. Supr., 535 A.2d 400, 405 n.3 (1987).

[15-17] ***Cede III***, the Supreme Court's comprehensive discussion of the appropriate framework for analysis of directors' conduct, suggests compliance with Section 144 does not automatically remove the "taint" of self-interest. 663 A.2d at 1169 (*citing* ***Kahn v. Lynch Communication Sys., Inc.***, Del. Supr., 638 A.2d 1110 (1994)). A plaintiff who alleges and then ultimately proves a transaction to be unfair may deprive a director defendant of Section 144's statutory safe harbor and make the director's action voidable, exposing the director to liability. *See* ***Cede III***, 663 A.2d at 1169. Section 144's protection will not be mechanically applied. ***Cede III***, 663 A.2d at 1169. Within the context of a motion to dismiss analysis, where the plaintiff's own plead facts indicate a director meets Section 144(a)(1) or (a)(2), the plaintiff must then allege facts showing the transaction to be unfair. ***Id.*** ***Cede III***'s interpretation of Section 144 provides a plaintiff who can allege facts showing an unfair transaction a final opportunity to prevail. ***Id.*** No longer does "section 144 remove[ ] the 'interested director cloud' from a transaction through these alternative methods and permit[ ] an otherwise interested transaction to be brought within the protection of the business judgment rule." ***Cede II***, 634 A.2d at 366, n.34; *cf.* ***Cede III***.

As the Director Defendants point out, though, there is no explicit indication ***Cede III*** overrules the statutory requirements; the burden shifting may have been a requirement tailored for ***Kahn*** alone. The General Assembly clearly provided for a court determination of the fairness of the transaction to be simply *one of three* safe harbor alternatives. The facts plaintiff alleged in the complaint show the director Defendants did meet Section 144(a)(1) and (a)(2). It certainly seems unlikely the General Assembly intended the same Director Defendants,

who have made full disclosure and whose contemplated transaction has received the blessings of a majority of disinterested directors and a majority of shareholders, to defend against a claim the transaction was nonetheless unfair. If the General Assembly had so intended, Section 144(a)(3) would have been preceded by "and" not "or." A requirement for a court to find "the transaction fair to the corporation" seems to be relevant only where full disclosure has not been made to either a majority of disinterested directors or a majority of shareholders before obtaining their approval of the transaction.

[18] Plaintiff asserts the General Assembly never intended Section 144 to apply to this type of merger situation. The challenged transaction here clearly is the type of "interested director transaction" falling within the scope of conduct Section 144 contemplates. Unlike the merger situation in the *Cede* series, the Athlone directors' interest in the transaction was substantial. In *Cede III*, no directors were directly involved in the challenged transaction, and the Supreme Court did not apply Section 144. 663 A.2d at 1169. Here, the directors did have a substantial interest - an extremely lucrative pay out resulting from the Merger. Plaintiff acknowledges this in her pleadings and in her oral argument. While this self-interest puts the Director Defendants at risk of losing the benefit of the business judgment rule, it is the type of self-interested conduct to which Section 144 applies. Even if Section 144 does not explicitly include this type of transaction, the policy behind this statutory protection supports its application. *Cede III*, 663 A.2d at 1170.

[19] The Director Defendants may avail themselves of the protection of Section 144. First, a majority of the four disinterested directors approved the terms of the Merger after full disclosure by interested directors of the details of their conflict. In fact, the vote was unanimous - all interested and all disinterested directors. The circumstances did not compel this board, as constituted, to convene a committee comprised solely of independent directors.

[20] Second, it is undisputed the Director Defendants disclosed their self-interest in the proxy statement to the Athlone shareholders. The proxy included full information regarding the prospective lump-sum payments to three of the individual directors. A majority of the Athlone stockholders approved the Merger after receiving detailed information disclosing the conflict and the terms of the transaction.

5. The Fairness of the Challenged Transaction

Even if I read Section 144 as Plaintiff suggests, Plaintiff attacks the fairness of the merger transaction without pleading facts which support unfair dealing or unfair price.

[21] Weighing the pleadings in the light most favorable to Plaintiff, I cannot find facts supporting a claim the Merger was unfair to the Athlone stockholders. As Vice Chancellor Hartnett addressed in his *Nebenzahl* opinion,

> Extensive, arms-length negotiations took place between Athlone and [ALC] over a period of one-and-a-half years; there was an active shopping of Athlone to all interested parties; the directors relied upon a favorable fairness opinion by Morgan Stanley, and the directors considered all facets of the proposed merger before approving the merger.

Letter op. at 7. Plaintiff presents no facts in the *Amended Complaint* suggesting any more substantive information is available today than when Vice Chancellor Hartnett assessed the issue of the sufficiency of the claim for injunctive relief.

[22] The proxy statement fully disclosed all information material to the Merger. A fact is material if there is a substantial likelihood a reasonable investor would view its disclosure as having significantly altered the "total mix" of information available. ***Rosenblatt v. Getty Oil Co.***, Del. Supr., 493 A.2d 929, 944 (1985). The proxy statement contained an accurate representation of the material facts including ALC's primary interest in the acquisition of Jessop (as opposed to the Green River and Reynolds subsidiaries).

Morgan Stanley assigned a neutral value to these subsidiaries. Plaintiff insists ALC's post-Merger annual report assigned significant asset value to the two subsidiaries. According to her *Amended Complaint*, the two subsidiaries must have had value at the time of the Merger in 1993 because ALC assigned value to them years later. Plaintiff alleges no facts to support her theory. This is a conclusory statement which I must disregard in the context of a motion to dismiss. In addition, Plaintiff accuses the Director Defendants of failing to disclose Morgan Stanley did not account for the lump sum payments, the dividend reduction, the lack of appraisal rights, and the reduction from a majority to 37 percent of stockholders' approval to effectuate the Merger. I cannot agree. In fact, the proxy did contain all the material information Plaintiff alleges the Director Defendants omitted.

[23] Plaintiff challenges the fairness of the consideration in the Merger. Plaintiff complains the price was less than the high end of Morgan Stanley's estimated valuation range. This may be true, but it does not indicate an unfair price. The exchange price *was within the range* of valuations which Morgan Stanley prepared in its analysis. Morgan Stanley exercised care and demonstrated expertise in its valuations. Plaintiff's allegations the price undervalued Athlone's subsidiaries is a conclusion without a plead factual basis. The *Amended Complaint* also indicates ALC was the only bidder for Athlone. Regardless of the paper value of the corporation, in the absence of competing purchases, a sole, willing purchaser wields the leverage in pricing the buy out. Plaintiff has not alleged facts which support her conclusory statement the transaction is unfair. Under *Cede III*, she must at least plead facts showing she could meet the burden of establishing an unfair transaction in order to be entitled to relief.

6. Summary

Whether I conclude the protection provided by Section 144 cannot cloak the Director Defendants with the protection of the business judgment rule or that it does but the legislature contemplated future inquiry into the "fairness" of the transaction, it would make no difference. Plaintiff has alleged nothing more than conclusory, self-serving hypotheses in support of her theory the transaction was unfair.

The face of the pleadings make it clear to a reasonable degree of certainty she would not be entitled to relief under any set of facts which she could prove in support of her claim. Therefore, I dismiss the *Amended Complaint* as to Athlone and the individual Director Defendants - Harold Miller, Daniel J. Lyons, Alan Shaw, Stanley Harris, Walter J. Roper, Theodore W. Kheel, Guy F. McCracken, and Carl R. Moulton.

C. ALC's Motion to Dismiss

Plaintiff alleges ALC directly or indirectly participated with the other Defendants in their breaches of fiduciary duty. The gravamen of the claim is ALC knowingly participated in aiding and abetting the allegedly wrongful conduct of Athlone and the Director Defendants. As Vice Chancellor Hartnett explained in his November 8, 1993 *Nebenzahl* opinion at 6, "There is . . . no basis for any claim against [ALC]." The relevant facts have not changed since his conclusion.

[24] To succeed on a claim for aiding and abetting, a plaintiff must prove (1) the existence of a fiduciary relationship, (2) the fiduciary

breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary. ***Nebenzahl***, Letter op. at 6; ***Gilbert v. El Paso***, Del. Ch., 490 A.2d 1050, 1057 (1984), *aff'd*, Del. Supr., 575 A.2d 1131 (1990); ***Endervelt v. The Nostalgia Network, Inc.***, Del. Ch., C.A. No. 11,415-NC, Chandler, V.C. (Jul. 23, 1991), Mem. op. at 10.

[25] As I discussed *supra*, Plaintiff's *Amended Complaint* does not sufficiently state a claim the Director Defendants breached their fiduciary duties to the corporation and Athlone stockholders. Without a showing of breach of fiduciary duty, Plaintiff cannot maintain her action against ALC for aiding and abetting the breaches by the Director Defendants. Plaintiff cannot meet the requirements for an aiding and abetting claim.

[26] Even if Plaintiff were able to show the Director Defendants breached their fiduciary duties, there is only conclusion and conjecture ALC knowingly participated in that breach. The *Amended Complaint*'s absence of facts indicating knowing participation prevents Plaintiff from prevailing on her aiding and abetting claim.

[27-28] A court can infer a non-fiduciary's knowing participation only if a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges specific facts from which that court could reasonably infer knowledge of the breach. *See, e.g.*, ***Katell v. Morgan Stanley Group, Inc.***, Del. Ch., C.A. No. 12343, Chandler, V.C. (Jan. 14, 1993), Mem. op. at 17, ***Lewis v. Leaseway Transp. Corp.***, Del. Ch., C.A. No. 8720, Chandler, V.C. (May 16, 1990), Mem. op. at 17; ***LA Partners, L.P. v. Allegis Corp.***, Del. Ch., C.A. No. 9033, Berger, V.C. (Oct. 22, 1987), Mem. op. at 18; ***Weinberger v. Rio Grande Indus., Inc.***, Del. Ch., 519 A.2d 116, 131 (1986). After a detailed review of the pleadings, I find no facts - merely conclusions - suggesting ALC knowingly participated in any of the alleged breaches of fiduciary duty. Accordingly, I grant ALC's *Motion to Dismiss*.

D. Morgan Stanley's Motion to Dismiss

[29] Plaintiff alleges Morgan Stanley also aided and abetted the Director Defendants in their alleged breach of fiduciary duty. As I explained earlier, the Director Defendants did not breach their fiduciary duty. Without some pleaded facts evidencing a fiduciary breached a duty, a non-fiduciary cannot aid and abet. *See* ***Nebenzahl***, Letter. op. at 6; ***Gilbert***, 490 A.2d at 1057; ***Endervelt***, Mem. op. at 10. I dismiss the *Amended Complaint* against Morgan Stanley.

In summary, I grant all Defendants' *Motion to Dismiss*. A separate order will follow reflecting this decision.

ORDER

For the reasons stated in the Memorandum Opinion dated August 26, 1996, the *Complaint* is dismissed against all Defendants.

ODYSSEY PARTNERS, L.P. v. FLEMING COS.

No. 14,770

Court of Chancery of the State of Delaware, New Castle

July 24, 1996

Plaintiffs, minority shareholders of ABCO Holdings, Inc., which owns all the outstanding stock of ABCO Markets, Inc., allege that defendants breached a fiduciary duty by foreclosing publicly on a security interest on all the assets of ABCO Markets, Inc. Plaintiffs also allege that the defendant used its power over ABCO Holdings, Inc. prior to foreclosure to prevent ABCO Holdings, Inc. from effectively taking action that would have prevented or remedied the default that permitted the foreclosure sale to occur. Defendants moved to dismiss for failure to state a claim, arguing that defendant acted within its rights as a creditor and did not breach its separate responsibilities as a fiduciary of the corporation.

The court of chancery, per Chancellor Allen, denied defendant's motion to dismiss. The court considered the well-pleaded factual allegations as true and found that the elements of a claim for breach of fiduciary duty were met.

1. Federal Civil Procedure ⚷ 1829
Pretrial Procedure ⚷ 679

Upon a motion to dismiss, the court must consider all well-pleaded factual allegations as true and will draw all permissible inferences from the well-pleaded facts.

2. Pleading ⚷ 34(1), 48
Pretrial Procedure ⚷ 624, 687

A complaint need only give notice of the claim asserted; the pleader is entitled to have all reasonable inferences from the pleading drawn in his or her favor.

3. Pretrial Procedure ⚷ 679

Special characteristics of shareholder litigation require courts to try to distinguish between broadly possible inferences from specific allegations of fact, on one hand, and hollow conclusions with few specific allegations, on the other.

4. Corporations ⚷ 309(1), 309(4)

The owner of debt has the legal rights to foreclose pursuant to law.

5. Corporations ⚷ 307, 309

The law can impose no additional duty, under the guise of fiduciary duties, lest it take legal rights from a creditor to which it is entitled.

6. Corporations ⚷ 309(1)

The coincidence that the creditor is also a controlling shareholder should count for nothing when a secured party exercises its creditor rights.

7. Corporations ⚷ 179, 186, 187

The dutiful compliance with their fiduciary role does not require that the defendants hold and exercise nonstockholder rights for the benefit of the minority shareholders.

8. Corporations ⟹ 174, 180, 310(1)

Fiduciary principles require loyalty of the holder of a power impressed with this character; the duty of loyalty requires that any power over the corporation held in a fiduciary capacity may be exercised only for the purpose of advancing collective/corporate welfare. But fiduciary duty does not require self-sacrifice.

9. Corporations ⟹ 179, 186, 187

One who may be both a creditor and a fiduciary does not by reason of that status also have special limitations upon the exercise of his or her creditor rights.

10. Corporations ⟹ 307

The exercise of legal rights would not privilege the prior misuse of corporate information, which would constitute a violation of fiduciary duty.

11. Corporations ⟹ 307

A fiduciary who in good faith acquires for value legal interests from third parties is entitled to exercise fully within the law the legal rights so acquired, free of fiduciary constraints, unless in acquiring those interests the fiduciary was violating a duty of loyalty to the corporation.

12. Federal Civil Procedure ⟹ 1829
Pretrial Procedure ⟹ 679

Plaintiffs' allegations could constitute a breach of fiduciary duty where the parent corporation controlled the board of its subsidiary, the parent corporation prevented the subsidiary from exploring fully available sources of additional capital because it would have had the effect of diluting its proportionate ownership and, as a result, the subsidiary was not able to raise needed capital and a default occurred which lead to the subsidiary shares losing all of their value and the parent corporation acquiring the assets at a good price.

Richard D. Allen, Esquire, and Katherine R. Witherspoon, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for plaintiffs.

R. Franklin Balotti, Esquire, Stephen E. Herrmann, Esquire, and Matthew E. Fisher, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendants.

ALLEN, *Chancellor*

This suit by a group of minority shareholders of ABCO Holdings, Inc. ("Holdings") constituting about 28% of the outstanding stock, challenges as a breach of fiduciary duties, actions of Fleming Companies, Inc., the largest creditor and, allegedly, the controlling (50.1%) shareholder of Holdings. The only substantial asset of Holdings is it ownership of all of the outstanding stock of ABCO Markets, Inc., which in turn owns approximately 71 supermarket retail stores in the State of Arizona. While the *sine qua non* of the complaint involves action taken by Fleming to foreclose publicly on a security interest (acquired in an arms-length transaction with ABCO's primary lender) on all of the assets of ABCO Markets and thus to acquire all of the operating assets that give value to Holdings stock, importantly, the complaint also entails allegations that Fleming used its power over Holdings prior to its foreclosure to prevent ABCO from effectively taking action that would have prevented or remedied the default that permitted the foreclosure sale to occur. Slightly more specifically, plaintiffs allege that Fleming used its influence over the ABCO board to (i) obstruct ABCO's success, (ii) push ABCO into default of key debt obligations, (iii) cause the Holdings board to approve Fleming's acquisition of the bank loans through which Fleming acquired senior creditor status, (iv) foreclose its loans without considering alternatives to foreclosure more beneficial to the other shareholders, (v) structure the foreclosure sale to deter other bids, and (vi) purchase ABCO assets at the foreclosure auction.

On February 16, 1996, defendants filed this motion to dismiss for failure to state a claim, arguing essentially that Fleming acted within its rights as a creditor and did not, in exercising these rights, breach its separate responsibilities as a fiduciary of the corporation.

For the reasons set forth below, the pending motion to dismiss will be denied.

I. Facts.

The following represents a summary of the allegations of the complaint. ABCO was formed in 1984 by Odyssey Partners, L.P., a Delaware limited partnership, and the management of 30 Arizona based Alpha Beta supermarkets for the purpose of the leveraged acquisition of

those supermarkets. In 1988 ABCO sold notes with an aggregate principal amount of approximately $62.5 million to acquire 38 more stores.

After 1988, ABCO's financial condition deteriorated as a result of a recession, its debt obligations, and a lack of operating capital. In an effort to improve its financial performance, ABCO developed a business plan that included remodeling its stores in a modern and appealing "Desert Market" format. ABCO, however, could not obtain the necessary capital to fully effectuate this plan and by 1992, it financial position became critical.

In 1992, Holdings' trade creditors, debt holders and preferred stockholders agreed to restructure their financial interests in Holdings. Fleming was at that point a major supplier to ABCO, a significant trade creditor and a bondholder. The 1992 arrangements principally involved the exchange of debt for equity. As part of this restructuring, Chemical Bank reaffirmed its status as ABCO's senior secured creditor and entered into amendments to existing ABCO credit agreements. At the same time Fleming agreed to loan and credit agreements with ABCO and entered into a supply agreement in which ABCO agreed in substance to purchase no less than 51% of all its merchandise needs from Fleming (due to expire in 2003). Fleming also acquired shares of Holdings common and a warrant to acquire additional shares in the event that a default occurred in payment of principal or interest under the Chemical Bank loans, the Fleming loans, or the supply agreement. By exercising the rights under the warrant, Fleming could increase its interest to 50.1% of Holdings' outstanding shares. Plaintiffs allege that following the restructuring, Fleming became the controlling stockholder of Holdings and gained effective control over the Holdings board of directors.

In connection with the 1992 restructuring, all holders of Holdings common stock entered into a stockholders agreement that (1) required a supermajority director vote (four of five directors) for the "sale of substantial assets--defined as exceeding 10% of the assets of Holdings--of any Holdings subsidiary [sic]", ¶26, (2) establishing that the Holdings board of directors was to consist of five directors, and (3) authorizing the formation of committees of the board of directors as needed from time to time so long as they were comprised of two non-Fleming directors and one Fleming director.

After 1992, ABCO converted several of its markets to the "Desert Market" format. The remodeled stores have among the highest gross margins and operating profits in the Arizona food retailing industry. However, even after the restructuring, ABCO remained undercapitalized and could not carry forward its strategic business plan of remodeling its

other stores. ABCO's potential was contingent in large part on ABCO raising the necessary capital to convert more supermarkets to the new format.

In 1995, Holdings retained investment banking firms to help raise needed capital, but Fleming and the directors purportedly under its control refused to allow Holdings and ABCO to pursue alternatives that would dilute Fleming's interest in Holdings. ¶37.

In or about October 1995, Fleming itself proposed a "Rights Offering" (which would not dilute its control) to current shareholders as a possible means of raising capital. The Rights Offering required stockholders to accept the termination of the stockholders' agreement and to agree to other terms that Fleming knew few stockholders would favor. The shareholders never approved the proposed offering and it expired in or about November 1995. However, during the pendency of this Rights Offering, Fleming prohibited Holdings from seeking alternative ways to raise capital.

On or about November 20, 1995 ABCO was in default on its loan obligations. At that time Fleming exercised its right under its warrant to become the majority shareholder of Holdings (coming at that point to own 50.1% of the common stock).

Around the same time, Fleming acquired from Chemical Bank the ABCO term and revolving notes held by the bank. These notes were in default and were secured by all of ABCO's assets. Fleming thereby became the senior secured creditor of ABCO. Fleming acquired the notes in order to foreclose on the debt and acquire ABCO assets. The Holdings board, under the control of Fleming, voted to approve of Fleming's acquisition of the debt owed to Chemical.

By notice dated in or about December 1995, Fleming announced that it would hold a public foreclosure sale of substantially all of the assets of Holdings, *viz.* all of the stock of ABCO on January 9, 1996.

Thus, in summary, plaintiffs attempt to allege that defendants engaged in a course of conduct designed to acquire ABCO assets and thereby effectuate a goal of expanding into the retail segment of the market. Plaintiffs allege that with this goal in mind, defendants acquired a controlling interest in Holdings, exacerbated ABCO's financial difficulties by preventing it from acquiring needed capital, purchased ABCO's senior debt, and thereafter acquired the ABCO assets in a foreclosure sale. The specific actions by defendants alleged to have breached fiduciary duties include blocking efforts to improve ABCO by an infusion of necessary capital, wasting time and resources in connection with an allegedly unfair Fleming-sponsored rights offering, attempting to coerce shareholders into accepting the rights offering, causing the board

to approve the acquisition of the Chemical Bank notes, and structuring the foreclosure auction to favor Fleming and deter other bids.

II. Analysis

[1-3] Defendants assert that the foregoing, when read against the appropriate legal test, fails to state a claim upon which relief may be granted. In considering this motion the court must consider all well-pleaded factual allegations as true and will draw all permissible inferences from the well-pleaded facts. *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993); *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988). Generally, a complaint need only give notice of the claim asserted; the pleader is entitled to have all reasonable inferences from the pleading drawn in his or her favor. *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979); *Delaware State Troopers Lodge, etc. v. O'Rourke*, 403 A.2d 1109, 1110 (Del. 1979). I am mindful, however, that the special characteristics of shareholder litigation require courts to try to distinguish between broadly possible inferences from specific allegations of fact, on one hand, and hollow conclusions with few specific allegations, on the other. *See Gagliardi v. TriFoods International, Inc.*, C.A. No. 14725 (Del.Ch. July 19, 1996), Slip. Op. at 3; *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099, 1105 (Del. 1985); *Grobow v. Perot*, 539 A.2d at 187 n.6.(Del. 1988).

[4-6] The gist of the motion to dismiss is the assertion, which seems clearly correct insofar as it extends, that Fleming had legal rights as the owner of the Chemical Bank debt, including the right to foreclose pursuant to law. According to the argument of the moving parties, what Fleming did in acquiring all of the operating assets of ABCO at a public auction was simply the exercise of its legal rights as a creditor and as a buyer at the public sale. The allegations do not sufficiently allege that Fleming did not fully respect the *legal* constraints imposed upon a foreclosing creditor, it is said, and the law can impose no additional duty, under the guise of fiduciary duties, lest it take legal rights from a creditor to which it is entitled. On this view, the "coincidence" that the creditor is also a controlling shareholder[1] should count for nothing when a secured party exercises its creditor rights.

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[1]Fleming warmly denies that it ever was a controlling shareholder of Holdings. It asserts that it never exercised the voting power it acquired in 1995 and never otherwise controlled the Holdings board. This dispute is essentially factual and not resolvable at this stage. Thus, I pass over that matter.

[7-9] Defendants rely upon the principle that dutiful compliance with their fiduciary role does not require that they hold and exercise nonstockholder rights for the benefit of the minority shareholders, *see Solomon v. Pathe Communications Corp.*, C.A. No. 12563 (Del.Ch., Apr. 21, 1995), Mem. Op. at 14, *aff'd* 672 A.2d 35 (Del. 1996). Fiduciary principles require loyalty of the holder of a power impressed with this character; the duty of loyalty requires that any power over the corporation held in a fiduciary capacity may be exercised only for the purpose of advancing collective/corporate welfare. But fiduciary obligation does not require self-sacrifice. *See, e.g., Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 598 (Del.Ch. 1986); *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 888 (Del. 1970). More particularly, it does not necessarily impress its special limitation on legal powers held by one otherwise under a fiduciary duty, when such collateral legal powers do not derive from the circumstances or conditions giving rise to the fiduciary obligation in the first instance. Thus one who may be both a creditor and a fiduciary (*e.g.*, a director or controlling shareholder) does not by reason of that status alone have special limitations imposed upon the exercise of his or her creditor rights. *See Solomon v. Pathe Communications Corp., supra.*

[10] But the obverse of this proposition is true as well: it may be the case that a creditor misuses a fiduciary position (by, for example, using confidential corporate information) to try to advantage himself in his creditor capacity. The advantage he seeks may involve the exercise of some independent right--the right to buy something or a creditor's right under a credit agreement, for example. In such circumstances the exercise of legal rights would not, of course, privilege the prior misuse of corporate information, which would continue to constitute a violation of fiduciary duty.

[11] The complaint in this case survives the current motion, applying appropriate standards of review of pleadings, not because Fleming had a fiduciary duty not to exercise the legal rights it acquired by purchase from Chemical bank, and not because (absent misuse of confidential information) it did not have a privilege to buy the Chemical loan in default when the corporation itself was financially unable to cure the default. These circumstances, standing alone do not allege a violation of that loyalty that a fiduciary owes to the corporation and under some circumstances to its public shareholders. Some facts other than acquisition of the interest or exercise of the legal rights acquired by a fiduciary must be stated, in my opinion--and those other facts must themselves constitute a breach of loyalty--in order for these transactions to state a claim for breach of fiduciary duty. Thus a fiduciary who in

good faith acquires for value legal interests from third parties is entitled to exercise fully within the law the legal rights so acquired, free of fiduciary constraints, unless in acquiring those interests the fiduciary was violating a duty of loyalty to the corporation in some respect. While that principle plainly has some relevance to this case, it is not in itself enough to defeat plaintiffs' pleading.

[12] The complaint alleges facts, which if true are consistent with a violation of fiduciary duty not dependent upon the exercise of creditor rights. I refer to the allegations, which for these purposes I accept as true, that Fleming controlled the board and caused Holdings and ABCO to fail to explore fully available sources of additional capital because Fleming ruled out any capitalization plan that would have the effect of diluting its proportionate ownership. Instead, according to the pleading, it insisted upon a proposal that would give to each investor an option to make further investments (which is characterized as unfair, *etc.*, in the complaint, but I need not focus on the characterization; it is not an important element in the reasoning leading to my conclusion). Defendant complains that these allegations are not sufficiently specific, are conclusory, *etc.*, but in my judgment they should be regarded as sufficient to survive a motion to dismiss here. *Cf. Gagliardi, supra*, Slip Op. at 13-18 (identifying factors, not present in this case, which make strike suits a particular risk in shareholder litigation and identifying one of the legal system's responses to that fact).

Looked at in one way, these allegations could constitute a breach of fiduciary duty. The charter apparently gives no preemptive rights to holders of Holdings common stock. In this instance preemptive rights were, allegedly, advantageous to the party who, allegedly, controlled the board. That party exercised power over the corporation to force the corporation to abandon, or not fully explore, one option (non-preemptive capital raising) for its private reasons. As a result, no capital was raised and a default occurred or continued, ultimately leading to the public shares losing all value[2] and the controlling shares acquiring the assets at a good price. On this view of things, whether Fleming or Chemical Bank foreclosed on the defaulted senior loan is more or less unimportant to the loss experienced by plaintiffs (except insofar as it tends to explain why Fleming was willing to force its view of appropriate capital raising on the corporation and its minority shareholders). In all events a sale would

[2]According to the plaintiffs, in August 1995, following an exhaustive analysis, an investment banker valued Holdings' common stock at $30/share if Fleming adopted the investment bankers' plan. Fleming's own Rights Offering valued the stock at $20/share.

occur and interested parties were given the opportunity to bid as the relevant law of security interests dictated.

Thus the elements of claim are stated in the complaint. Whether it can be proven that Fleming held and exercised power over Holdings and ABCO, and whether misuse of that power for personal reasons (prior to acquisition by Fleming of the Chemical debt) can be proven remains to be seen. But one cannot foreclose the possibility at this stage (meaning that the record to the extent it has been developed does not at this stage itself foreclose the inferences upon which this opinion rests) and thus I must conclude that the complaint states a claim for breach of fiduciary duty, of the type identified, and cannot be dismissed.[3]

The pending motion will therefore be denied. **It is so ordered.**

IN RE PAINE WEBBER LIMITED PARTNERSHIPS

No. 15,043 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

September 17, 1996

Plaintiffs were limited partners in the defendant limited partnerships. Plaintiffs commenced action to seek a court order forcing the limited partnerships to turn over a listing of the names, addresses, and ownership interests of all of the limited partners in each of the defendant limited partnerships. Plaintiffs argued that (1) they had a statutory right to the lists under section 17-305, and (2) they had a contractual right to the lists based on their partnership agreements with the defendants. The defendants contended that with respect to the partnership agreements that (1) the court must read into the agreements the proper purpose requirement contained in section 17-305 or (2) the court must infer an improper purpose defense which precluded the plaintiffs from receiving the partnership lists they sought.

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[3]The record does not at this stage reflect the nonexistence of any implied material fact. Therefore, I skip over defendants' claim that this motion can be viewed as one for summary judgment.

The court of chancery, per Vice-Chancellor Jacobs, held that in these particular circumstances (1) the plaintiffs had no statutory right to the lists because they had not established a proper statutory purpose as required by section 17-305; (2) the plaintiffs did have a contractual right to the lists under the applicable partnership agreements; (3) section 17-305's purpose requirements did not trump partnership agreements; and (4) an improper purpose defense could not be implied as a term of the partnership agreements in question. Therefore, the court held that the plaintiffs were entitled to the relief sought under the partnership agreements.

1. Partnership ⚷ 351, 366

In order for a limited partner to have a statutory right to receive information from the partnership, the limited partner seeking the information must have a purpose reasonably related to the limited partner's interest as a limited partner. DEL. CODE ANN. tit. 6, § 17-305 (1991).

2. Partnership ⚷ 351, 366

Where a limited partner seeks to receive information by statutory right under section 17-305, two issues are implicated — one factual and one legal: (1) what is the limited partner's true purpose for requesting the information, and (2) is that purpose sufficient under section 17-305? DEL. CODE ANN. tit. 6, § 17-305 (1991).

3. Corporations ⚷ 181(5)
Partnership ⚷ 351

A desire to be prepared to communicate with fellow limited partners about unspecified topics at some unspecified future time is not a proper statutory purpose under section 17-305.

4. Partnership ⚷ 351

A desire to sell a listing of limited partners for commercial purposes is not a proper statutory purpose under section 17-305. DEL. CODE ANN. tit. 6, § 17-305 (1991).

5. Partnership ⟹ 351

A desire to use a listing of limited partners in order to participate in a potential tender offer is a proper statutory purpose under section 17-305. DEL. CODE ANN. tit. 6, § 17-305 (1991).

6. Partnership ⟹ 351

A desire to use a listing of limited partners to increase the value of their investments in the defendant limited partnership is a proper statutory purpose under section 17-305. DEL. CODE ANN. tit. 6, § 17-305 (1991).

7. Partnership ⟹ 351

Where the use of a partnership list relates solely to a third party's interest as a potential buyer and not the plaintiff's interest as limited partners, such as where a plaintiff seeks a listing of limited partners in order to use the list as an aid in a possible tender offer in which the plaintiff's participation would be token, is not a proper statutory purpose under section 17-305. DEL. CODE ANN. tit. 6, § 17-305 (1991).

8. Partnership ⟹ 350

Where a limited partner has no statutory right to request information from the limited partnership, any entitlement to the information must flow from the partnership agreement.

9. Partnership ⟹ 350

The proper purpose requirement found in section 17-305 does not override or trump any partnership agreement that does not contain such a requirement. DEL. CODE ANN. tit. 6, § 17-305 (1991).

10. Partnership ⟹ 351.5
Statutes ⟹ 184

An important policy underlying the Delaware Revised Uniform Limited Partnership Act is to give maximum effect to the principles of freedom of contract and the enforceability of partnership agreements. DEL. CODE ANN. tit. 6, § 17-1101(c) (1991).

11. Partnership ⟹ 350, 366

The Delaware Revised Uniform Limited Partnership Act provides that any partner's duties and liabilities to a limited partnership or to another partner may be expanded or restricted by contract provisions in the partnership agreement. DEL. CODE ANN. tit. 6, § 17-1101(d) (1991).

12. Partnership ⟹ 350

The judicial addition of a proper purpose requirement into partnership agreements would create an anomalous inconsistency with corporation law.

13. Partnership ⟹ 349

Equity investors in a limited partnership have the same power to contract for expanded rights as equity investors in a corporation.

14. Contracts ⟹ 3
Partnership ⟹ 350

Section 1519 of the Revised Delaware Uniform Partnership Act does not contain an express requirement relating to purpose and if the partnership agreement does not contain an express agreement relating to purpose, then a partner has no obligation to prove a proper purpose in order to enforce a right of prescribed access. DEL. CODE ANN. tit. 6, § 1519 (1991).

15. Contracts ⟹ 168
Implied and Constructive Contracts ⟹ 1

The conditions under which an implied contractual obligation may be inferred are narrowly construed. An obligation may be inferred when, given the terms of the express contract made and the circumstances of the contracting process, it is more likely than not that if the parties had thought to address the subject, they would have agreed to create the obligation that is currently under consideration by the court.

16. Partnership ⟹ 351

After September 1, 1985, Delaware limited partnerships are not required to publicly file a list of their limited partners. 65 Del. Laws 188 (1985).

17. Partnership ⟹ 350, 351, 352

For partnerships created prior to 1985, there is no presumption that it is more likely than not that if the parties had addressed the subject, they would have agreed that a partnership could deny access to the partner list where the partner seeking access is doing so for a personal reason that is adverse to the interests of the partnership. For partnerships created after 1985, such a presumption may exist.

18. Partnership ⟹ 363, 366

When there is no opportunity for newly admitted limited partners to bargain at the time of admission, there is no legal basis to inquire into how the partners would have contracted had they been able to bargain.

19. Implied and Constructive Contracts ⟹ 70
Partnership ⟹ 111

In cases where the improper purpose defense can be implied, a court may deny access to partnership information if the partnership can demonstrate that the plaintiff partner's purpose (1) is personal to the plaintiff and (2) would actually harm the value of the joint investment. Both requirements must be shown before the defendant can successfully use this defense.

20. Partnership ⟹ 70, 111

Where the partnership agreement creates an unqualified right to the list, a partner is legally entitled to the list even if its purpose is not proper, unless the partnership can demonstrate that access to the list would also harm the value of the partners' joint investment.

Craig B. Smith, Esquire, Charles E. Butler, Esquire, and Joanne M. Shalk, Esquire, of Smith, Katzenstein & Furlow, Wilmington, Delaware, for plaintiffs.

Andre G. Bouchard, Esquire, and Joel Friedlander, Esquire, of Lamb & Bouchard, Wilmington, Delaware, for defendants.

JACOBS, *Vice-Chancellor*

The plaintiffs in this action, Liquidity Fund 33, L.P., Liquidity Fund 34, L.P., and Liquidity Fund 53, L.P. (collectively, the "plaintiffs") seek a court-ordered list of the limited partners of certain Paine Webber-affiliated limited partnerships.[1] Specifically, the plaintiffs seek a list of the names, addresses, and ownership interests of all of the limited partners of each of the defendant limited partnerships (the "lists"). In a series of letters beginning on October 13, 1995 and ending on or about May 24, 1996, plaintiffs formally demanded the lists from the defendant limited partnerships. Those requests were denied, and on June 6, 1996 this action was filed.

The Court concludes that, in these particular circumstances, (1) the plaintiffs do not have a statutory right to the lists, because they have not established a proper statutory purpose as required by 6 Del. C. §17-305; and (2) the plaintiffs do have a contractual right to the lists under the applicable Partnership Agreements. In arriving at that result, the Court declines to imply an "improper purpose defense" as a term of those Partnership Agreements. The Court also finds that even if such a defense could be implied, the defendants have failed to establish it in this case. Accordingly, for the reasons discussed more fully below, the plaintiffs are entitled to the relief that they seek under the Partnership Agreements.

I. FACTS

A. The Parties

The plaintiffs are California limited partnerships that were organized to invest in real estate properties. Liquidity Financial Group, L.P. ("Liquidity Financial") is a California limited partnership that serves as the sole general partner of each of the plaintiff limited partnerships. Liquidity Financial Corporation, a California corporation, is the sole general partner of Liquidity Financial. Mr. Brent Donaldson

[1]Those partnerships (collectively, the "defendant limited partnerships) are: Paine Webber Growth Partners, L.P., Paine Webber Income Properties Three, L.P., Paine Webber Qualified Plan Property Fund Two, L.P., Paine Webber Qualified Plan Property Fund Three, L.P., and Paine Webber Qualified Plan Property Fund, L.P.

("Donaldson"), Liquidity Financial Corporation's President, controls the plaintiff limited partnerships.

The defendants are Delaware limited partnerships that were organized by Paine Webber, the investment banking firm, for the purpose of making real estate investments. Also named as defendants are the general partners of the defendant limited partnerships. Each of these general partners is indirectly managed by a Paine Webber affiliate.

B. The Requests for the Lists

On October 13, 1995, Liquidity Financial requested a list of the names and addresses of the limited partners, and the number of units held by each, in the defendant limited partnerships. At that particular point in time, Liquidity Financial's stated purpose was "to enable it to communicate with other Limited Partners with respect to issues of Partnership business and to assess the strength of the market for and thus the value of, its investment in the Partnership." Pl. Ex. 15.

Liquidity Financial was asked to clarify its purpose on October 23, 1995, and by letter dated November 13, 1995, it responded that it desired "to hold complete files on all of [its] investments." Pl. Ex. 14. Liquidity Financial added that though it had utilized such lists in the past to inform investors of its interest in negotiating separate purchases, it had not used the lists for that purpose or in that manner since 1993. By letter dated November 30, 1995, the defendants denied the plaintiffs' request for the lists.

Liquidity Financial made a second request for the lists by letter dated December 6, 1995. That letter stated no purpose for seeking the lists. It did, however, prompt a series of somewhat antagonistic telephone calls between Mr. Donaldson and Paine Webber's Vice President of Investor Relations. The lists were not produced.

Liquidity Financial's third written request for the lists was made in a letter dated January 8, 1996. In that letter, Liquidity Financial repeated its stated purpose as of October 23, 1995, viz., to have complete files on all of its investments. Liquidity Financial also advised that in the past that it had used investor lists to communicate with other limited partners about partnership business, to value its investments, and to negotiate separate purchases of limited partnership interest, but at this time it had no immediate plans to contact any of the limited partners. By letter dated January 22, 1996, the defendants rejected that request as well.

In a letter dated February 1, 1996, Liquidity Financial again requested the lists. That letter did not state any purpose for the request, and no lists were produced.

Liquidity Financial made its final request for the lists in separate letters, all dated May 24, 1996, to each of the five defendant limited partnerships. In those letters, Liquidity Financial advised that it wanted the lists "to assist [it] in determining whether to seek additional interests." Pl. Exs. 1-5. The defendants refused to furnish the lists and this action followed.

II. DECISION

In this action, the plaintiffs claim both a statutory and a contractual right to the limited partner lists.[2] Those two claims are addressed seriatim.

A. The Plaintiffs' Statutory Claim

[1] The plaintiffs first claim an entitlement to the lists pursuant to 6 Del. C. §17-305, which requires that the limited partner requesting the information have a purpose "reasonably related to the limited partner's interest as a limited partner." §17-305(a). Plaintiffs concede that they have the burden of proof on this issue, but insist that their stated purposes and their proof at trial satisfy that burden.
[2] The statutory claim implicates two issues, one factual and the other legal: 1) what is the plaintiff's true purpose, and 2) is that purpose sufficient under §17-305?

1. The Plaintiffs' True Purpose

Despite repeated requests from the defendants, Liquidity Financial (and, more specifically, Mr. Donaldson) has never settled upon any clear and firm purpose for seeking the lists. Liquidity Financial's various letters demanding the lists reveal a cornucopia of often incongruous, ever-shifting purposes. Indeed, at one point, Mr. Donaldson asked the defendants to provide him examples of proper purposes from which he could then choose. Mr. Donaldson's deposition and trial testimony did little to clarify Liquidity Financial's true purpose. For example, one of the stated purposes in some of the plaintiffs' demand letters and in the

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[2]Plaintiffs also claim that by failing to supply the lists, the general partners of the defendant limited partnerships breached their fiduciary duty. Because the plaintiffs cite 6 Del. C. §17-305 and the Partnership Agreements as the source of that fiduciary duty, this Court's disposition of the plaintiffs' statutory and contract claims will dispose of their fiduciary duty claim as well.

plaintiffs' pre-trial brief was valuation of the partnership interests. Yet in his trial testimony, Mr. Donaldson omitted any reference to valuation, and in response to questions by the Court, he admitted that valuation was "an ancillary reason, but ... certainly not for most [sic] in my mind." Tr. 157-58. The plaintiffs' resistance in committing to any definite purpose creates the unavoidable impression of a studied effort to contrive a purpose -- any purpose -- that a court could find legally sufficient, while at the same time "hiding the ball" regarding their true purpose. That impression does little to enhance the credibility of the plaintiffs' case.

The Court made a final attempt to divine the plaintiffs' purpose at the post-trial oral argument. In response to the Court's questions, plaintiffs' counsel represented that (1) the plaintiffs' "contract" purpose (i.e., the purpose advanced in connection with their contract claim) was that they wanted to be prepared to communicate with the other limited partners at a future time about (unspecified) partnership business, and that (2) the plaintiffs' "statutory" purpose was to conduct a survey to help plaintiffs decide whether or not to increase their ownership of units in the defendant limited partnerships by way of a tender offer.[3]

The trial, however, was when the true nature of the plaintiffs' primary purpose came to light. Mr. Donaldson admitted that if any tender offer were to be made, it would be conducted not by the plaintiffs directly, but, rather, by an as-yet-to-be-created $50 million investment fund (the "investment fund"). Tr. at 134-36. In his pre-trial deposition Mr. Donaldson testified that it had not been determined whether the plaintiffs would even participate in any of those purchases. Def. Ex. 22 at 136-37. What did become clear was that if the plaintiffs were to participate in any tender offer by the investment fund, that participation would be de minimis because the three plaintiff partnerships do not have significant available cash.[4] Finally, Mr. Donaldson testified at trial that any participation by the plaintiffs may take the form of their furnishing

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[3]When asked to clarify how the plaintiffs could have one purpose when claiming rights under the statute and another when claiming rights under the Partnership Agreements, plaintiffs' counsel explained that conducting the survey in connection with a possible tender offer was his clients' primary purpose, whereas their desire to maintain complete files "on the shelf" was their secondary purpose.

[4]As of year end December 1995, Liquidity Fund 33, L.P., Liquidity Fund 34, L.P., and Liquidity Fund 53, L.P., had cash on hand of approximately $67,000, $70,000 and $140,000, respectively. Tr. 140-42. Although each fund currently has a positive cash flow, Liquidity Financial's historical practice has been to invest each fund's capital at formation, distribute the income earned on those underlying investments when and as earned, and then liquidate the funds once the underlying investments complete their life cycle. Plaintiffs have provided no evidence that Liquidity Financial intends to depart from this historical practice by using the funds' accumulated capital to participate in a future tender offer.

the lists to the investment fund in exchange for an equity participation in that fund. Tr. at 134, 143.

The plaintiffs insist that any tender offer by the investment fund would be incidental, and that the plaintiffs' primary purpose in seeking the lists is to conduct a survey to decide whether or not to acquire additional partnership units. However, the economic rationale for conducting such a survey is dubious: Mr. Donaldson conceded that such surveys cost approximately $4,000 to $5,000, and that there were other ways to value a small investment. The plaintiffs could suggest no reason why they would commit to that expense where they would be, at best, minor participants in any tender offer. In the Court's view, given the lack of significant funds available to plaintiffs, and given Mr. Donaldson's testimony that the plaintiffs may not even participate in any tender offer, incurring the expense of such a survey would be worthwhile only to the investment fund that would conduct the tender offer. For these reasons, I conclude that the plaintiffs' primary purpose for seeking the lists of limited partners is not to conduct a survey. Rather, it is to make the lists available to the investment fund in return for an equity participation in that fund, should it ever be created.

2. The Legal Sufficiency of the Plaintiffs' Purposes

[3] The plaintiffs' true purposes having been determined, the question then becomes whether they are legally sufficient under §17-305. Plaintiffs acknowledge that a desire to be prepared to communicate with fellow limited partners about unspecified topics at some unspecified future time, is not a proper statutory purpose. See Northwest Indus. v. B.F. Goodrich Co., Del. Supr., 260 A.2d 428 (1969); Hatleigh Corp. v. Lane Bryant, Inc., Del. Ch. C.A. No. 6259, Hartnett, V.C. (Oct. 20, 1980); AAR Corp. v. Brooks & Perkins, Inc., Del. Ch., C.A. 6222, Brown, V.C., Letter Op., (Aug. 12, 1980). Thus, the analysis must center on the plaintiffs' other ("contract") purpose -- i.e., the plaintiffs' intent to furnish the lists to the (yet to be formed) investment fund.

[4] The desire to obtain a shareholder list in order to sell it for commercial purposes has long been considered improper under 8 Del. C §220, which is the corporate analogue to §17-305. Theile v. Cities Service Co., Del. Supr., 115 A. 773 (1922); Tannetics, Inc. v. A. J. Indus., Del. Ch., C.A. No. 4592, Marvel, V.C. (Sept. 4, 1974) Plaintiffs have suggested no reason why that purpose is any less improper in the partnership context.

[5] Plaintiffs contend that they would not be "selling" the lists, but, rather, would be "using" them as a means to participate in a potential tender offer. That, plaintiffs argue, is similar to a stockholder seeking a stockholder list in order to value his stock, to help him decide whether to sell his shares, or to purchase additional shares. Delaware courts have found that purpose to be proper under §220. See BBC Acquisition v. Durr-Fillauer Medical, Del. Ch., 623 A.2d 85 (1992); CM & M Group, Inc. v. Carroll, Del. Supr., 453 A.2d 788 (1982). The problem with that argument is that it lacks credibility in this context: even if the plaintiffs decide to participate in the investment fund that conducts the tender offer, their participation would be minimal.

[6] Plaintiffs' response is that the size or magnitude of the plaintiffs' investment is legally irrelevant, and for support they rely upon Hirschfeld v. Emery Air Freight Corp., Del. Ch., C.A. No. 9806, Hartnett, V.C., Mem. Op., (Apr. 22, 1988). Plaintiffs' reliance is misplaced. In Hirschfeld, the plaintiffs sought a stockholder list in order to give it to another person (Mr. Bass), who planned to use the list to wage a proxy contest to gain control of the board. The Court found that even though Mr. Hirschfeld's role was strictly supportive, his bona fide purpose in helping Mr. Bass was to help elect an opposition slate committed to implementing policies that could ultimately increase the value of his shares. Consequently, that purpose was found to be proper.

[7] Here, in contrast to Hirschfeld, the plaintiffs have no plans to use the lists to increase the value of their current investments in the defendant limited partnerships. Rather, Mr. Donaldson and Liquidity Financial are using the plaintiffs' normal investment in the defendant limited partnerships[5] purely as a legal vehicle to obtain the lists in anticipation of a possible tender offer, to be conducted by a separate entity and in which the plaintiffs' participation would at best be token. Thus, the use of the lists to aid in that tender offer is a purpose that relates solely to the investment fund's interest as a potential buyer, not to the plaintiffs' interest as limited partners. That purpose is therefore not proper under §17-305. See BBC Acquisition v. Durr-Fillauer Medical, Inc., Del. Ch., 623 A.2d 85 (1992); Badger v. Tandy Corporation, Del. Ch., C.A. No. 6898, Duffy, J. (Mar. 24, 1983) (denying relief under §220 for stockholder list where the plaintiff's purpose was to sell the information to fellow stockholders who were unaware that they owned such stock).

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[5]Together, the plaintiffs own 0.01%,0.18%, 0.76%, 1.45% and 2.62% of the units in the five defendant limited partnerships.

Because neither of the plaintiff's purposes for requesting the lists of limited partners is proper, plaintiffs have failed to demonstrate their entitlement to the lists under the statute.[6]

B. The Plaintiffs' Contract Claim

1. The Partnership Agreements

[8] Because the plaintiffs have no statutory right to the lists, any entitlement they may have must flow from the Partnership Agreements. The relevant provision(s) of those Agreements state as follows:

> **Books and Records.**
>
> A. Books and records of the Partnership shall be maintained at the principal office of the Partnership or at any other place designated by the General Partner and shall be available for examination there by any Partner or his duly authorized representatives at any and all reasonable times. The Partnership may maintain such books and records and may provide such financial or other statements as the General Partner in its sole discretion deems advisable. Any Partner, or his duly authorized representatives, upon paying the costs of collection, duplication and mailing, shall be entitled to a copy of the list of the names and addresses of the Limited Partners (including the number of Units owned by each of them).

Pl. Ex. 7, at §11.1; Pl. Ex. 8, at §11.1; Pl. Ex. 9, at §10.1; Pl. Ex. 10, at §10.1; Pl. Ex. 11, at §11.1.

No language in the above-quoted provision(s) requires a showing of a proper purpose. On their face the Partnership Agreements give plaintiffs the unqualified right to the lists they request without regard to purpose. The defendants contend, however, that the Court must read into the Agreements the proper purpose requirement contained in §17-305 or,

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[6]Plaintiffs also contend that the defendants have not established a defense under §17-305(b), which permits a general partner to refuse to furnish limited partner lists if the general partner believes in good faith that disclosure is not in the best interest of the limited partnership. The statutory good faith defense is relevant only if the plaintiffs have established a proper statutory purpose. Because the plaintiffs have not established a proper statutory purpose, it becomes unnecessary to address this defense.

alternatively, should infer an "improper purpose defense" as an implied contractual term. For the reasons now discussed, neither argument has merit.

2. The Argued-For Role of §17-305

[9] The Defendants first argue that the purpose requirements of §17-305 must be read into the Partnership Agreements. Their purpose, simply put, is that the statute, which contains a proper purpose requirement, "trumps" any partnership contract that does not. I conclude that there is no basis for this contention.

[10-11] An important policy underlying the Delaware Revised Uniform Limited Partnership Act (the "Act") is to give maximum effect to the principles of freedom of contract and the enforceability of partnership agreements. 6 Del. C. §17-1101(c). The Act provides that any partner's duties and liabilities to a limited partnership or to another partner may be expanded or restricted by contract provisions in the partnership agreement. 6 Del. C. §17-1101(d). Despite this policy, defendants would have this Court imprint a proper purpose requirement upon Partnership Agreements that impose no such condition. No legal justification for doing that is shown.

[12-13] In addition to abridging the parties' freedom of contract, the judicial addition of a proper purpose requirement into the Partnership Agreements would create an anomalous inconsistency with our corporation law. This Court has enforced a stockholders' agreement that expands the rights of the contracting stockholders to obtain a stockholder list beyond those rights conferred by §220. Such an agreement was recognized as creating "additional [enforceable] rights beyond those created by §220." Ostrow v. Bonney Forge Corp., Del. Ch., C.A. No. 13270, Allen, C. (Apr. 6, 1994), Mem. Op. at 10. By analogy to the shareholders agreement upheld in Bonney Forge, the Partnership Agreements in this case have expanded the limited partners' statutory right to obtain lists of the limited partners by not requiring a showing of a proper purpose. Under the defendants' "statutory incorporation" argument, equity investors in a limited partnership would be denied any power to contract for such expanded rights, while equity investors in a corporation would have that power. No justification for such a dual standard has been suggested.

[14] Although the defendants argue the contrary, Schwartzberg v. CRITEF Assocs. Ltd. Partnership, Del. Ch., C.A. No. 14837, Allen C. (June 7, 1996) ("Schwartzberg") does not mandate that the proper purpose requirement of §17-305 be read into the Partnership Agreements. In

Schwartzberg, the plaintiff was both a general partner and a limited partner of one partnership, and a limited partner of another partnership. The plaintiff claimed both a statutory right, and a contractual right, to inspect lists of the partners in both partnerships. Addressing the plaintiff's statutory claim as a limited partner, Chancellor Allen found that the plaintiff had not stated a proper purpose as required by §17-305. Id., at 19 n.14. However, the Court observed that because neither the partnership agreements nor Section 1519 of the Revised Delaware Uniform Partnership Act (6 Del. C. §1519) contained an express requirement relating to "purpose", "in [such] instance[s] one must begin with the recognition that a partner has no obligation to prove that it has a 'proper purpose' in order to enforce one of these rights to the prescribed access." Schwartzberg, at 19.[7] Thus, Schwartzberg supports the proposition that this Court should not read §17-305 into a partnership agreement that grants a limited partner access to partnership information without requiring a demonstration of proper purpose.

3. Inferring an Improper Purpose Defense

Given the absence of language in the Partnership Agreements requiring the plaintiffs to show a proper purpose for their request, this Court would seem bound to enforce the plaintiffs' unqualified contractual right to inspect the limited partner list. The defendants disagree, asserting that Schwartzberg requires this Court to infer an "improper purpose defense" into the Partnership Agreements. In this particular factual setting, that argument lacks merit.

[15] As the Court stated in Schwartzberg:

> The conditions under which an implied contractual obligation may be inferred were narrowly construed by this court in Katz v. Oak Industries, Inc., Del. Ch., 508 A.2d 873 (1986); see also E.I. DuPont De Nemours and Co. v. Pressman, Del. Supr., C.A. No. 35, 1995, Veasey, C.J. (May 2, 1996), 1996 Del. LEXIS 179, at *22 (citing Katz with approval on this point). It was there stated that an obligation may be inferred when, given the terms of the express contract made and the circumstances of the contracting process, it is more likely than not ... that if the parties had thought to address the subject, they would have

[7]In making that observation, the Court was addressing the plaintiff's statutory and contractual claims as a general partner, as well as his contractual claims as a limited partner.

> agreed to create the obligation that is under consideration by the court ex post facto.

Schwartzberg, at 20 (emphasis in original).

In this case, the Schwartzberg analysis does not lead to the conclusion that had the contracting parties thought to address the subject, they would have agreed to allow the partnerships to refuse to produce a list of partners in cases where the partnership could show that the plaintiff's purpose for seeking the list was improper.

[16] Before September 1, 1985, Delaware limited partnerships were legally required to include a list of limited partners in their publicly-filed certificate of limited partnership. Thus, the identities of the limited partners became a matter of public record. That law was subsequently changed, with the result that from and after September 1, 1985, Delaware limited partnerships were no longer required publicly to file a list of their limited partners. See 65 Del. Laws 188 (1985), amending and restating 63 Del. Laws 420 (1983).

[17] Schwartzberg involved a partner's right to obtain lists of partners of limited partnerships that were formed after 1985 -- after the enactment of the statute that enabled limited partners to maintain their confidentiality. In those circumstances, the Chancellor properly concluded that it was "more likely than not" that had the partners addressed the subject of purpose when they formed the limited partnerships, they would have agreed that the partnership could deny access to the partner list where "the partner seeking access is doing so for a purpose personal to that partner and adverse to the interests of the partnership considered jointly." Id., at 22. Here, however, because the defendant limited partnerships were formed prior to 1985, this Court cannot conclude that if the persons who negotiated the Partnership Agreements had addressed the subject, they would "more likely than not" have agreed to deny access to the lists that were already a matter of public record.

[18] Defendants argue, however, that (i) the Partnership Agreements are amended by the admission of each new limited partner, and that (ii) because new limited partners joined the defendant limited partnerships after 1985, this Court must determine what agreement the partners would have reached as of the present time when the identity of limited partners is not public record. The flaw in that argument is that the Partnership Agreements require newly admitted limited partners to adopt the

Partnership Agreements as stated.[8] Because there is no opportunity to bargain at the time of admission, there is no legal basis to inquire into how the partners would have contracted had they been able to bargain.

Finally, even if this Court were to imply an "improper purpose defense," the defendants have failed to establish that defense in this particular case.

[19-20] Schwartzberg did not (as defendants argue) blanketly infer a statutory "proper purpose" requirement into all partnership agreements, for to do that would effectively override all partnership agreements that expand the inspection rights conferred by statute by not requiring a showing of proper purpose. The implied "improper purpose defense" recognized by Schwartzberg is something quite different from the "proper purpose" concept under §17-305. Schwartzberg holds that in cases when that defense can be implied, inspection relief may be denied if the partnership can demonstrate that the plaintiff partner's purpose (a) is personal to the plaintiff and (b) would actually harm the value of the joint investment. Id., at 21-22 (finding that plaintiff's purpose in requesting a list was to gain leverage against other partners in other pending litigation at considerable risk to the financial welfare of the partnerships). Thus, under Schwartzberg, where the partnership agreement creates an unqualified right to the list, a partner is legally entitled to the list even if its purpose is not proper (i.e., is personal), unless the partnership can demonstrate that access to the list would also harm the value of the partners' joint investment.[9]

The defendants have failed to make that showing in this case. Although selling the lists to the investment fund would clearly be a purpose personal to the plaintiffs, the defendants have not adduced persuasive evidence that such a sale would harm the value of the

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[8]Specifically, the relevant section of each Partnership Agreement states: "Each Additional Limited Partner ... shall become a signatory hereof by signing such number of counterpart signature pages to this Agreement and such other instrument or instruments, and in such manner, as the Managing General Partner shall determine. By so signing, each Additional Limited Partner ... shall be deemed to have adopted, and to have agreed to be bound by all the provisions of this Agreement..." Pl. Ex. 7, at §14.1; Pl. Ex. 8, at §14.1; Pl. Ex. 9, at §13.1; Pl. Ex. 10, at §13.1; Pl. Ex. 11, at §14.1.

[9]Schwartzberg's implied "improper purpose defense" concept may be viewed as a particularized example, in the limited partnership context, of the broader principle that a court of equity may deny specific performance of an established contract right if specific enforcement would cause more harm to the party found to be in breach than to the party seeking enforcement. See Craft Builders, Inc. v. Ellis D. Taylor, Inc., Del. Supr., 254 A.2d 233, 234 (1969) ("[S]pecific performance is purely an equitable remedy, it will not be granted when enforcement of a contract will produce undue hardship"); 71 Am. Jur. 2d, Specific Performance § 73 (1973).

partners' joint investment. The defendants claim that the limited partners could be harmed by the plaintiffs' aggressive sales tactics, but even if that assertion were to be credited, defendants have not shown that that conduct would adversely affect (in an economic sense) the defendant limited partnerships as a whole, as distinguished from the limited partners as individuals. Therefore, even if the limited defense recognized in Schwartzberg could be implied, the defendants have failed to establish it here.

III. Conclusion

The plaintiffs have failed to demonstrate their entitlement to a list of the limited partners of the defendant limited partnerships pursuant to 6 Del. C. §17-305. However, the plaintiffs have established their entitlement to that relief under the Partnership Agreements. Counsel shall confer and submit an appropriate form of order.

PASTERNAK v. GLAZER

No. 15,026

Court of Chancery of the State of Delaware, New Castle

September 24, 1996

The plaintiffs in this matter moved to enjoin a merger involving the defendants. The court of chancery held that the injunction to enjoin the merger would be granted.

The court of chancery, per Vice-Chancellor Jacobs, decided the issue of whether a supermajority provision in a corporation's charter, which required an eighty percent vote to approve a merger, required an eighty percent vote to approve a merger between a wholly owned subsidiary and another corporation. The court held that the clear language of the broadly worded supermajority provision applied equally to a merger involving a wholly owned subsidiary and mergers involving the corporation itself.

1. Corporations ⟹ 373

Because a certificate of incorporation is a contract between the corporation and its shareholders, it is interpreted according to the rules of contract construction.

2. Corporations ⟹ 18

A court must give effect to the intent of the contracting parties as evidenced by the language of the certificate and the circumstances surrounding its creation and adoption.

3. Corporations ⟹ 372

Except in the case where a charter provision is found ambiguous, a court must give effect to its clear language.

4. Contracts ⟹ 143(2)

A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, it is ambiguous only when the provisions in the controversy are reasonable or fairly susceptible of different interpretations or may have two or more different meanings.

5. Corporations ⟹ 7, 372

In determining whether a charter provision is ambiguous, the intent of the stockholders in enacting the provision is instructive.

6. Contracts ⟹ 153

An interpretation of a contract that renders one or more terms redundant is not preferred over a construction that gives effect to each of the agreement's terms.

7. Corporations ⟹ 18, 373

Where the drafters of a certificate of incorporation specifically exclude a limitation in one subsection but which is expressly contained in two preceding subsections, its absence shows that the drafters intended no such limitation.

8. Corporations ⟹ 372

A charter provision that requires a supermajority vote to effect a merger, and does not explicitly limit the supermajority provision to mergers between a parent corporation and another corporation, applies to a merger between a subsidiary corporation and another corporation. Any other interpretation would render the supermajority provision ineffective by allowing the directors to circumvent the supermajority requirement by the simple expedient of structuring a merger in two steps rather than one.

9. Corporations ⟹ 18, 373

Where a provision in a certificate of incorporation was intended to protect shareholders against conflict of interest transactions by making those transactions difficult to effect, an interpretation which is inconsistent with that intention will not be deemed reasonable or fair.

10. Corporations ⟹ 18, 373

An interpretation that is inconsistent with the intent to protect shareholders from exploitation in conflict of interest transactions would strip the shareholders of that important procedural protection.

11. Corporations ⟹ 373, 510, 582

An injunction, prohibiting the consummation of a proposed merger, will be granted when the merger agreement, which requires only a simple majority stockholder approval of the proposed merger, contravenes a provision of the certificate of incorporation which requires approval by eighty percent of shareholders.

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Joseph C. Schoell, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendants Malcolm I. Glazer and Avram A. Glazer.

JACOBS, *Vice-Chancellor*

On May 31, 1996, the plaintiffs commenced this action challenging a proposed merger (the "Merger") between Zapata Corporation ("Zapata") and Houlihan's Restaurant Group, Inc. ("Houlihan's"). On July 11, 1996, the plaintiffs amended their complaint to allege that the proposed merger is invalid because the June 4, 1996 Agreement and Plan of Merger (the "Merger Agreement") requires approval by only a simple majority of Zapata's shareholders, whereas Article SEVENTH of Zapata's Restated Certificate of Incorporation (the "Supermajority Provision") requires approval by 80% of Zapata's shareholders.

The plaintiffs moved to enjoin the proposed Merger, and a final hearing on their injunction application was held on September 6, 1996. For the reasons next discussed, the application to enjoin the proposed Merger will be granted.

I. FACTS

A. The Merger Agreement

The defendant, Zapata, is a Delaware corporation. Defendant Malcolm Glazer ("Glazer") is the Chairman of Zapata's board of directors, and owns or beneficially controls approximately 35% of Zapata's stock. Glazer also owns or controls 73.3% of the outstanding share of Houlihan's.

On June 4, 1996, Zapata, Houlihan's and Zapata Acquisition Corp., a wholly owned subsidiary of Zapata specially created to effect the Merger ("Zapata Sub"), entered into the Merger Agreement. Under that Agreement, Houlihan's will emerge with and into Zapata Sub, and Houlihan's stockholders will receive shares of Zapata in exchange for their Houlihan's stock.

The Merger Agreement provides that only the approval of a simple majority of Zapata's outstanding shares is required to approve the Merger:

> Section 4.14. Vote Required. The affirmative vote of the holders of a majority of the outstanding shares of [Zapata] Common Stock and Preference Stock, voting together as a

> class, on the issuance of the shares of [Zapata] Common Stock in the Merger, as required by the NYSE, is the only vote of the holders of any class or series of [Zapata's] capital stock necessary to approve the Merger and the transactions contemplated thereby.

Pl. Cert. Ex. B, at A-23.

The shareholders meeting to vote on the proposed merger was originally scheduled for August 22, 1996, but it has been postponed pending the outcome of this litigation.

B. Article SEVENTH of Zapata's Restated Certificate

The charter provision critical to this motion is Article SEVENTH, Subsection (A)(i) of Zapata's Restated Certificate of Incorporation. Article SEVENTH, which was adopted in 1971, states in relevant part as follows:

> ...the affirmative vote or consent of the holders of 80% of all stock of this corporation entitled to vote in elections of directors, considered for the purposes of this Articles SEVENTH as one class, shall be required:
>
> > (i) for a merger or consolidation with or into any other corporation, or
> >
> > (ii) for any sale or lease of all or any substantial part of the assets of this corporation to any other corporation, person or other entity, or
> >
> > (iii) any sale or lease to this corporation or any subsidiary thereof of any assets ... in exchange for voting securities ... of this corporation or any subsidiary by any corporation, person or entity,
>
> if as of the record date for the determination of stockholders entitled to notice thereof and to vote thereon or consent thereto such other corporation, person or entity which is party to such a transaction is the beneficial owner, directly or indirectly, of 5% or more of the outstanding shares of stock of this corporation entitled to vote in elections of directors, considered for the purpose of this Article

> SEVENTH as one class. Such affirmative vote or consent shall be in addition to the vote or consent of the holders of the stock of this corporation otherwise required by law or any agreement between this corporation and any national securities exchange.

Pl. Cert. Ex. C, at 31-32 (emphasis added).

Subsection (D) of Article SEVENTH states that the 80% supermajority vote requirement does not apply in two circumstances: (a) if the merger was approved by Zapata's board of directors before the other constituent corporation became the beneficial owner of more than 5% of Zapata's stock, or (b) if the transaction is between Zapata and a majority-owned subsidiary. Neither exception is applicable here.

II. THE PARTIES' CONTENTIONS

The plaintiffs claim that Article SEVENTH unambiguously requires an 80% shareholder approval of the proposed Merger.[1] Specifically, plaintiffs contend that Subsection (A)(i), which governs "a merger or consolidation with or into any other corporation", applies not only to a merger with or into Zapata itself, but also to a merger with or into a wholly owned Zapata subsidiary. That is because, plaintiffs argue, Subsection (A)(i) is broadly worded and contains no language that explicitly limits its application to mergers involving only Zapata itself.[2]

Defendants disagree. They contend that Article SEVENTH is unambiguously inapplicable to mergers with or into a Zapata subsidiary, because Subsection (A)(i) has no language that explicitly encompasses subsidiary merger transactions. Therefore, defendants conclude, Subsection (A)(i), by its own terms and when viewed in the larger

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[1]The defendants have conceded that under the attribution provisions of Article SEVENTH subsections (B) and (C), the Supermajority Provision is applicable to a merger between Houlihan's and Zapata, given Glazer's stock interest in both corporations.

[2]In addition to their contract interpretation argument, Plaintiffs claim that the defendants' decision to structure the transaction as a three-party merger (i.e., into a Zapata-owned subsidiary) was specifically intended to circumvent the supermajority voting provision. That, according to plaintiffs, constitutes an inequitable manipulation of the corporate machinery which creates an independent basis to enjoin the Merger.

Defendants respond that the current merger structure was contemplated before the supermajority vote issue was even considered. Therefore, defendants say, there is no evidence that the transaction was structured to avoid the Supermajority Provision, or that any inequitable manipulation occurred. Because the Court finds that supermajority approval of the proposed Merger is required by the plain meaning of the Article SEVENTH, Subsection (A)(i), it does not reach the inequitable manipulation claim.

context of Article SEVENTH, applies only to a merger where Zapata itself is a constituent corporation.

III. ANALYSIS

A. Applicable Principles of Interpretation

[1-2] Because a certificate of incorporation is a contract between the corporation and its shareholders, it is interpreted according to the rules of contract construction. Berlin v. Emerald Partners, Del. Supr., 552 A.2d 482, 488 (1988). Accordingly, this Court must give effect to the intent of the contracting parties as evidenced by "the language of the certificate and the circumstances surrounding its creation and adoption." Waggoner v. Laster, Del. Supr., 581 A.2d 1122, 1134 (1990); accord, Kaiser Aluminum Corp. v. Matheson, Del. Supr., ___ A.2d ___, No. 168, 1996, Veasey, C.J. (Aug. 29, 1996), at 8.
[3-5] Except in the case where a charter provision is found ambiguous, this Court must give effect to its clear language. Kaiser, at 9. "'A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, ... [it] is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" Id., at 9 (quoting Rhone-Poulenc Basic Chems. Co. v. American Motors Ins. Co., Del. Supr., 616 A.2d 1192, 1196 (1992)). In determining whether a charter provision is ambiguous, the intent of the stockholders in enacting the provision is instructive. Centaur Partners, IV v. National Intergroup, Inc., Del. Supr., 582 A.2d 923, 928 (1990).

Having set forth the applicable principles of construction, I turn to the parties' respective arguments.

B. The Structure and Plain Language of Article SEVENTH

The defendants contend that this Court must read the Supermajority provision as applying solely to a merger "of this corporation," i.e., a merger involving Zapata itself. Although the defendants concede that these words are not explicitly found in Subsection (A)(i), they argue that that meaning is implicit, because the phrase "this corporation" is found in the paragraph that immediately precedes the enumeration, in the subparts immediately following, of the three categories of transactions

requiring supermajority approval.[3] In this Court's view, nothing in Article SEVENTH supports the position that Subsection (A)(i) is or was intended to be so limited.

[6] Unlike the broad language of Subsection (A)(i) (which covers "a merger with or into another corporation"), the language of Subsection (A)(ii) and (A)(iii) explicitly and precisely limits the scope of those two latter Subsections. Thus, Subsection (A)(ii) covers a sale or lease of "all or any substantial part of the assets of this corporation to any other corporation, person or other entity..." Pl. Cert. Ex. C, at 31 (emphasis added). Subsection (A)(iii) refers to a sale or lease "to this corporation or any subsidiary thereof..." Id., at 32 (emphasis added). No such language appears in Subsection A(i). If the defendants' argued-for limitation is added to the three Subsections by implication, the explicit limitations in Subsections (A)(ii) and (A)(iii) would become surplusage. An interpretation of a contract that renders one or more terms redundant is not preferred over a construction that gives effect to each of the agreement's terms. See Warner Commun. v. Chris-Craft Industries, Del. Ch., 583 A.2d 962, 971 (1989), aff'd Del. Supr., 567 A.2d 419 (1989).

[7] The use of the phrase "of this corporation" in Subsections (A)(ii) and (A)(iii) demonstrates that had the drafters of Article SEVENTH intended to limit the scope of Subsection A(i) to mergers involving only Zapata, they knew fully well how to accomplish that.[4] The total absence in Subsection A(i) of the limitation expressly contained in Subsections (A)(ii) and (A)(iii), shows that the drafters intended no such limitation. See Sullivan Money Management, Inc. v. FLS Holdings, Inc., Del. Ch., C.A. No. 12731, Jacobs, V.C. (Nov. 20, 1992), Mem. Op. at 9-10.

In contrast to the defendants' interpretation, the plaintiffs' construction of Subsection (A)(i) as encompassing subsidiary mergers requires no implication or importation of any language from other sections of Article SEVENTH. Nor does the plaintiffs' interpretation render any term of that Article redundant. Rather, the plaintiffs' interpretation flows directly from the clear, explicit language requiring a supermajority vote for "any merger with or into any other corporation."

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[3]Specifically, a merger [Subsection (A)(i)], a sale of all or substantially all of Zapata's assets [Subsection (A)(ii)], and a sale of assets of $2 million or more to Zapata or its subsidiary in exchange for voting securities of Zapata or its subsidiary [Subsection (A)(iii)].

[4]See also, Warner Commun. v. Chris-Craft Industries, supra, at 970 (charter provision creates protections for preferred stock "... in case of any consolidation or merger of the corporation with or into another corporation") (emphasis added).

C. The Stockholders' Intent in Adopting Article SEVENTH

[8] The defendants' interpretation of Subsection (A)(i) is deficient for another reason: it would render that provision essentially ineffective, by the simple expedient of structuring a merger in two steps rather than one. In step one -- the merger of the acquired corporation ("Houlihan's) with and into a Zapata subsidiary -- Article SEVENTH would not apply, because the merger would not involve Zapata as a constituent corporation. In step two -- the merger of the subsidiary with and into Zapata -- Article SEVENTH would not apply because the transaction would be exempt under Subsection (D)(ii).[5]

[9] It cannot be supposed that the drafters of Article SEVENTH, or the stockholders who adopted that provision, would have intended for the supermajority voting protection to be so easily sidestepped. The proxy statement accompanying the proposed amendment to Zapata's certificate of incorporation indicated that the purpose of the proposed amendment was to confer broad protection to shareholders against the risks posed by transactions involving Zapata and a large shareholder. The proxy statement represented that "[t]he intended effect of the proposed amendments would be to make more difficult the use by a corporation of its ownership in the Company to effect a transaction which might not be in the best interests of the Company and its other stockholders." Pl. Cert. Ex. G, at 7. Thus, Article SEVENTH was intended to protect shareholders against "conflict of interest" transactions involving Zapata and holders of significant blocks of Zapata stock, by making those transactions more difficult to effect.[6] The defendants' interpretation, which would not make such transactions any more difficult to effect, is in that respect inconsistent with the drafters' intent.[7] That weighs heavily

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[5]Whether intended or not, a similar circumvention would occur here by the use of Zapata Sub to acquire Houlihan's. The Houlihan's stockholders will receive Zapata (not Zapata Sub) stock in the Merger--the same consideration they would receive were Houlihan's being merged directly into Zapata.

[6]This case involves precisely the same "conflict of interest"-related risk that would exist if the merger were into Zapata directly. Glazer, as the holder of 73.3% of Houlihan's stock and as the holder of approximately 35% of Zapata's stock, stands to gain more from a higher purchase price (paid by Zapata) for his Houlihan's stock, than do the other Zapata stockholders.

[7]The defendants contend that Article SEVENTH was intended only as an anti-takeover provision, but offer no persuasive evidence to support that assertion. Article SEVENTH, by its very language, is not limited to transactions involving a potential takeover of Zapata. For example, Subsection (A)(iii) specifically requires a supermajority vote for a sale or lease of assets, having an aggregate fair market value of $2 million or more, to a subsidiary of Zapata in exchange for stock of a subsidiary of Zapata. Such a transaction would not necessarily

against accepting the defendants' interpretation as reasonable or fair. See Centaur Partners, 582 A.2d at 928.

[10] The plaintiffs' interpretation would not create such a glaring loophole. Their construction of Article SEVENTH to encompass mergers involving Zapata subsidiaries is entirely consistent with the intent to protect shareholders from exploitation in "conflict of interest" transactions.[8] The defendants' interpretation, on the other hand, would defeat that intent and strip Zapata's shareholders of that important procedural protection.

IV. CONCLUSION

For the reasons stated above, the defendants have failed to persuade this Court that their interpretation of Subsection (A)(i) of Article SEVENTH is reasonable or fair, or (as a consequence) that that provision is ambiguous. Clearly and on its face the Supermajority Provision of Article SEVENTH applies to mergers involving a wholly owned subsidiary of Zapata, as well as mergers involving Zapata itself.

[11] To the extent that the Merger Agreement requires only a simple majority stockholder approval of the proposed Merger, it contravenes Article SEVENTH of Zapata's Certificate of Incorporation. On that basis, an injunction prohibiting the consummation of the proposed Merger will issue. Counsel shall submit an implementing form of order.

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involve a change of control or takeover.

[8]That a broad application of the Supermajority Provision to mergers was intended is further evidenced in the declaration found in the Proxy Statement that "the Board of Directors is of the opinion that where a proposed merger or other similar transaction involves a corporation or other business entity having a direct or indirect substantial ownership or control of the voting power of [Zapata] ... a substantially higher voting requirement is preferable." Pl. Cert. Ex. G, at 7 (emphasis added).

ROVNER v. HEALTH-CHEM CORP.

No. 15,007

Court of Chancery of the State of Delaware, New Castle

July 3, 1996

Plaintiffs, owners of 227,000 shares of Health-Chem Corporation common stock, filed this action seeking preliminary injunctive and other relief in connection with a stock purchase agreement between Health-Chem and Health-Chem's president and CEO, Marvin Speiser. Plaintiffs sought an injunction against the consummation of the stock purchase agreement and rights offering, contending that there was a reasonable probability of success on the merits of their claim because: (1) a subsequent stock purchase plan and proposed rights offering was in violation of a court order; and (2) that if the court reviewed the stock purchase agreement for entire fairness, it was reasonably likely to find that Speiser and the board of directors breached their duty of loyalty and good faith. Plaintiffs also alleged that the court's refusal to grant the preliminary injunction would result in irreparable injury.

The court of chancery, per Vice-Chancellor Chandler, concluded that a preliminary injunction in this case would be improper because (1) it was unclear whether Speiser and Health-Chem violated the terms of the court's order; (2) the plaintiffs' claim of irreparable injury due to possible dilution of their voting rights was too speculative to justify a preliminary injunction; and (3) because the plaintiffs failed to demonstrate that they would suffer irreparable harm, it was unnecessary for the court to make a preliminary determination on the merits of their breach of loyalty claim.

1. Injunction ⚷ 138.1

For plaintiffs to prevail on their motion for a preliminary injunction, they must demonstrate (1) a reasonable probability of success on the merits of their claim at trial; (2) a reasonable probability of immediate and irreparable harm in the absence of a preliminary injunction; and (3) the harm to the plaintiffs if the court denies injunctive relief outweighs the harm to the defendants if the court denies such relief.

2. Contracts ⚷ 236

A court order approving a stipulation of settlement between parties based in part on a previous option agreement between those parties will not be deemed violated due to the parties renegotiation of the option agreement, where neither the settlement agreement nor the option agreement contained any statements or clauses which bound the parties permanently to the terms contained in those agreements.

3. Injunction ⚷ 12

A court may not grant plaintiffs' motion for a preliminary injunction unless plaintiffs also demonstrate that they will suffer irreparable injury if a court refuses to grant the injunction.

4. Injunction ⚷ 132

A preliminary injunction is an extraordinary procedural step because it requires a court to make a preliminary determination of the merits of a case before there can be a final adjudication of the plaintiffs' claims.

5. Injunction ⚷ 132

Generally, courts provide remedies after the parties have developed a complete record; however, in granting a preliminary injunction, a court will undertake to determine the merits on a preliminary basis in order to prevent some act or event that would otherwise irreparably harm the applicant by depriving him of an adequate remedy.

6. Injunction ⚷ 138.9

A court will not issue an injunction for claims in which the plaintiffs have an adequate remedy at law in the form of an action for money damages.

7. Injunction ⚷ 138.1

A court will not provide an injunctive remedy if the harm plaintiffs complain of is merely remote and speculative.

8. Corporations ⚷ 320(13)
Injunction ⚷ 138.9, 138.42

Plaintiffs' theory that a stock purchase will dilute the cash value of their shares clearly states a claim for money damages; after trial on the merits, if a court concluded that the value of the shares decreased after the stock purchase as a result of defendants' wrongful actions, then the court could compare the difference in value, and this difference would measure the plaintiffs' damages.

9. Injunction ⚷ 138.9

Plaintiffs' claim that defendants may assert a section 102(b)(7) defense to an action does not change the nature of the damages; to the extent that plaintiffs argue that damages are an inadequate remedy on the basis of a section 102(b)(7) defense, it is merely speculative until a court rules that 102(b)(7) protects defendants from liability for money damages in the particular case. DEL. CODE ANN. tit. 8, § 102(b)(7) (1991 & Supp. 1994).

10. Injunction ⚷ 138.9

Section 102(b)(7) protects directors from monetary liability only with respect to duty of care claims; thus, where plaintiffs' have not asserted a claim for breach of duty of care, the record does not support plaintiffs' contention that a possible 102(b)(7) defense will transform their money damage claim into a basis on which a court might grant injunctive relief. DEL. CODE ANN. tit. 8, § 102(b)(7) (1991 & Supp. 1994).

11. Corporations ⚷ 320(12)

Notwithstanding section 102(b)(7), monetary damages are available for wrongful conduct going beyond duty of care violations.

12. Corporations ⚷ 320(13)
Injunction ⚷ 138.6, 138.42

In some instances, voting dilution may constitute irreparable harm. However, a court determines this on a case-by-case basis.

13. Corporations ⟹ 320(13)
Injunction ⟹ 138.6, 138.42

Where plaintiffs rely on the speculative assumption that a rights offering will be under-subscribed and thus, the shareholder holding the unsold stock will have increased voting power, a court cannot evaluate the probable result of that offering; while plaintiffs may be correct at the conclusion of the rights offering, a court may not grant a preliminary injunction on the remote possibility that the plaintiffs' voting power might be diluted.

14. Corporations ⟹ 320(13)
Injunction ⟹ 138.42

A court has broad power to fashion an equitable remedy after a transaction to protect the plaintiffs from harm; if the plaintiffs are able to demonstrate that a particular shareholder's voting power actually increased as a result of an undersubscribed rights offering, they can seek to enjoin that shareholder from exercising any increase in his voting power until such time as the court conducts a trial on the merits of the claim.

15. Corporations ⟹ 320(13)
Injunction ⟹ 138.42

Where the record is void of evidence that a shareholder's voting power will increase drastically, that the corporation has scheduled any important matters which require shareholders to vote, or that there are any such votes on the horizon, a preliminary injunction is inappropriate.

16. Injunction ⟹ 138.21

Where the plaintiffs fail to demonstrate that they will suffer irreparable injury if the court refuses to grant the requested injunction, the court will decline to make a preliminary determination whether there is a reasonable probability of success on the merits of plaintiffs' breach of duty of loyalty claim.

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Andre G. Bouchard, Esquire and Joel Friedlander, Esquire, of Lamb & Bouchard, Wilmington, Delaware, for defendant Marvin M. Speiser.

Henry E. Gallagher, Jr., Esquire, of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware, for defendants Gregory P. Speiser, Robert D. Speiser, Steven Bernstein, Samuel R. Goodson, Paul R. Moeller, Bruce M. Schloss, Matthew Goldstein, Martin Benis, Eugene Roshwalb, and Milon Zussman.

CHANDLER, *Vice-Chancellor*

Plaintiffs, owners of 227,000 shares of Health-Chem Corporation ("Health-Chem" or the "Company") common stock, filed this action on May 20, 1996 seeking preliminary injunctive and other relief in connection with a stock purchase agreement between Health-Chem and Health-Chem's President and CEO, Marvin Speiser ("Speiser"). On May 28, 1996, the Court granted plaintiffs' motion for expedited proceedings, and the parties conducted expedited discovery. I heard oral argument on plaintiffs' motion for a preliminary injunction on June 24, 1996. Because I conclude that the plaintiffs have not demonstrated that they will suffer irreparable harm absent injunctive relief, I deny plaintiffs' motion. Since the underlying facts in this action are complex, I review the facts and arguments in some detail before reaching my conclusion.

I. BACKGROUND

Health-Chem, a Delaware corporation, through its subsidiaries develops and markets products connected with laminated or coated films used in the health care, pharmaceutical, and environmental industries. Health-Chem has almost eight million shares of common stock outstanding which is traded on the American Stock Exchange. At the present time, the market values Health-Chem at approximately $2 per share.

Speiser currently holds 3,565,946 shares of Health-Chem. However, 1,782,689 of those shares are subject to two repurchase option