prejudice to the defendant arising from an unreasonable delay in bringing the claim.[72]

This case is one in which application of the doctrine of laches on a motion to dismiss is inappropriate. First, the reasons for delay are often more important than its length.[73] BAE pleads facts that suggest delay was the result of an inability to discover breach because of improper behavior on the part of Lockheed. BAE claims to have "repeatedly" requested information regarding ATS work covered by the MOA; starting upon learning of possible work allocation problems.[74] In response, BAE claims that Lockheed "delayed and/or otherwise failed" to disclose the information necessary to discover breach.[75] Accepting these facts as true, the Court can-not find that dismissal for unreasonable delay is appropriate; BAE pleads that any delay in discovering breach and bringing suit was the fault of Lockheed. Second, Lockheed points to prejudice resulting from the alleged delay; it asserts that, with the passage of time, it is no longer practicable for BAE to participate with it in these time-sensitive and ongoing technical efforts. Lockheed may well be correct in this contention. The facts necessary to support such an argument, however, cannot be gleaned from the Amended Complaint.

III. CONCLUSION

Accordingly, for the foregoing reasons, Defendant Lockheed's motion to dismiss is granted as to Plaintiff BAE's claim for unjust enrichment; otherwise, it is denied.

An implementing order will be entered.

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[72] *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930, 951 (Del Ch. 2004), *vacated on other grounds*, 875 A.2d 632 (Del. 2005) (TABLE).

[73] *Steele v. Ratledge*, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002).

[74] BAE's Answering Br. at 17.

[75] *Id.* at 18.

BASF CORP. v. POSM II PROPERTIES PARTNERSHIP, L.P.

No. 3608-VCS

Court of Chancery of the State of Delaware, New Castle

March 3, 2009

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STRINE, *Vice Chancellor*

I. Introduction

The plaintiff, BASF Corporation, a Delaware corporation, seeks to withdraw from defendant POSM II Limited Partnership, L.P. (the "Partnership"), a Delaware limited partnership, and have its interest in the Partnership bought out. BASF has a contractual right to withdraw if Lyondell Chemical Company or one of Lyondell's affiliates no longer operates the Partnership's petrochemical facility in Channelview, Texas (the "Plant"). Historically, Lyondell both leased the Plant from the Partnership and served as the general partner of defendant POSM II Properties Partnership, L.P. ("POSM II Properties") which is, in turn, the general partner of the partnership. BASF argues that the December 2007 purchase of Lyondell, which was then a public company, by Basell AF S.C.A. changed this situation and triggered BASF's contractual right to have its interest in the Partnership bought out by the general partner, POSM II Properties.

In its First Amended and Supplemental Verified Complaint (the "Amended Complaint"), BASF argues that its right to be bought out was

triggered either because: (1) the fact that Lyondell has experienced a change in control means that Lyondell is no longer operating the Plant; or (2) as a factual matter, LyondellBasell Industries AF S.C.A., Lyondell's new parent company, is operating the Plant rather than Lyondell. POSM II Properties and the Partnership have moved to dismiss this action, arguing that BASF has no rights upon a change in control of Lyondell and that BASF has not adequately pled that Lyondell no longer operates the Plant.

In this opinion, I grant the defendants' motion to dismiss. First, I address BASF's contention that because Lyondell went from a publicly traded company to a wholly owned subsidiary of another company, Lyondell ceased to operate the Plant. I conclude that the plain language of the withdrawal provision does not entitle BASF to have its interest bought out simply because Lyondell has experienced a change of control. Rather, BASF only has the right to withdraw if Lyondell or one of its affiliates is no longer operating the Plant. Although Lyondell may now have a single owner of its shares, rather than a large group of public stockholders, as long as Lyondell continues to operate the Plant, POSM II Properties is not obligated to purchase BASF's interest in the Partnership.

Next, I turn to BASF's conclusory allegation that LyondellBasell—Lyondell's parent company—now operates the Plant, rather than Lyondell itself. This is a conclusory allegation because it is not supported by any pled facts. BASF does not plead that the Plant is no longer managed and operated by managers and employees of Lyondell. Rather, BASF distorts a management report and a set of financial statements of Lyondell's parent corporation that plainly are designed to portray the overall financial and operational situation of LyondellBasell, and excerpts quotes that supposedly suggest that LyondellBasell is directly operating the plant. But, the very documents BASF cites make clear that LyondellBasell is a holding vehicle with no employees or operations of its own. Instead, LyondellBasell's subsidiaries, of which Lyondell is one, conduct LyondellBasell's operations. Of equal importance is the fact that BASF pleads no facts suggesting that Lyondell's separate corporate form should be disregarded. That is, BASF pleads no facts suggesting that Lyondell is not continuing to operate the plant, much less that its parent corporation has so disrespected Lyondell's separate existence that Lyondell's veil should be pierced. All that BASF has pled is that Lyondell now has a single owner of its equity rather than many, and that this single owner is in a position to influence Lyondell. Every solvent corporation is subject to influence by its stockholders, when those stockholders use the correct means. The fact that Lyondell now has a single stockholder does not rationally support an inference that Lyondell does not operate anything itself, including the Plant. Accordingly, I grant the defendants' motion to dismiss.

II. Factual Background[1]

At the center of this litigation is the Partnership, which was formed on July 27, 1990 by the Agreement of Limited Partnership between POSM II Properties, Alberta Gas Chemicals, Inc., and Mobil Chemical Company. The Partnership was created for the sole purpose of "own[ing] a propylene oxide/styrene monomer coproduction plant . . . at a site in Channelview, Texas" and leasing that Plant and the land it was built on to ARCO Chemical Company.[2]

When the Partnership was formed, Alberta and Mobil were limited partners and POSM II Properties was the general partner.[3] Aside from being the intended tenant of the Plant, ARCO was also POSM II Properties' initial general partner.[4] Thus, from its inception, the Partnership was indirectly controlled by the operator of the Plant.

The Partnership Agreement did not set out what the limited partners would contribute to the Plant's construction. Instead, POSM II Properties entered into separate agreements with each of the limited partners of the Partnership addressing that subject.[5] In June 1991, POSM II Properties entered into a Supplementary Agreement with Mobil. In that Agreement, Mobil promised to contribute an initial $5 million as well as up to an additional $85 million. The Supplementary Agreement also granted Mobil certain rights. Most importantly for this action, § 14(b) provides that:

> If [POSM II Properties] becomes aware that the Plant no longer is to be operated by [ARCO] or its Affiliates (as defined in the Partnership Agreement) it shall so notify [Mobil], such notifycation to be given at any time up to thirty days after the date of such change in operation. Upon receipt of such notice, [Mobil]

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[1]All facts are drawn from the First Amended and Supplemental Verified Complaint ("Am. Compl."), the exhibits thereto, or BASF's Verified Complaint. *See* Ct. Ch. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008) ("Under some circumstances, a party may offer earlier versions of its opponent's pleadings as evidence of the facts therein." (quoting *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002))); *Ishimaru v. Fung*, 2005 WL 2899680, at ** 9-10 (Del. Ch. Oct. 26, 2005) (considering amendments to a complaint on a motion to dismiss). All reasonable inferences have been drawn in BASF's favor. Conclusory allegations not supported by pled facts, however, have not been accepted as true.

[2]Am. Compl. Ex. 1 (Agreement of Limited Partnership (July 27, 1990)) ("Partnership Agreement") § 2.2.

[3]Partnership Agreement at 70, 71.

[4]Partnership Agreement at 70.

[5]Partnership Agreement § 7.1(a).

> shall have ninety days to notify [POSM II Properties] that it wishes to withdraw from the partnership.[6]

Section 14(c) then provides a mechanism by which Mobil's interest would be bought out if § 14(b) is triggered. By stark contrast, the Supplementary Agreement does not contain a change of control provision expressly obligating POSM II Properties to purchase Mobil's stake if ARCO is purchased by another company, has its board or management changed as the result of a proxy contest, or has a change in its capital structure.

And, Mobil was not just a passive investor in the Plant; it also intended to be a major consumer of the Plant's output. On the same day Mobil signed the Supplementary Agreement, Mobil signed a separate processing contract to have ARCO produce styrene monomer for Mobil's use.[7] According to BASF, the processing agreement required ARCO to pro-duce styrene monomer for Mobil at cost.[8]

Although the Partnership still exists, the parties in interest have changed. In July 1992, only a little over a year after the Supplementary Agreement was signed, BASF took over Mobil's stake in the Partnership.[9] In the process, BASF was assigned Mobil's rights under both the Partnership Agreement and the Supplementary Agreement.[10] BASF also obtained Mobil's rights under the styrene monomer processing contract.[11]

In 1998, Lyondell acquired ARCO and, according to BASF, succeeded to ARCO's interest.[12] Lyondell also took over the lease for the Plant that ARCO had entered into with the Partnership. Thus, by mid-2007, Lyondell was both operating the Plant and controlling the Partnership through POSM II Properties, and BASF was a limited partner who also had the right to buy styrene monomer from Lyondell at cost.

According to BASF, this state of affairs was interrupted in late December 2007 when Basell, a privately held Dutch chemical group, acquired Lyondell by purchasing all of Lyondell's stock for cash.[13] In the process, Lyondell transformed from a publicly held company with a diverse

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[6]Am. Compl. Ex. 2 (POSM II Supplementary Agreement (June 10, 1991)) ("Supplementary Agreement") § 14(b).

[7]Am. Compl. Ex. 4 (Styrene Monomer Processing Contract (June 10, 1991)).

[8]Am. Compl. ¶ 16.

[9]Am. Compl. Ex. 1 (Agreement Assigning of Mobil's Interest in the Partnership (July 1, 1992)) at 2.

[10]*Id.*

[11]Am. Compl. Ex. 4 (Agreement Assigning Mobil's Interest under the Styrene Monomer Processing Contract (July 1, 1992)) at 1.

[12]Am. Compl. ¶¶ 8, 15.

[13]Am. Compl. ¶ 18.

stockholder base into the wholly owned subsidiary of a privately held company. As part of the acquisition, Basell also changed its capital structure. A new, privately held Dutch company, LyondellBasell Industries AF S.C.A., is now the parent of both Basell and Lyondell, which remain separate subsidiaries.[14]

The day Basell's acquisition of Lyondell was completed, BASF wrote to POSM II Properties asserting that POSM II Properties had to give BASF the option of having its interest in the Partnership bought out.[15] In ensuing correspondence, BASF argued that because LyondellBasell now owns Lyondell, LyondellBasell "exercises complete operational control of the Plant," and, as a result, § 14(b) of the Supplementary Agreement was triggered.[16] POSM II Properties, however, responded that Lyondell remains the operator of the Plant and that there was no change in operation within the meaning of § 14(b).[17]

BASF then brought this action against the Partnership and POSM II Properties seeking a declaration that there has been a change in operation within the meaning of § 14(b). Despite the fact that § 14(b) is concerned with the operations of the Plant, BASF has not pled a single fact about those operations. BASF does not allege that the Plant is being run differently than it was before Basell acquired Lyondell. Nor does it allege that Lyondell employees and officers are not directly managing, overseeing, and operating the Plant. In short, the allegations in the Amended Complaint are totally bereft of any fact indicating that operations at the Plant were affected at all by the fact that Lyondell's equity is now owned by a single owner. Because BASF has pled no facts suggesting how the change in Lyondell's equity ownership has affected the Plant in any way at all, much less an adverse way, it appears that BASF has independent business reasons of its own for seeking to withdraw, reasons that are not substantively related to the change in Lyondell's equity ownership. Rather, that change is simply the hook on which to hang a claim that BASF's § 14(b) right to withdraw has been triggered.[18]

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[14]Am. Compl. Ex. 6. It is not entirely clear from the Amended Complaint whether LyondellBasell is a new company or simply a renamed version of Basell. For purposes of this motion, I have assumed that it is a new company as that is how the Complaint describes it, but whether that is the case is immaterial. *See* Am. Compl. ¶ 19.

[15]Am. Compl. Ex. 10 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Dec. 20, 2007)).

[16]Am. Compl. Ex. 11 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Jan. 21, 2007)).

[17]Am. Compl. Ex. 14 (letter from George T. Shipley, Shipley Snell Montgomery LLP to Thomas Clare, Kirkland & Ellis LLP (Feb. 15, 2008)).

[18]Tr. at 29. Since oral argument on this motion, LyondellBasell has announced that it is suffering from serious financial problems. See Chemical Unit Files For Bankruptcy, N.Y. Times,

Interestingly, in its Verified Complaint (the "Original Complaint"), BASF asserted that it had the right to withdraw solely on the basis that if LyondellBasell was the controlling stockholder of Lyondell, LyondellBasell was also controlling the Plant, a situation that supposedly triggered § 14(b).[19] In making its original argument, BASF conceded that Lyondell was still in fact operating the Plant. Rather, BASF argued that § 14(b) was triggered because LyondellBasell, as the owner of Lyondell, can now direct Lyondell's operation of the Plant.

But, in its Amended Complaint, BASF pivoted away from its statement that Lyondell operates the Plant. After its 180 degree spin, BASF now asserts that LyondellBasell, rather than Lyondell, is operating the Plant.[20] BASF says that because Lyondell is no longer operating the Plant, § 14(b)'s plain language gives BASF a right to withdraw.

After having changed its tack, BASF therefore settled for asserting two theories for relief: (1) that a change in control of the operator of the Plant means that there was a change in operator for purposes of § 14(b); and (2) that LyondellBasell now operates the Plant, rather than Lyondell.

The defendants have moved to dismiss the Amended Complaint. They argue that the Supplementary Agreement gives BASF no rights upon a change in control of Lyondell and that BASF has not alleged actual facts that support BASF's conclusory allegation that Lyondell no longer operates the Plant.

III. Legal Analysis

Because this is a motion to dismiss, I must evaluate BASF's claim under the familiar Rule 12(b)(6) standard. This means that I must accept the well-pled allegations in the Amended Complaint as true and give BASF the benefit of all reasonable inferences that flow from the face of the Amended Complaint.[21] But, even at this stage of the litigation, "neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true."[22] As a result, I only

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Jan. 7, 2009, at B4 ("The United States operations of LyondellBasell, a petrochemical company, filed for bankruptcy protection in New York on Tuesday, facing a huge debt load and slumping demand for its products."). BASF has not moved to amend based on this event.

[19] *See* Verified Complaint ¶ 28.

[20] In line with the plaintiff-friendly Rule 12(b)(6) standard, I have not given any weight to the allegation in the Original Complaint that Lyondell operates the Plant. I merely present the fact that BASF changed its theory for completeness.

[21] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (holding that on a motion to dismiss under Rule 12(b)(6), "the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint").

[22] *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988); *see also In re General Motors*

accept conclusory statements as true where they are supported by pled facts.[23] Finally, in conducting this inquiry I am allowed to consider the documents that BASF has attached to its Amended Complaint.[24]

A. A Change In Operation Is Not Triggered By A Change In Control Of Lyondell

BASF's first argument is that the withdrawal right provided in §14(b) is triggered by a purchase of Lyondell. This argument presents a straightforward question of contract interpretation. "Under Delaware law, the proper interpretation of language in a contract is a question of law."[25] Accordingly, the meaning of a contract is properly determined on a motion to dismiss.[26] This is done by effectuating, "to the extent possible, the reasonable shared expectations of the parties at the time they contracted."[27] In determining this intent, I am limited to considering the words of the contract unless their meaning is ambiguous.[28]

Here, the provision at issue is a relatively simple one. Section 14(b) is only triggered if POSM II Properties "becomes aware that the Plant no longer is to be operated by [Lyondell] or its Affiliates."[29] On its face, this asks a simple question: is Lyondell or one of its affiliates operating the Plant?[30]

(Hughes) S'holder Litig., 897 A.2d 162, 168 (Del. 2006) (holding that in deciding a motion to dismiss, "a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff'" (quoting *Malpiede*, 780 A.2d at 1083)); *In re Lukens Inc. S'holder Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (holding that on a motion to dismiss, a court need only accept allegations supported by pled facts).

[23]*See Grobow*, 539 A.2d at 187 n.6.

[24]*See* Ct. Ch. R. 10(c).

[25]*Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

[26]*Id.*

[27]*Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. Sept. 4, 2003) (quoting *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *9 (Del. Ch. June 6, 1996)).

[28]*See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").

[29]Supplementary Agreement § 14(b). Because the Supplementary Agreement was between ARCO and Mobil, § 14(b) actually discusses whether ARCO is no longer operating the Plant. But, in their briefing both parties have assumed that this language applies to Lyondell in the same manner it applied to ARCO. *See* Op. Br. at 7; Ans. Br. at 8. Thus, I have assumed for purposes of this opinion that the language applies if neither Lyondell nor one of its affiliates is operating the Plant.

[30]As the defendants have pointed out, there remains a question as to whether LyondellBasell is an affiliate within the meaning of § 14(b). Neither side, however, spent a great deal of time briefing this issue, and, in any event, it is not necessary to reach this question as I find that even if LyondellBasell is not an affiliate within the meaning of § 14(b), BASF's Complaint still does not state a claim.

Notwithstanding this obvious interpretation, BASF advances a strained reading of § 14(b) to argue that a change in control of the operator of the Plant means that there was a change in the operator itself. The first step in its approach is to simplify and distort § 14(b)'s focus on whether or not Lyondell is still operating the plant by referring to this question as whether there has been a "change in operation."[31] BASF then notes that "operate" has been defined to mean "to control [or direct] the functioning of."[32] BASF argues that because LyondellBasell is now the sole stockholder in Lyondell, it controls Lyondell. And, because LyondellBasell now controls Lyondell, BASF argues that LyondellBasell is now indirectly operating the Plant through Lyondell.

Boiled down to its essence, BASF is asserting that if any party besides Lyondell is capable of exerting influence on Lyondell, and therefore influencing Lyondell's operation of the Plant, then in some sense that third-party is the actual party operating the Plant. This is an extraordinary argument that reads § 14(b) very loosely, so loosely that its text has almost no relevance to the meaning advanced. As BASF admitted at oral argument, this broad construction of § 14(b) would give it a withdrawal right in a myriad of situations, including ones that could have occurred if Lyondell remained a public company without a single controlling stockholder. Thus, as BASF confessed, BASF interprets § 14(b) as providing it with a withdrawal right if: (1) a successful proxy contest was conducted at Lyondell that resulted in a change of the Lyondell board and a decision to replace Lyondell's CEO, and the new CEO changes operations at the Plant;[33] or (2) stockholders successfully exerted pressure on Lyondell management to change its approach to operating the Plant.[34]

Admittedly, these sorts of events do not occur every year. But, given the ever-increasing level of stockholder activism over recent decades, these events are far from uncommon. Over the life of the Partnership, one would expect a public company with a diverse stockholder base, as Lyondell was before it was acquired by Basell, to be subjected to a variety of cross-cutting pressures that might change how it would approach its operations, including

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[31] *See, e.g.*, Ans. Br. at 8. As noted later, the phrase "change in operation" is used in § 14(b), but only as a short hand for the specific commitment Mobil received which turned on whether "the Plant no longer is to be operated by [ARCO] or its Affiliates." Supplementary Agreement § 14(b).

[32] Ans. Br. at 12 (citing *The American Heritage Dictionary of the English Language*, *available at* http://dictionary.reference.com/browse/operate (last visted Oct. 8, 2008); *Webster's II New College Dictionary* (3d ed. 2005)).

[33] Tr. at 37-38.

[34] Tr. at 55-56.

those at the Plant. According to BASF, § 14(b) gave BASF a withdrawal right whenever Lyondell's stockholder base changed in some important way (would it be enough if someone bought a controlling stake but did not take the company private?) or where Lyondell's stockholders somehow influenced (or simply had the capability of influencing?) the corporation in its operation of the Plant.

Burdening stockholders' ability to alienate or vote their shares with a financial penalty at the corporate level, such as a requirement for the corporation to pay off a contractual partner like BASF, is not a small thing. But, it commonly happens. The method by which it is done, however, involves something far more straightforward than § 14(b); it involves the use of a change of control provision that vests certain rights in one contractual party if the other experiences a change of control as defined in the contract. Such provisions are used in many contexts, including in the joint venture context analogous to the limited partnership here.[35] Given the important rights of Lyondell stockholders that would be burdened by BASF's reading of § 14(b) and the prevalence of common contractual models that directly state what BASF claims is implied by § 14(b), a court should be chary about reading a provision like § 14(b) that, on its face, has nothing to do with a change of corporate control as one that embodies hidden meanings burdening stockholders. If the parties to the Supplementary Agreement had reached a bargain to give Mobil a right to walk away and be bought out upon a change of control of ARCO, one would have expected them to use the common technique and do that explicitly. In this regard, it is notable that change of control provisions often detail the precise scenarios that qualify,[36] whereas, under BASF's approach, the parties would either have to reach an after-

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[35] *See, e.g.*, MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (2006) (defining "a Change in Control of the Member or Person directly or indirectly controlling the Member" as a Default Event and specifically defining what constitutes a "Change in Control"). Change of control provisions have also become a common fixture in a variety of corporate contracts. *See* Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Stockholder Choice*, 152 U. PA. L. REV. 577, 614 (2003) ("Change of control provisions can be—and currently are—incorporated into a variety of contracts, including intellectual property licenses, leases, joint ventures, debt and equity financing, union contracts, and employee stock option plans."); *see also In re Loral Space and Commc'ns Corp. Inc.*, 2008 WL 4293781, at **12-13 (Del. Ch. Sept. 19, 2008) (describing a change in control provision in a securities purchase agreement); *Sutton Holding Corp. v. DeSoto, Inc.*, 1991 WL 80223 (Del. Ch. May 14, 1991) (addressing whether there was a change in control under a pension plan); Kenneth C. Johnson, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L. J. 909 (1985) (addressing concerns about change of control provisions in employment contracts).

[36] *See* MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (specifying in detail the situations that would constitute a change in control).

the-fact accord on what corporate events qualified as an implied change in the operator or have a court do so.

Delaware law does not invest judicial officers with the power to creatively rewrite unambiguous contracts in this manner. By its plain terms, § 14(b) is not a change of control provision. Although § 14(b) contains the phrase "change in operation," § 14(b) is not concerned with any and all changes in operation, but only a specific, albeit important, change. Section 14(b) is only triggered in the event that "the Plant no longer is to be operated by [Lyondell] or its Affiliates."[37] Putting to the side the question of whether LyondellBasell is an affiliate of Lyondell,[38] the mere fact that Lyondell now has a single stockholder—LyondellBasell—rather than a disaggregated group of public stockholders, does not mean that Lyondell has stopped operating the Plant within the meaning of § 14(b).

As will be discussed in more detail in addressing BASF's other argument, BASF does not allege that Lyondell has not continued its existence as a separate corporation, does not have assets, does not have large number of managers and employees, and is not using its assets, managers, and employees to operate the Plant. For purposes of § 14(b), the mere fact that Lyondell is now controlled by a private company does not make it, as BASF argues, a different company than the one referred to in the Supplementary Agreement.[39] The fact that Lyondell's equity is owned by LyondellBasell does not change the fact that Lyondell Chemical Company still exists and operates the Plant.[40] BASF has not pointed to any language in the Supplementary Agreement or any other agreement that makes promises about how Lyondell would be capitalized or on whose behalf the Plant would be operating.

The original parties to the Supplementary Agreement could, of course, have negotiated specific promises from POSM II Properties about the capital

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[37]Supplementary Agreement § 14(b).

[38]Without answering the question, it seems plausible that LyondellBasell is an affiliate of Lyondell under the Partnership Agreement's definition of the term, which defines two companies as affiliates when one is wholly owned by the other. *See* Partnership Agreement at 5. Indeed, one could imagine rational parties not caring whether the affiliate was a parent or a subsidiary of Lyondell so long as it shared a commonality of interest with Lyondell in the success of the Plant.

[39]*See* Op. Br. at 15-16 ("[E]ven if 'Lyondell Chemical Company' continues to exist on paper . . . it is not the same 'Lyondell Chemical Company' that actually existed in reality and actually operated the Plant.").

[40]The fact that § 14(b) is only directed at the operator as a legal entity is also reflected in the Supplementary Agreement's use of the term "ACC" to refer to ARCO. The definition of ACC in the Partnership Agreement is simple, ACC means ARCO Chemical Company. Partnership Agreement at 5. This captures ARCO as a legal entity, not as a transient collection of owners and business policies.

structure of the operator of the Plant or about the other common occurrences that, under BASF's interpretation, would mean that the contractually defined operator was no longer operating the Plant, such as the replacement of the operator's management or the purchase of a certain percentage of stock by a single investor or a group of affiliated investors. And, BASF could have negotiated to add such promises after it acquired Mobil's interest. But, the arrangement between BASF and POSM II Properties, as the deal now stands, does not contain promises about Lyondell's capital structure. And, having failed to secure those promises through negotiations, BASF is not well placed to argue that this court should create those terms because they might serve BASF's business interests.[41]

Section 14(b) is only triggered if Lyondell no longer operates the Plant, which Lyondell may continue to do even if it experiences a change in control of its equity.

B. BASF Has Not Adequately Pled that LyondellBasell Operates The Plant

Having determined that § 14(b) is only triggered if Lyondell no longer operates the Plant, I now turn to whether BASF adequately pleads its alternative theory that LyondellBasell is now operating the Plant in Lyondell's stead. As explained above, even at this stage of the proceedings, I need "not concede pleaded conclusions of law or fact where there are no allegations of specific facts which would support such conclusions."[42] Thus, in order to state a claim, BASF must plead facts that rationally support the inference that LyondellBasell, rather than Lyondell, now operates the Plant.[43]

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[41] *See Delucca v. KKAT Mgmt.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) ("[I]t is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts.").

[42] *Shintom Co., Ltd. v. Audiovox Corp.*, 2005 WL 1138740, at *2 (Del. Ch. May 4, 2005) (quoting *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1264 (Del. Ch. 1979)), *aff'd*, 888 A.2d 225 (Del. 2005); *see also Grobow*, 539 A.2d at 187 n.6 ("Even under the less stringent standard of a Chancery Court Rule 12(b)(6) motion to dismiss, all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true, but neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true.").

[43] *See Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (requiring that a complaint "plead facts supporting an inference of breach, not simply a conclusion to that effect" to survive a motion to dismiss); *Feldman v. Cutaia*, 956 A.2d 644, 653-54 (Del. Ch. 2007) ("While specific allegations of fact, along with reasonable conclusions buttressed by specific allegations of fact, will sustain a complaint, mere conclusions of law or fact are insufficient under this standard of review." (citations omitted)), *aff'd*, 951 A.2d 727 (Del. 2008). Recognizing the costs of modern litigation, the U.S. Supreme Court has adopted a similar standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

But, as we have seen, aside from the conclusory allegation that, following Basell's purchase of Lyondell, "LyondellBasell Industries became the operator of the Plant,"[44] the Amended Complaint does not plead any facts about the Plant's operations. The Amended Complaint also does not allege that the Lyondell managers and employees who were operating the Plant have been replaced by managers and employees working directly for LyondellBasell. In fact, the Amended Complaint does not allege any change in the operational direction of the Plant.

Instead, in flipping from its original statement that Lyondell operates that Plant to its current allegation that LyondellBasell operates the Plant, BASF has relied entirely on two quotes from LyondellBasell's public disclosures.

Specifically, BASF quotes LyondellBasell's Management Report for the Year Ended December 31, 2007 (the "Management Report") as stating that "LyondellBasell Industries' PO/SM II plant at the Channelview, Texas complex was created through a joint venture among Lyondell and unrelated equity investors. LyondellBasell Industries retains a majority interest in [the Plant] and is the operator of the [Plant]."[45] Similarly, BASF's Amended Complaint excerpts the statement "LyondellBasell Industries operates the U.S. PO Joint Venture's . . . plants . . . ." from LyondellBasell's Consolidated Financial Statements Years ended December 31, 2007 and 2006 (the "Financial Statements").[46]

But, although these documents provide good quotes for BASF, they do not substitute for fact pleading that rationally supports the inference that Lyondell no longer operates the Plant. Indeed, when read completely and in context, these documents refute rather than support the inference that BASF seeks the court to draw.[47] As so read, both documents are clearly meant to provide a picture of LyondellBasell as a corporate holding company, and thus they refer to LyondellBasell and its various subsidiaries as a single

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127 S. Ct. 1955, 1959 (2007) (holding that a claim for relief "requires more than labels and conclusions" and that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true").

[44]Am. Compl. ¶ 25.

[45]Am. Compl. ¶ 25 (quoting Am. Compl. Ex.8 (Lyondell Basell AF S.C.A Management Report for the Year Ended December 31, 2007) ("Management Report") at 16.

[46]Am. Compl. ¶ 2 (quoting Am. Compl. Ex. 9 (LyondellBasell Industries AF S.C.A. Consolidated Financial Statements Years ended December 31, 2007 and 2006 With Independent Auditors' Report) ("Financial Statements") at 19).

[47]*See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995) (noting that even in cases where the relevant document is not part of the complaint, it is important that a court be able to consider the whole document because "[w]ithout the ability to consider the document at issue, 'complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure.'" (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991))).

entity instead of as a collection of subsidiaries and affiliated companies. The documents cannot sensibly be read to suggest that LyondellBasell as a holding corporation operates the Plant, instead of Lyondell, the operating subsidiary that presumably continues to hold all the assets it possessed before the change in its equity owner.

The first document, the Management Report, makes its scope explicit and defines "LyondellBasell Industries" as LyondellBasell and its consolidated subsidiaries.[48] Thus, when it says that LyondellBasell Industries operates the Plant, the Management Report is simply offering the unremarkable proposition that LyondellBasell or one of its subsidiaries operates the Plant. That is, the entire basis for BASF's claim is that because Basell bought Lyondell, Lyondell is now a subsidiary of LyondellBasell, and—voilà—Lyondell is now included and subsumed in the Management Report's term "LyondellBasell Industries." Rather than having to do something it apparently cannot (such as pleading that Lyondell's corporate veil should be pierced because it in fact has no separate dignity from its parent), BASF has, by the magic of simplifying definitions in documents describing the consolidated operations of holding corporations, won its case. Because Lyondell's parent produces documents that include its subsidiaries within the scope of the term LyondellBasell Industries, the subsidiary Lyondell must not be operating the Plant. Rather, all operations must now be occurring at the mother ship, regardless of the continued existence of the various subsidiaries.

This line of reasoning is not, well, really reasoning. A holding corporation like LyondellBasell must present reports of their affairs on a consolidated basis.[49] The fact that holdings corporations do so does not render all their subsidiaries inutile, deprived of all their separate legal dignity. If that were the case, one wonders why large public holding corporations would continue their common practice of running business lines and holding assets through multiple subsidiaries.[50] After all, simply by making SEC filings, the

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[48]Management Report at 8 ("'LyondellBasell Industries' or the 'Company' refers to LyondellBasell Industries AF S.C.A and its consolidated subsidiaries.").

[49]*E.g.*, *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN NO. 51, ¶ 3 (1959) ("All majority-owned subsidiaries . . . shall be consolidated except [for subsidiaries that the majority-owner does not control].").

[50]Delaware public policy does not lightly disregard the separate legal existence of corporations. *Gasden v. Home Pres. Co., Inc.*, 2004 WL 485468, at *4 (Del. Ch. Feb. 20, 2008) ("A Delaware court will not lightly disregard a corporation's jural identity."). The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment of capital in new enterprises. *See, e.g.*, *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *8 (Del. Ch. Mar. 4, 2004) (holding that a parent company was not liable for its subsidiary's breach of contract where there was no basis

holding corporation would eliminate its subsidiaries' separate legal existences!

There is nothing in the Management Report that supports a rational inference that LyondellBasell is actually operating the Plant in place of its operating subsidiary, Lyondell. In fact, the Report directly contradicts BASF's conclusory assertion that LyondellBasell operates the Plant. *The Report unambiguously states that LyondellBasell by itself "does not manufacture any products, does not have any employees or business operations, operates exclusively through its subsidiary companies, and has no source of operating income or assets of its own other than its interests in its subsidiary companies."*[51] That description is impossible to reconcile with BASF's allegation that LyondellBasell actually operates a large petrochemical plant.[52]

This leaves the Financial Statements to bear the full weight of BASF's assertion. Unlike the Management Report, the Financial Statements do not contain a single definition of LyondellBasell Industries that shows that the Statements are explicitly referring to LyondellBasell and its consolidated subsidiaries as operating the Plant. On their face, the Consolidated Financials therefore read literally as stating that LyondellBasell operates the Plant.

But, the purpose that Lyondell offers the Financial Statements for—to show that LyondellBasell operates the Plant in place of LyondellBasell's wholly owned subsidiary Lyondell—distorts the nature of consolidated financial statements. Under Generally Accepted Accounting Principles, "[t]he purpose of consolidated statements is to present, primarily for the benefit of the stockholders and creditors of the parent company, the results of operations and financial position of a parent company and it subsidiaries

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for piercing the corporate veil); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at **8-9 (holding that a parent company cannot be liable for its subsidiaries actions absent veil piercing or agency liability). To pierce a corporate veil, a plaintiff must show that the interests of justice require it because matters like fraud, public wrong, or contravention of law are involved. *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (holding that veil-piercing "may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved"). BASF has not even tried to meet that standard. Moreover, it is precisely because sophisticated parties like BASF understand that changes in control can affect the behavior of a corporate contractual partner that they bargain expressly for change of control provisions.

[51]Management Report at 8 (emphasis added).

[52]BASF points out that the Management Report defines Lyondell separately from LyondellBasell, and that when the Management Report refers to LyondellBasell operating the Plant, the authors had the choice of using the precise, defined term for Lyondell, but did not do so. When read as a whole and in concert, the Management Report does not support a rational inference that LyondellBasell itself, rather than Lyondell, is operating the Plant. In complex documents, inconsistencies arise. That is why it is important to read them as a whole and contextually. Indeed, the only fair inference is that LyondellBasell does not directly operate anything because, among other things, it has no employees or business operations of its own. Management Report at 8. Rather, operations are done at the subsidiary level by companies like Lyondell. *Id.*

essentially as if the group were a single company with one or more branches or divisions."[53] Thus, although the Financial Statements may not be felicitously drafted, there is no rational basis for believing that when LyondellBasell's accountants drafted the Financial Statements they were addressing the legal question of who operates each LyondellBasell facility around the world instead of following accounting rules and crafting a picture of the total health of LyondellBasell and its various holdings, which include Lyondell.[54] In this context, a single statement about LyondellBasell operating the Plant does not create a rational inference that the parent holding company, LyondellBasell, is actually operating the Plant. Instead, although the sentence that refers to the Plant might have been more carefully worded, its plain meaning in line with the rest of the Financial Statements is that the Plant is operated, as are all of LyondellBasell's operations, through one of its subsidiaries. The short hand of the Financial Statements is to describe LyondellBasell as being accountable for all of the operations and results of its wholly-owned subsidiaries, so that the Financial Statements can provide a complete picture of the health of LyondellBasell as a holding company that possesses subsidiaries with diverse operations and substantial assets.

In sum, BASF has certain rights in the event that Lyondell no longer operates the Plant. To try to invoke those rights, BASF changed its description of the relationship between LyondellBasell and the Plant in its Amended Complaint, switching from alleging that Lyondell operates the Plant to alleging that LyondellBasell operates the Plant. But, BASF has not pled any facts about conditions on the Plant floor at all. NONE. Instead it makes a conclusory allegation that is only supported by "gotcha" quotes from LyondellBasell filings. When actually examined, the only reasonable inference that flows from the documents is that Lyondell continues to operate the Plant. As long as Lyondell is still operating the Plant, § 14(b) of the Supplementary Agreement is not triggered.

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[53] *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN NO. 51, ¶ 1 (1959).

[54] *E.g.*, CONSOLIDATED FINANCIAL STATEMENTS, Accounting Review Bulletin No. 51, ¶ 3 (1959) ("All majority-owned subsidiaries . . . shall be consolidated except [for subsidiaries that the majority-owner does not control]."); Financial Statements at 9 ("The consolidated financial statements, prepared under accounting principles generally accepted in the United States, include the accounts of LyondellBasell Industries and its consolidated subsidiaries."); 17 C.F.R. § 210.3-01(a) (2009) (requiring consolidated balance sheets by SEC registrants); 17 C.F.R. § 210.3-02(a) (2009) (requiring consolidated statements of cash flow and income by SEC registrants).

IV. Conclusion

For the foregoing reasons, BASF's First Amended and Supplemental Verified Complaint is dismissed. **IT IS SO ORDERED.**

FISK VENTURES, LLC v. SEGAL

No. 3017-CC

Court of Chancery of the State of Delaware, New Castle

January 13, 2009

Jon E. Abramczyk, Esquire, and John P. DiTomo, Esquire, of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; and Steven C. Seeger, Esquire, of Kirkland & Ellis LLP, Chicago, Illinois, of counsel, for petitioner.

Vernon R. Proctor, Esquire, and Jill K. Agro, Esquire, of Proctor Heyman LLP, Wilmington, Delaware; and Kevin J. O'Connor, Esquire, of Wolfblock LLP, Boston, Massachusetts, of counsel, for respondent Andrew Segal.

CHANDLER, *Chancellor*

This case presents the narrow question of whether it is "reasonably practicable," under 6 *Del. C.* § 18-802, for a Delaware limited liability company to continue to operate. When such a company has no office, no employees, no operating revenue, no prospects of equity or debt infusion, and when the company's Board has a long history of deadlock as a result of its governance structure, more than ample reason and sufficient evidence exists to order dissolution. Accordingly, I will grant petitioner's motion for judgment on the pleadings and order that dissolution of the limited liability company occur as contemplated in the company's charter.

I. BACKGROUND

Genitrix, LLC ("Genitrix" or the "Company"), originally a Maryland limited liability company, was formed by Dr. Andrew Segal in 1996 to commercialize his biotechnology concepts of directing the human immune system to attack cancer and infectious diseases.[1] Although initially promising, the Company's financial condition has deteriorated to the point where currently Genitrix is in critical financial straits.

The LLC Agreement provides that Genitrix's business purpose is:

> (a) to engage in research and development, and /or generate through the manufacture and sale and licensing of biomedical technology, including that related to the use of opsonin molecules, in combination with other organic molecules, to produce immunizing and therapeutic drugs for human and animal diseases, and (b) to engage in all action necessary, convenient or incidental to the foregoing. Without the express approval of the Board, the Company shall not engage in any other business activity.

As this Court stated in a previous opinion, "[t]he Company has no office, no capital funds, no grant funds, and generates no revenue."[2] Genitrix, as it currently stands, is unable to operate in furtherance of its business purposes.

In forming Genitrix, Segal obtained a patent rights license from the Whitehead Institute of Biomedical Research ("Whitehead") concerning the Company's core technology. In 1997, Genitrix entered into a Patent License Agreement (the "Whitehead Agreement") with Whitehead and Massachusetts Institute of Technology.

The Whitehead Agreement was entered into among Genitrix, Whitehead, and M.I.T. It provides for the exclusive license to Genitrix of certain patent rights, owned by Whitehead. Genitrix paid for the prosecution and issuance of the patents owned by Whitehead. As set forth in Article 2 of the Whitehead Agreement, the license gives Genitrix the worldwide right to develop, sell and commercialize Licensed Products and Licensed Services derived from the patent rights. Article 11 of the Whitehead Agreement

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[1]Given the procedural posture of this case and consistent with the standard of viewing the facts in the light most favorable to the nonmoving party, I take the facts in this opinion from the complaint and respondent's answer to the complaint.

[2]*Fisk Ventures v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *6 (Del. Ch. July 3, 2008).

provides that the license is not assignable, except in limited circumstances including "in connection with the sale or transfer of all or substantially all of Genitrix's equity and assets."[3]

In September 1997, H. Fisk Johnson, head of Fisk Ventures, LLC, became an investor in Genitrix. As a condition to Johnson's investment, Genitrix was redomiciled in Delaware. In the initial investment round, Johnson contributed $842,000 in cash in exchange for Class B interests in Genitrix. Investments by other Class C investors brought the total cash investment in Genitrix to $1.1 million. Segal received a $500,000 Class A investment credit in exchange for his contribution of patent rights that he obtained from Whitehead. To continue operating, Genitrix has relied on equity and debt investments and grants from institutions to provide capital. In recent years, both Segal and Fisk Ventures have paid for certain Company expenses.

As a Class B member of Genitrix, Fisk Ventures negotiated a "Put Right" with respect to the Class B membership interests, found in § 11.5 of the LLC Agreement. Section 11.5(a) allows "the holders of the Class B Interests . . . to sell any or all of such Member's Class B Interests to the Company on such terms as are set forth herein," at any time after "the fourth anniversary of the date of this Agreement." After exercising the Put Right, the LLC Agreement requires an adjustment of the book value of all Company assets based upon an independent valuation of Genitrix conducted by "a nationally recognized, reputable investment banker."[4]

Under § 11.5(c), the put price for the Class B interests is deemed to "equal the amount of such Class B Interest holder's Capital Account balance after such balance has been adjusted as required by Section 11.5(b)."[5] If that put price "exceeds 50% of the tangible assets of the Company," Genitrix must issue notes to the pertinent Class B holders that are payable one-third within thirty days of receipt of the valuation; one-third on the first anniversary of the exercise date of the Put Right; and the balance on the second anniversary of such exercise. In the event of a default by the Company, the Class B Interest holders may replace one of Segal's representatives with an additional Class B representative.[6]

Fisk Ventures has been free to exercise the Put Right ever since September 11, 2001—the fourth anniversary date of the LLC Agreement. The Put Right permits Fisk Ventures, at their sole discretion, to exit their

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[3]Whitehead Agreement, Art. 11, Segal Aff., Ex. A.
[4]LLC Agreement, § 11.5(b), Ex. 1.
[5]LLC Agreement, § 11.5(c), Ex. 1.
[6]*Id.*

investment in Genitrix—for fair market value—for any reason or for no reason.

Soon after formation, a four-person Board was organized to manage the affairs of Genitrix, with Segal and Johnson each appointing two representatives. The Genitrix Board now consists of five representatives. Under § 7.5 of the LLC Agreement, the Genitrix Board can only act pursuant to approval of 75% of its members, whether by vote or by written consent.

Segal was originally appointed as both President and Chief Executive Officer of Genitrix. Segal ceased to be CEO of the Company in March 2006, but continues to serve as President.

Only a handful of Board meetings have been held over the entire course of Genitrix's existence. Segal maintains that § 7.5 of the LLC Agreement contemplates that Genitrix's Board can operate by written consent without a meeting, provided that the requisite 75% of the representatives approve such action. Segal and his appointees declined to attend Board meetings from about September 2006 until July 2008, requesting instead that the Board conduct business by e-mail. Segal and the Class B representatives held a two-hour board meeting by telephone on August 5, 2008.

II. ANALYSIS

1. *Standard of Review*

Judgment on the pleadings is appropriate when accepting as true the nonmoving party's well pleaded facts, "'there is no material fact in dispute and the moving party is entitled to judgment under the law.'"[7] The Court will draw all reasonable inferences in favor of the nonmoving party and "[t]he nonmoving party must therefore be accorded the same benefits as a plaintiff defending a motion under [Court of Chancery] Rule 12(b)(6)."[8]

2. *Freedom of Contract and Limited Liability Companies*

"Limited Liability Companies are creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and

[7] *In Re Seneca Investments, Inc.*, C.A. No. 3624-CC, 2008 WL 4329230, at *2 (Del Ch. Sept. 23, 2008) (quoting *Warner Commc'ns, Inc. v. Chris-Craft Indus. Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989)); *see also Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L. P.*, 624 A.2d 1199, 1205 (Del. 1993).

[8] *In Re Seneca Investments, Inc.*, 2008 WL 4329230, at *2.

flexibility to the parties involved.'"[9] Delaware's LLC Act thus allows LLC members to "'arrange a manager/investor governance relationship;' the LLC Act provides defaults that can be modified by contract" as deemed appropriate by the LLC's managing members.[10] The LLC Act explicitly states that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[11]

Genitrix's LLC Agreement provides that the Company "shall be dissolved and its affairs wound up only on the first to occur of the following: (a) the written consent of Members holding at least 75% of the Membership Interests, voting as provided in § 3.5; and (b) the entry of a decree of judicial dissolution of the Company under Section 18-802 of the Act."[12] Segal, as the controlling member of Genitrix's Class A membership interest, opposes dissolution. Since the managing members are hopelessly deadlocked to the extent that 75% of the membership interest in Genitrix will not be voted in favor of dissolution, the only other opportunity for members seeking dissolution would be through a decree of judicial dissolution in accordance with the LLC agreement.

3. *Standard for Dissolution of a Limited Liability Company*

The Court of Chancery may decree judicial dissolution of a Delaware limited liability company "whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."[13] Section 18-802 has the "obvious purpose of providing an avenue of relief when an LLC cannot continue to function in accordance with its chartering agreement."[14]

In interpreting § 18-802, this Court has by analogy often looked to the dissolution statute for limited partnerships, 6 *Del. C.* § 17-802.[15] In so doing, the Court has found that "the test of § 17-802 is whether it is 'reasonably

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[9] *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, C.A. No. 3803-CC, 2008 WL 3846318, at *4 (Del. Ch. Aug. 19, 2008) (quoting *TravelCenters of Am., LLC v. Brog*, C.A. No. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008)).

[10] *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, C.A. No. 3803-CC, 2008 WL 3846318, at *4; *see* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 5 (2007).

[11] 6 *Del. C.* § 18-1101(b).

[12] LLC Agreement § 12.1, Ex. 1.

[13] 6 *Del. C.* § 18-802.

[14] *Haley v. Talcott*, 864 A.2d 86, 94 (Del. Ch. 2004).

[15] *In re Silver Leaf, LLC*, C.A. No. 20611, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005).

practicable' to carry on the business of a limited partnership, and not whether it is impossible."[16] To decide whether to dissolve a partnership pursuant to § 17-802, the courts have historically looked to the "business of the partnership and the general partner's ability to achieve that purpose in conformity with the partnership agreement."[17] For example, in *PC Tower,* this Court found that the relevant partnership agreement stated that the partnership's business purpose was to acquire land in the hope of making a future profit.[18] The Court held that the partnership was unable to carry on its business in a reasonably practicable manner because there was (1) a depressed real estate market, (2) property debt was in excess of value, and (3) uncontradicted evidence of a heavily leveraged property where the rent payments were supposed to be forthcoming from a declared insolvent entity. Thus, because it was no longer reasonably practicable to use the partnership's property "for profit and for an investment," the Court ordered dissolution of the partnership.[19]

Applying the same logic in the limited liability company context, there is no need to show that the purpose of the limited liability company has been "completely frustrated."[20] The standard is whether it is reasonably practicable for Genitrix to continue to operate its business in conformity with its LLC Agreement.

The text of § 18-802 does not specify what a court must consider in evaluating the "reasonably practicable" standard, but several convincing factual circumstances have pervaded the case law: (1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate.[21]

These factual circumstances are not individually dispositive; nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating. In fact, the Court in *Haley v. Talcott* found that although the limited liability company was "technically functioning" and "financially stable," meaning that it received rent checks and paid a mortgage, it should be dissolved because the company's activity was "purely a residual, inertial status quo that just happens to exclusively benefit one of the

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[16] *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assoc. Ltd. P'ship*, C.A. No. 10788, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989).

[17] *Id.*

[18] *Id.* at 1.

[19] *Id.* at 6.

[20] *Id.* at 6; *see also In re Silver Leaf, LLC*, 2005 WL 2045641, at *10.

[21] *In re Silver Leaf*, 2005 WL 2045641, at *11; *Haley v. Talcott*, 864 A.2d 86, 95 (Del. Ch. 2004).

50% members."[22] If a board deadlock prevents the limited liability company from operating or from furthering its stated business purpose, it is not reasonably practicable for the company to carry on its business.

4. *Judicial Dissolution of a Limited Liability Company*

More than sufficient undisputed evidence exists in this case to demonstrate the futility of Genitrix's deadlocked board, the LLC Agreement's failure to prescribe a solution to a potentially deadlocked board, and Genitrix's dire financial straits. For these reasons, and as explained further below, I conclude that it is not reasonably practicable to carry on the business operations of Genitrix in conformity with the LLC Agreement.

a. Genitrix's Board is Deadlocked

Under the LLC Agreement, Genitrix's Board has the exclusive power to manage the business and affairs of the company.[23] The Board is unable to act unless both the Class B and the Class A shareholders agree on a course of action. The LLC Agreement imposes a 75% voting requirement for business issues: "Approval of at least 75% of the Representatives shall be required to authorize any of the actions . . . specified in this Agreement as requiring the authorization of the Board."[24] The LLC Agreement requires the cooperation of the Board's managing members in order to accomplish or overcome any issue facing Genitrix. This type of charter provision, unless a "tie-breaking" clause exists, is almost always a recipe for disaster. In this case, unfortunately, the parties are behaving true to form.

Although Genitrix's Board is charged to run the Company, the Board is unable to act and is hopelessly deadlocked. Fisk Ventures and Segal have a long history of disagreement and discord over a wide range of issues concerning the direction and operation of Genitrix. On one of the most important issues facing the Company, the raising and use of operating capital, the Board is unable to negotiate acceptable terms to all involved parties. Additionally, the Board has even been considerably deadlocked over whether to have Board meetings. The parties have a history of discord and disagreement on almost every issue facing the Company. There exists almost a five-year track record of perpetual deadlock. Indeed, concerning the current issue, dissolution, the Board is equally deadlocked.

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[22] *Haley v. Talcott*, 864 A.2d at 91, 96.
[23] LLC Agreement § 7.1(a), Ex. 1.
[24] LLC Agreement § 7.2, Ex. 1.

Given the Board's history of discord and disagreement,[25] I do not believe that these parties will ever be able to harmoniously resolve their differences. Consequently, I conclude that Genitrix's Board is deadlocked and unable to resolve any issue, including the current issue of dissolution, facing Genitrix.

b. Navigating the Deadlock in The LLC Agreement

In examining the four corners of Genitrix's LLC Agreement I conclude that no provision exists that would allow the Board to circumvent the deadlocked stalemate. The document was negotiated by sophisticated parties engaged in an arm's length negotiation. The product of that negotiation, the LLC Agreement, was carefully drafted in such a way that solved one problem but lead directly to the deadlock now gripping the Company. The provision requiring a 75% vote for Board action was agreed upon by the parties to specifically prohibit board domination by one party over another. The provision has certainly accomplished its intended purpose. Unfortunately, it has also led to a stalemate, and the LLC Agreement on its face provides no means of remedying the situation.

Segal argues that since Fisk Ventures owns a Put Right, provided for in § 11.5 of the LLC Agreement, which allows Fisk Ventures to exit its investment by forcing Genitrix to buy out Fisk Ventures for the fair value of its investment, the LLC Agreement contains a provision that will resolve the Board's deadlock. Segal points to Fisk Ventures' Put Right as a proper "exit mechanism" and as an alternative to judicial dissolution. Under § 11.5, the amount to be paid to the Class B investors is to be determined by an independent valuation. If the price exceeds 50% of the value of Genitrix's tangible assets, they will gain creditor status, giving their holder greater security and a higher priority than they currently have as purely equity members.

Segal ignores the fact, however, that the Put Right contemplated in the LLC Agreement grants its owner an option, to be freely exercised at the will and pleasure of its holder.[26] Nowhere in § 11.5 or in the entire LLC Agreement does the Company have the right to force a buyout if it considers one of its members belligerent or uncooperative. Fisk Ventures holds the option,

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[25]Other examples of deadlock in the undisputed record include: Fisk Ventures Note, Answer ¶¶ 135-44; Fisk Ventures Term Sheet, Answer ¶¶ 154-58; The Tilson Term Sheet, Answer ¶¶ 165-78; the 2006 Buy-Down Proposal, Answer ¶¶ 188-93, and the 2007 Buy-Down Proposal, Answer ¶ 208.

[26]Nor does Segal explain how Genitrix would be able to pay Fisk Ventures if it were to exercise its Put Right.

not Genitrix. Fisk Ventures negotiated for and obtained the Put Right as consideration for its original investment in Genitrix and it would be inequitable for this Court to force a party to exercise its option when that party deems it in its best interests not to do so. I am not permitted to second guess a party's business decision in choosing whether or not to exercise its previously negotiated option rights.

c. Not Reasonably Practicable to Carry on the Business

As noted previously, Genitrix is in dire financial condition. "The Company has no office, no capital funds, no grant funds, and generates no revenue."[27] Genitrix has survived up to this point on equity and debt investments, and on grants from institutions such as the National Institute of Health. The Company does not have any further source of funding, and no realistic expectation of additional grants or infusions of capital.

Segal argues that one of the major sources of Board contention and deadlock has been Fisk Ventures' unwillingness to allow further capital infusion without significant anti-dilution protections. For this reason alone, Segal argues, Genitrix has been unable to raise additional funds. Segal further contends that if Fisk Ventures is forced to exercise its Put Right then Genitrix will be free to raise funds to effect the buy-back. But again, Segal fails to realize that Fisk Ventures has the right to protect itself against what it perceives as Company actions that would diminish the value of its stake in Genitrix. This Court will not substitute its business judgment for that of Fisk Ventures simply because Segal believes that will be in his best interest.

Additionally, Segal believes that dissolution should be denied because it would destroy any value the Company has preserved in its Whitehead Patent License. As stated above, the Whitehead Agreement is the legal vehicle for the grant of significant patent rights now licensed to Genitrix. Under Article 11 of the Whitehead Agreement, the license is not assignable except "in connection with the sale or transfer of all or substantially all of Genitrix's equity and assets."[28] Segal argues that the Company's members will then lose all of the considerable value of that asset, and Genitrix's own patents, which are subordinate to Whitehead's patent, because a purchaser will not be free to operate without a license from Whitehead. This argument is unconvincing.

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[27] *Fisk Ventures v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *6 (Del. Ch. July 3, 2008).

[28] Whitehead Agreement, Article 11, Segal Aff., Ex. A.

First, it appears equally likely that a purchaser could enter into a separate licensing agreement with Whitehead for use of its patent. Alternatively, the terms of the Whitehead Agreement could be renegotiated or altered in the sale negotiations. Second, it is ultimately futile to enter into an operating agreement that on its face is doomed to conflict and deadlock, to become mired in a deadlock for years on issues of financing and operations, and then to demand that the Court force the opposing party in the deadlock to capitulate in order to preserve a fleeting hope that additional financing might become available to help preserve some future potential value in a licensing agreement. That argument leads to the same deadlock that now exists on every issue of this company. The value of the Whitehead Agreement is hotly contested and I am unconvinced that any potential value it theoretically might have could not be accessed through a fair and proper sale of the asset. One thing is certain, however. These parties will never be able to reach agreement on how to dispose of this asset, whatever its potential value.

Finally, Segal's argument that Fisk Ventures cannot seek judicial dissolution because it comes to the Court with unclean hands is without merit. The LLC Agreement is a negotiated contract and Fisk Ventures has the right to attempt to maximize its position in accordance with the LLC Agreement's terms. If Fisk Ventures chooses to exercise its leverage under the LLC Agreement to benefit itself, it is perfectly within its right to do so. Additionally, Segal offers no facts to support his contentions that Fisk Ventures seeks dissolution simply to buy Genitrix's assets at fire sale prices. A party cannot simply allege a conclusory inequitable action as a last ditch effort to persuade the Court to deny a motion for judgment on the pleadings and to allow that party an opportunity to take discovery.

Ultimately, even if the financial progress of Genitrix is impeded by the deadlock in the boardroom, if that deadlock cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law. The Court is in no position to redraft the LLC Agreement for these sophisticated and well-represented parties.

III. CONCLUSION

This case involves a long-lived corporate dispute that resulted in devastating deadlock to Genitrix's Board and the loss of significant value to all involved. Genitrix's Board is hopelessly deadlocked, and the LLC Agreement fails to anticipate that risk by prescribing a solution to the Board conflict. Further, Genitrix has no office, no operating revenue, and no prospects of equity or debt infusion. Because Genitrix's dire financial straits

leave the Company with no reasonably practical means to operate its business, I conclude judicial dissolution in accordance with the LLC Agreement is the best and only option for these parties. For the foregoing reasons, I grant the motion seeking judgment in favor of petitioner on the petition for dissolution.

The parties shall confer and agree upon a form of implementing order within twenty days from this date.

NEMEC v. SHRADER

Nos. 3878-CC & 3934-CC

Court of Chancery of the State of Delaware, New Castle

April 30, 2009

Peter J. Walsh, Jr., Esquire, and Scott B. Czerwonka, Esquire, of Potter Anderson & Corroon LLP, Wilmington, Delaware, for plaintiff Joseph Nemec.

Henry E. Gallagher, Jr., Esquire, and Meredith L. Gaudio, Esquire, of Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware, for plaintiff Gerd Wittkemper.

David J. Teklits, Esquire, and Kevin M. Coen, Esquire, of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; and Everett C. Johnson, Jr., Esquire, J. Christian Word, Esquire, and Rebecca S. Giltner, Esquire, of Latham & Watkins LLP, Washington, D.C., of counsel, for defendants.

CHANDLER, *Chancellor*

In this consolidated action, plaintiffs Joseph Nemec and Gerd Wittkemper allege that defendants Ralph W. Shrader, C.G. Appleby, Gary D. Ahlquist, Shumeet Banerji, Peter Bertone, Martin J. Bollinger, Christian Burger, Francis J. Henry, Lloyd W. Howell, Jr., William C. Jackson, Christopher M. Kelly, Pamela M. Lentz, Joseph W. Mahaffee, John D.

Mayer, Helmut Meier, Patrick F. Peck, Joe Saddi, Eric A. Spiegel, and Steven B. Wheeler (collectively, "Directors") have breached their fiduciary duty of loyalty and that defendant Booz Allen Hamilton Inc. (the "Company" or "Booz Allen") has breached the implied covenant of good faith and fair dealing in connection with a retirement contract that was entered into between the Company and plaintiffs. In addition, plaintiffs also bring a claim of unjust enrichment against defendants. Defendants have responded by filing a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). This is the Court's opinion on defendants' motion.

For the reasons set forth herein, I grant defendants' motion and dismiss all of plaintiffs' claims against defendants.

I. BACKGROUND

After nearly 36 years with the Company, Joseph Nemec retired from Booz Allen on March 31, 2006. At the time of his retirement, he ranked third in seniority among all Booz Allen partners. He was elected three times to the Company's board of directors, where he served on the Finance and Professional Excellence Committees and chaired the Audit Committee. Gerd Wittkemper retired from Booz Allen on March 31, 2006, after nearly twenty years of service as a partner. Wittkemper built the foundation for Booz Allen's German business, and helped expand Booz Allen throughout Europe. He also led the establishment and growth of Booz Allen's successful Middle East business. Wittkemper was a member for nine years of Booz Allen's Worldwide Commercial Business Leadership Team, where he served as head of the Communications Media Technology practice and later as head of Booz Allen's European business. Another Booz Allen partner, defendant C.G. Appleby, referred to both Nemec and Wittkemper as "founding fathers" of Booz Allen's modern business.[1]

Booz Allen is a Delaware corporation, with headquarters in McLean, Virginia. It is a leading strategy and technology consulting firm providing services to government agencies, institutions, and infrastructure organizations. In July 2008, Booz Allen had approximately 300 stockholders, 21,000 employees, and annual revenues of approximately $4.8 billion. Originally founded as a partnership in 1914, Booz Allen has since changed its legal structure from a partnership to a Delaware corporation, retaining, however, the attitude and culture of a partnership, owned and led by a relatively small cadre of corporate officers, referred to as the "partners" of Booz Allen. The

[1]Pls.' Compl. ¶ 40.

Directors served on Booz Allen's board of directors when the Company was presented with a game changing opportunity—a transaction with The Carlyle Group to sell Booz Allen's government business. At the time of the transaction, each of the Directors owned significant amounts of Booz Allen stock. Collectively, the Directors owned approximately 11% of the outstanding common stock of the Company at the time of the transaction.

Throughout their tenure, Nemec and Wittkemper, along with all other officers of the Company, were partially compensated with annual stock rights that could be converted into common stock of the Company. Nemec, at the time of his retirement, owned 76,000 shares of Booz Allen stock, comprising approximately 2.6% of the issued and outstanding stock of the Company. Wittkemper, upon his retirement, owned 28,000 shares of Booz Allen stock. The Booz Allen stock program (the "Stock Plan") under which the plaintiffs and the other "partners" acquired stock in the Company was initially adopted in 1988, and was amended by the Booz Allen board of directors in 1996. Under the Stock Plan, each retired officer held a "put" right, for a period of two years from the date of his or her retirement, to sell his or her shares back to the Company for book value. After the two-year put right expired, the Company had the right to redeem part or all of the retired officer's stock at book value. Nemec chose to retain all of his Booz Allen stock during the two-year period following his retirement. Wittkemper also decided to retain most of his Booz Allen stock after retirement, but chose to exercise his option for part of his stock.

The transaction with The Carlyle Group began to emerge in early 2007. At that time, Booz Allen had two principal lines of business. One side of the Company provided consulting services to governments and governmental agencies, and the other provided services to commercial and international businesses. In February 2007, Booz Allen reorganized its two lines of business into separate business units: Government and Global Commercial. At that time, Booz Allen's leadership began considering a spin-off of one of those businesses.

During the summer of 2007, Booz Allen's firm leaders held discussions about a potential transaction in which Booz Allen would sell its government business. Discussions between Booz Allen and The Carlyle Group began around October 2007. In November 2007, The Carlyle Group submitted a proposal to purchase Booz Allen's government business for $2.54 billion. Booz Allen's board of directors then engaged in active discussions regarding the transaction.

In late 2007, the Booz Allen board convened a nominating committee, comprised solely of partners from the commercial side of the business, to select members for a board of a yet-to-be-formed company—Booz & Company, Inc. ("Booz & Co.")—that would operate Booz Allen's commercial

business after completion of the sale to The Carlyle Group of Booz Allen's government business. On January 16, 2008, the Wall Street Journal confirmed that Booz Allen was "in discussions to sell its government-consulting business to private-equity firm Carlyle Group," and that "the sale price will likely be around $2 billion."[2] Also in January 2008, it was reported that the deal was expected to close by March 31, 2008, the end of Booz Allen's fiscal year. With the transaction targeted to close by March 31, 2008, plaintiffs expected to participate in the benefits of the transaction, which was to be completed before any redemption of the plaintiffs' Booz Allen shares could have occurred. At some point before March 31, 2008, however, Booz Allen's board of directors and management decided to close the transaction past the target closing date of March 31, 2008.

In early March, 2008, Booz Allen's commercial partners nominated and elected a "shadow" board of directors to prepare for governing the new Booz & Co. commercial entity upon completion of the transaction. By this point in time, the purchase price of the transaction was set and the Booz Allen board and partners knew that the transaction would generate a transaction price of more than $700 per share to Booz Allen's stockholders. In March 2008, Booz Allen's board also preserved the status quo of Booz Allen's stock ownership. This was a departure from Booz Allen's usual practice and reflected the board's recognition that, with the transaction pending, the stock-ownership status quo should be maintained so as not to disfavor any existing stockholder.

The plaintiffs were well aware of how the transaction would benefit them. On March 10, 2008, in a conversation with Nemec, defendant Ralph Shrader, Booz Allen's chairman and CEO, gave his assurance that both Nemec and Wittkemper would remain as Booz Allen stockholders until the close of the transaction. Shrader stated that this was an "easy moral decision." Nevertheless, in April 2008, before the transaction was formally approved, Booz Allen redeemed plaintiffs' respective shares at the pre-transaction book value—$162.46 per share. At the time of the redemptions, there appeared to be no insurmountable impediments to the closing of the transaction. The board was awaiting the receipt of an IRS private opinion letter regarding the tax treatment of the deal and the completion of an audit for prior fiscal years, which had already been certified. Neither of these conditions was anticipated to be problematic or unlikely to occur within the ensuing days or weeks. But despite Shrader's assurances, plaintiffs' shares were redeemed.

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[2]Pls.' Compl. ¶ 19.

Within weeks after the redemption of plaintiffs' shares, the Company moved forward with formal steps to complete the transaction. On May 15, 2008, Booz Allen entered into a merger agreement to sell its government business to The Carlyle Group. On May 16, 2008, Booz Allen announced publicly the sale of its government business to The Carlyle Group for $2.54 billion. The Directors collectively owned more than 300,000 shares and the redemption of plaintiffs' shares added almost $6 million to the proceeds that they collectively received through the transaction.

II. ANALYSIS

This Court will dismiss a complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted only if it can be "determine[d] with 'reasonable certainty' that a plaintiff could prevail on no set of facts that can be inferred from the pleadings."[3] In ruling, the Court must accept the factual allegations in the complaint as true and make all reasonable inferences from those facts in the plaintiffs' favor.[4] Conclusory allegations, however, without supporting factual allegations, will not be accepted as true.[5] Under this standard, if plaintiffs plead any set of facts that would entitle them to relief, then the motion to dismiss must fail.

A. Plaintiffs' Claim Against the Directors for Breach of the Duty of Loyalty

Plaintiffs argue that because the Directors knew that they were awarding themselves millions of dollars when they redeemed plaintiffs' stock, while at the same time depriving plaintiffs of economic benefits, the Directors were acting in their own economic self-interest. Thus, contend plaintiffs, the Directors were acting in their own interests at the expense of the shareholders' interests, breaching their duty of loyalty to plaintiff shareholders. This argument fails for several reasons.

First, the relationship between plaintiffs and Directors is governed primarily by contract under the Stock Plan. According to Delaware law where a dispute "relate[s] to obligations 'expressly treated . . .' by contract[, it] will be governed by contract principles."[6] If the "fiduciary claims relate

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[3] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (quoting *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

[4] *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 548 (Del. Ch. 2001).

[5] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995).

[6] *Madison Realty Co. v. AG ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001)

to obligations that are expressly treated" by contract then this Court will review those claims as breach of contract claims and any fiduciary claims will be dismissed.[7] Here, the facts underlying the cause of action alleging a breach of fiduciary duty are identical to plaintiffs' other causes of action. Plaintiffs allege that the Directors caused Booz Allen to improperly redeem plaintiffs' shares. Whether the Directors possessed the right to redeem plaintiffs' shares and whether the Directors properly exercised that right is simply a matter of contract interpretation. For this reason alone, the fiduciary duty claim should be dismissed.[8]

Second, even if I were to analyze whether the Directors breached their fiduciary duty, plaintiffs' claim would still fail. The Directors do not owe separate and distinct fiduciary duties to plaintiffs. Plaintiffs' theory surmises that the Directors owed unique duties to them that would have been inconsistent with the Company and the other shareholders. The Court in *Gilbert v. El Paso* makes this point clear:

> [D]irectors may take whatever action that, in their proper exercise of business judgment, will best serve the interests of the corporation or the entire body of shareholders. That such action may adversely affect the interests of a particular shareholder subgroup, will, in certain instances, be unavoidable. Nonetheless, no wrongdoing will have occurred if the directors are able to justify the result as furthering a paramount or overriding corporate or shareholder interest.[9]

Here, although the Directors' action to redeem plaintiffs' shares negatively affected plaintiffs, the Directors' action was not contrary to the exercise of reasonable business judgment. In fact, plaintiffs chose to not even dispute whether the Directors made an informed and reasonable business decision. Moreover, had Booz Allen not exercised its option to redeem plaintiffs'

(quoting *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, C.A. No. 13911, 11-12 (Del. Ch. Nov. 2, 1995); *see also Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 828, 833 (Del. Ch. 2006) (dismissing the fiduciary duty claim against directors because "the complaint asserts contractual and fiduciary claims that arise from the same alleged facts and underlying conduct"); *Gale v. Bershard*, 1998 WL 118022, at *5 (Del. Ch. Mar. 3, 1998) (stating that "because the contract claim addresses the alleged wrongdoing by the board, any fiduciary duty claim arising out of the same conduct is superfluous").

[7] *Madison Realty*, 2001 WL 406268, at *6.

[8] *See, e.g., Madison Realty Co.*, 2001 WL 406268, at *6 (dismissing fiduciary duty claim because parties' dispute was governed by contract); *Gale v. Bershad*, 1998 WL 118022, at *1 (Del. Ch. Mar. 4, 1998); *Tubergen*, 906 A.2d 827, at 833.

[9] *Gilbert v. El Paso*, 1988 WL 124325, at *10 (Del. Ch. Nov. 21, 1988), *aff'd*, 575 A.2d 1131 (Del. 1990).

shares, that fact would have reduced the value of the shares held by all of the other shareholders. Thus, because plaintiffs have not adequately pleaded sufficient facts to suggest that they were owed any separate or distinct fiduciary duties from the other shareholders or that the redemption of their shares was not in the best interests of the Company or its shareholders, or that the Directors acted contrary to the exercise of reasonable business judgment, their claim that the Directors breached their fiduciary duty should be dismissed.

B. Plaintiffs' Claim that Booz Allen Breached the Implied Covenant of Good Faith and Fair Dealing

The core of plaintiffs' argument is that in exercising its option to redeem plaintiffs' shares, Booz Allen did not have the obligation to redeem; it had a choice and by exercising that choice, to the plaintiffs' detriment, violated the implied covenant of good faith and fair dealing. Plaintiffs insist that when a contract confers discretion upon a party, that party is required to make the decision reasonably and in good faith.[10] Thus, plaintiffs argue, Booz Allen was required to exercise its option to plaintiffs' benefit. Plaintiffs, however, mischaracterize the parties' agreement under the Stock Plan. Plaintiffs' claim against Booz Allen for breach of the implied covenant is an attempt to alter the terms of the agreement under the Stock Plan so as to limit Booz Allen's negotiated contract rights.

The doctrine of the implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[11] This Court, however, has

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[10]Plaintiffs rely on the following language in *Amirsaleh v. Board of Trade of City of New York*:

> The implied covenant is particularly important in contracts that endow one party with discretion in performance; *i.e.*, in contracts that defer a decision at the time of contracting and empower one party to make that decision later. Simply put, the implied covenant requires that the "discretion-exercising party" make that decision in good faith. *Amirsaleh v. Board of Trade of City of New York, Inc.*, 2008 WL 4182998, at *30 (Del. Ch. Sept. 11, 2008).

Plaintiffs, however, misconstrue the application of *Amirsaleh* in this case, which is factually different from *Amirsaleh* in that the Stock Plan specifically grants Booz Allen the right to exercise an option to redeem plaintiffs' shares. In addition, the Stock Plan did not grant Booz Allen unilateral discretion under the contract. Plaintiffs, for the first two years after their retirement, had the original option to force the Company to purchase their shares, an option which for the most part they chose not to exercise. Under the Stock Plan, the Company is equally entitled to exercise its bargained-for option at a time it believes most beneficial to its interests.

[11]*Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

cautioned that "imposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare."[12] Additionally, parties "cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement."[13] Here, the Stock Plan specifically grants Booz Allen the right to redeem plaintiffs' shares at the end of two years after plaintiffs' retirement. The Stock Plan states:

> If an Officer ceases to be an employee of the Company or its subsidiaries by virtue of retirement . . . the Company shall have the right, exercisable at any time following the expiration of twenty-four months from such event, to purchase all or any portion of the Class A Non-Voting Common Stock held by Officer . . . at the Repurchase Price in effect at the date of the exercise of the Company's right.[14]

The Stock Plan is a negotiated instrument entered into freely by both parties. The implied covenant is not implicated simply because Booz Allen, by exercising its option, received the fruits of the agreed to bargain under the Stock Plan. Nor is the implied covenant implicated because the exercise of the option had negative effects on plaintiffs' bottom line. Plaintiffs also received their negotiated benefit of the Stock Plan by receiving a substantial payment from the Company upon the exercise of the Company's option. Both parties understood the nature of the bargain they had negotiated and the risk that the outcome of the arrangement may benefit one party over the other. This is the nature of derivative contracts. Contractually negotiated put and call rights are intended by both parties to be exercised at the time that is most advantageous to the party invoking the option. To assume the opposite would be illogical and detrimental to the freedom of contract. Thus, I conclude that plaintiffs have failed to state a cognizable claim that Booz Allen violated the implied covenant of good faith and fair dealing.

C. *Plaintiffs' Unjust Enrichment Claim*

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the

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[12] *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006).

[13] *Dunlap*, 878 A.2d 434, at 442.

[14] Ex. A § 10(b).

fundamental principles of justice or equity and good conscience."[15] A claim for unjust enrichment arises under Delaware law when a party obtains a benefit and "it would be unconscionable to allow them to retain that benefit."[16] Delaware courts, however, have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract.[17] Here, as stated above, the relationship between the parties is governed by the Stock Plan and Booz Allen properly exercised its bargained for option under the Stock Plan to redeem plaintiffs' shares. Plaintiffs cannot now maintain an unjust enrichment claim in the face of a valid and enforceable contract.[18] Thus, I conclude that plaintiffs' unjust enrichment claim must be dismissed.

III. CONCLUSION

While I sympathize with plaintiffs' sense of betrayal for not ultimately receiving the once-in-a-lifetime benefit they hoped for, plaintiffs entered into a negotiated contract and received the benefit for which they bargained. Plaintiffs' complaint fails to plead sufficient facts to support their claims that the Directors violated their fiduciary duty of loyalty, unjustly enriched themselves, or caused the Company to violate the implied covenant of good faith and fair dealing. Thus, I grant defendants' motion, under Rule 12(b)(6), and dismiss plaintiffs' complaints for failure to state a claim upon which relief can be granted. An order has been entered consistent with this decision.

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[15] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988).

[16] *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999) (quoting *Fleer Corp.* 539 A.2d at 1062).

[17] *Res. Ventures, Inc. v. Ress. Mgmt. Int'l, Inc.*, 42 F. Supp. 2d 423, 440 (D. Del. 1999); *ID Biomedical Corp. v. TM Techs.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995) ("A party cannot seek recovery under an unjust enrichment theory if a contract is the measure of the plaintiff's rights.").

[18] *See, e.g., Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005) (stating that there can be no unjust enrichment claim where there is a governing contract).

OPPORTUNITY PARTNERS, L.P. v. TRANSTECH SERVICE PARTNERS INC.

No. 4340-VCP

Court of Chancery of the State of Delaware, New Castle

April 14, 2009

Carmella P. Keener, Esquire, of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware; and Gregory E. Keller, Esquire, of Chitwood Harley Harnes LLP, Atlanta, Georgia, of counsel, for petitioner.

Kelly A. Terribile, Esquire, of Greenberg Traurig, LLP, Wilmington, Delaware; and Giovanni Caruso, Esquire, of Loeb & Loeb LLP, New York, New York, of counsel, for respondent.

PARSONS, *Vice Chancellor*

Petitioner brought this action, pursuant to 8 *Del. C.* § 211, to compel an annual stockholder meeting of a so-called "blank check vehicle" that goes by the name TransTech Service Partners, Inc. ("TransTech" or the "Company").[1] Currently, Petitioner, Opportunity Partners L.P., is a record holder of 100 shares of Company stock and the beneficial owner of 85,400 shares held in street name. Petitioner seeks to compel the annual meeting to elect directors, according to the procedure contained in § 211 for aggrieved stockholders of a company that has not had an annual meeting or action by stockholder consent in lieu of such a meeting for more than thirteen months.

The Company contests Petitioner's standing and also urges the Court to deny the request for a stockholder meeting based on Petitioner's "questionable goals." In the event I do compel a meeting, however, the Company asks the Court to schedule the annual meeting for a date in late June or, at least, after the stockholders vote on the consummation of a pending business combination at a special meeting the directors intend to call soon. The directors preliminarily have scheduled the special meeting for May 23, 2009.

[1]Another name for a "blank check vehicle" is a "SPAC," or special purpose acquisition company. *See* http://www.transtechservicespartners.com/.

The parties submitted this matter on a paper record and presented their oral arguments on April 8, 2009. For the reasons stated in this memorandum opinion, I grant Petitioner's request and order the Company to hold an annual meeting to elect directors within sixty days of April 9, 2009, the date I orally delivered this ruling — *i.e.*, by June 8, 2009.

I. BACKGROUND

TransTech was formed as a corporation under the laws of the State of Delaware on August 16, 2006.[2] As a "blank check vehicle," TransTech did not own any operating assets when it completed its initial public offering of stock. Instead, TransTech issued shares to the public nearly two years ago on the basis that it would use the net proceeds of the offering to engage in a merger, asset acquisition, or other business combination with one or more operating companies (a "qualified business combination").[3] In keeping with the corporation's special purpose, the Company's certificate of incorporation contains specialized rules-of-the-game, including a conditionally short lifespan and a rather intricate system for voting on business combinations. No such business combination has yet taken place, but one currently is proposed.

The Company's Charter calls for the net proceeds from the IPO to be held in trust for benefit of the stockholders, pending a qualified business combination or dissolution.[4] Per the Charter, the nonoccurrence of a qualified business combination within a certain period of time leads to prompt dissolution and an orderly distribution of the trust's corpus back to the stockholders. Specifically, the Certificate of Incorporation provides:

> In the event the Corporation does not consummate a Business Combination by the later of (i) 18 months after the consummation of the IPO or (ii) 24 months after the consummation of the IPO, in the event that either a letter of intent, an agreement in principle or a definitive agreement to complete a Business Combination was executed but was not consummated within such 18-month period (such later date being referred to as the

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[2]*See* DX 13. Although TransTech filed its Preliminary Proxy Statement ("Preliminary Proxy") with the SEC on April 6, 2009, it waited until three hours before the trial on April 8, 2009 to provide a copy to the Court. The first mention of this lawsuit in the 117-page Preliminary Proxy appears on page 98.

[3]TransTech filed its Form S-1 for the IPO with the SEC on May 16, 2007. *See* DX 2.

[4]Third Amended and Restated Certificate of Incorporation of TransTech Services Partners, Inc. (the "Certificate" or the "Charter"), contained in DX 3, Art. FIFTH(A).

> "Termination Date"), the directors and officers of the Corporation shall take all such action as necessary to dissolve the Corporation and liquidate the Trust Fund to holders of IPO Shares as soon as reasonably practicable, and after approval of the Corporation's stockholders and subject to the requirements of the [Delaware General Corporation Law ("DGCL")], including adoption of a resolution by the Board prior to such Termination Date . . . .[5]

By the Company's calculation, the Termination Date is May 23, 2009, because the time for completing a qualified business combination was extended from eighteen- to twenty-four months from the IPO. There is no dispute that within the first eighteen months after the IPO the Company signed a letter of intent with Active Response Group ("ARG"). According to the Company, the execution of the ARG letter of intent enabled TransTech to extend the period to consummate a business combination to twenty-four months.

On March 25, 2009, within the eighteen- to twenty-four-month window, the Company announced the ARG deal had fallen through. On the same day, though, TransTech also announced that it had entered into a binding letter of commitment with an Indian steel company called Global Hi-Tech Industries Limited ("GHIL").[6] Nevertheless, the Company has not yet consummated the GHIL deal; rather, it has preliminarily scheduled a special meeting of stockholders to vote on the proposed business combination for May 23, 2009 or earlier. The Company does not propose to elect directors at this special meeting, but does intend to ask the stockholders to vote on several other matters not strictly related to a vote on the consummation of the GHIL deal.[7]

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[5]*See id.* Art. FIFTH. Amending the Certificate's THIRD and FIFTH articles requires a vote of 95% of the stockholders. *See id.* Arts. THIRD, FIFTH.

[6]Petitioner maintains that by entering into the GHIL deal TransTech violated the Charter, because the six-month extension is valid only if the business combination that was signed up in the first eighteen months is the same business combination that is sought to be consummated in the eighteen- to twenty-four-month window. The Company counters that the more reasonable reading of the Charter is that when *any* letter of intent is signed and effective at the end of the first eighteen months, the Termination Date is extended, regardless of whether the business combination the Company ultimately seeks to consummate during the eighteen- to twenty-four-month window stems from that same letter of intent. Based on a cursory review of the relevant provisions of the Charter, both sides' arguments appear to be colorable. As the parties acknowledged at trial, however, the issue of whether the proposed business combination violates the Charter is outside the scope of this § 211 action.

[7]The Preliminary Proxy addresses six proposals up for stockholder vote: (i) a proposal to

Most of the details of the GHIL deal are not pertinent to this § 211 action, but the mechanism for voting on the transaction is relevant. The Charter provides:

> Prior to the consummation of any Business Combination, the Corporation shall submit such Business Combination to its stockholders for approval regardless of whether the Business Combination is of a type which normally would require such stockholder approval under the [DGCL]. In the event the holders of a majority of the IPO Shares (defined below) cast their respective votes at the meeting to approve the Business Combination, the Corporation shall be authorized to consummate the Business Transaction; provided that the Corporation shall not consummate such Business Combination if holders of 20% or more in interest of the IPO Shares exercise their conversion rights described in paragraph (C) . . . .[8]

Article FIFTH(C) of the Charter describes the conversion rights as follows:

> In the event that a Business Combination is approved in accordance with the above paragraph (B) and is consummated by the Corporation, any stockholder of the Corporation holding shares of Common Stock issued in the IPO ("*IPO Shares*") who voted against such Business Combination may, contemporaneously with such vote, demand that the Corporation convert such Stockholder's IPO Shares into cash. If so demanded, the Corporation shall, promptly after consummation of the Business Combination, convert such shares into cash at a per share conversion price equal to the quotient determined by dividing (1) the amount of the Trust Fund [inclusive of interest but exclusive of taxes and other fees specified in the Registration Statement] calculated as of two business days prior to the consummation of the Business Combination, by (ii) the total number of IPO Shares.

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acquire a controlling stake in GHIL; (ii) a proposal to amend the certificate of incorporation to remove certain provisions applicable to TransTech's status as a "blank check vehicle"; (iii) a proposal to change the name of the Company upon consummation of the GHIL deal; (iv) a proposal to continue the Company's existence if the GHIL deal is not approved; (v) a proposal to liquidate in the event the GHIL deal or the proposal to continue TransTech's existence is not approved; and (vi) a proposal to adjourn the special meeting to a later date to permit further solicitation of proxies in the event any other proposal, besides the name change, is not approved. *See* DX 13 at 1.

[8]Certificate Art. FIFTH(B).

These two charter provisions create multiple contingencies. If either the holders of 20% or more of the IPO Shares vote against the business combination and exercise their conversion rights, or less than 50% of the IPO Shares vote for the business combination, the business combination will not be consummated. Further, the shareholders who elect to exercise their conversion rights will not be cashed-out pursuant to the conversion right, unless holders of less than 20% of the IPO Shares demand their conversion rights and the deal is consummated.

Petitioner also claims that the directors of TransTech are conflicted in two relevant ways. First, certain directors' incentives in consummating a business combination diverge from the stockholders' interests, because these directors' interests in TransTech stock and warrants will be rendered worthless in the event a business combination is not consummated. None of these insiders will have a right to receive any distribution from the funds held in the trust account upon dissolution and liquidation. Thus, according to Petitioner, these directors have a powerful incentive to consummate a transaction before the Termination Date.[9] Second, if no business combination is consummated by the Termination Date, the directors' incentives in winding up the Company and liquidating are also misaligned with stock-holder interests, because two directors and officers "have agreed to personally indemnify the company for certain expenses paid out of the trust account to the extent there are insufficient funds in the account to pay shareholders the $7.88."[10] Petitioner asserts, therefore, that the directors have an incentive to delay the dissolution and liquidation, because interest earned on the trust funds can be used to pay down their indemnity obligations or to pay for other expenses the Company incurs.[11]

II. ANALYSIS

This Court jealously protects the right of a stockholder to seek an order compelling an annual stockholder meeting, provided two conditions are met. Section 211(c) provides, in relevant part:

> If there be a failure to hold the annual meeting or to take action by written consent to elect directors in lieu of an annual meeting . . . for a period of 13 months after the latest to occur of the

[9]Pet'r's Reply Pre-Trial Br. in Supp. of Pet. to Compel Annual Meeting of S'holders at 7.
[10]Pet'r's Op. Pre-Trial Br. in Supp. of Pet. to Compel Annual Meeting of S'holders at 4.
[11]*See id.* at 4, 10.

> organization of the corporation, its last annual meeting or the last action by written consent to elect directors in lieu of an annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director.

Thus, a prima facie case is made out pursuant to 8 *Del. C.* § 211 when (1) the petitioner is a stockholder, and (2) no meeting has been held for over thirteen months.

According to § 211, "the Court of Chancery *may* summarily order a meeting to be held."[12] Although that section does not mandate such an order, the Delaware Supreme Court has recognized that a stockholder's right to have a meeting to elect directors is "virtually absolute."[13] Moreover, the Supreme Court has held that "[g]iven the importance of an annual meeting of stockholders in the administration of corporate affairs, 'prompt' relief is essential under § 211."[14] Nonetheless, a stockholder's prima facie case can be defeated by an adequate affirmative defense.[15]

TransTech's counsel admitted at trial that no meeting or action by stockholder consent had occurred in over thirteen months, so the second prong of the prima facie case has been satisfied. There is a dispute, however, about whether Petitioner is a "stockholder," and thus has standing to demand an annual meeting under § 211. In addition, assuming that Petitioner is a stockholder, TransTech argues that Petitioner's "questionable goals" are such that this case qualifies as one of the "rare instance[s] in which relief should be denied to a plaintiff establishing a prima facie case under Section 211(c)."[16] Moreover, the Company argues that if a meeting for the election of directors is compelled, it should be held no earlier than June 30, 2009, rather than on May 23, 2009, to avoid logistical problems and interference with stockholders' ability to vote on the proposed business com-bination at the anticipated special meeting. I address these arguments in turn.

A. Standing

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[12] 8 *Del. C.* § 211(c) (emphasis added).

[13] *Saxon Indus., Inc. v. NKFW Partners*, 488 A.2d 1298, 1301 (Del. 1985) (citations omitted).

[14] *Coaxial Commc'ns, Inc. v. CAN Fin. Corp.*, 367 A.2d 994, 998 (Del. 1976) (citations omitted).

[15] *Saxon*, 488 A.2d at 1301.

[16] *See Speiser v. Baker*, 525 A.2d 1001, 1006 (Del. Ch. 1987).

On February 6, 2009, Petitioner filed its petition to compel an annual meeting. The Company argues that "Section 211(c) required Petitioner to be a 'stockholder' of the Company at the time it filed its petition."[17] The Company claims that Petitioner admits that it did not become a "stockholder" until March 10, 2009, and so lacked standing to pursue this action.[18]

In response, Petitioner submitted a trading statement which indicates it held 85,500 shares as of January 30, 2009.[19] Like most shares issued by the Company, these shares were held in street name. Additionally, shortly before it filed its petition on February 6, 2009, Petitioner directed its broker to request that TransTech's transfer agent issue a certificate for 100 shares registered on the books of the corporation. According to Petitioner, the registration of such shares typically takes about three days. For reasons apparently unknown to either side, however, it took four separate instructions by the broker and more than a month, until March 10, for the transfer agent to issue a share certificate in this case.[20]

The Company and Petitioner dispute the proper interpretation of the word "stockholder" in § 211. The Company maintains that "stockholder" means stockholder of record; Petitioner contends that it also should be read to include a beneficial owner. Neither side cited any case under § 211 in support of its interpretation of "stockholder." The Company points to 8 *Del. C.* § 220(a)(2), which was revised in 2003 to define "stockholder" as both "a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock . . . by a nominee."[21] According to TransTech, the absence of any similar revision to § 211 reflects a legislative intent that the word "stockholder" in § 211 refer only to stockholders of record.[22] Petitioner disputes this reasoning on several grounds.

Although this issue may raise intriguing questions of statutory interpretation, I need not resolve them here. Regardless of who was to blame for the failure to obtain the certificate before Petitioner filed its petition or whether standing under § 211 is limited to record holders, there is no dispute that Petitioner is now a stockholder of record of TransTech. At trial, I granted Petitioner leave to file a supplemental pleading averring that it is a stock-

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[17]Resp't's Answering Br. at 10.

[18]*Id.*

[19]PX 1.

[20]*See* DX 1.

[21]The amendment to § 220(a)(2) appears in Section 21 of 74 Del. Laws, c. 84, which provides: "This act shall become effective on August 1, 2003."

[22]Prior to the 2003 revision, 8 *Del. C.* § 220(a) stated: "As used in this section, 'stockholder' means a stockholder of record of stock in a stock corporation and also a member of a nonstock corporation as reflected on the records of the nonstock corporation."

holder of record.[23] Petitioner filed such a pleading on April 9, 2009, thereby mooting the Company's standing defense.[24]

B. Questionable Goals

The only other technical precondition for obtaining an Order compelling a meeting of stockholders is that no meeting have occurred for more than thirteen months after the later of the organization of the corporation, the last shareholder meeting, or action by shareholder consent in lieu of such a meeting. The Company conceded at trial that there has been no such meeting or action by consent for over thirteen months. Nevertheless, the Company maintains that no annual meeting should take place before the vote on the GHIL deal, which is slated for a vote on or before May 23, 2009. Moreover, according to the Company, no annual meeting should be scheduled before late June of this year.

Having considered TransTech's arguments for delaying the annual meeting until the end of June, I find its reasons insufficient to overcome the strong presumption articulated by the Supreme Court for a prompt annual meeting. In reaching this conclusion, I note that the Company and its directors bear the responsibility for the significant time constraints under which they are working. In addition, I find that Petitioner acted reasonably promptly in requesting an annual meeting, having first done so in January 2009.

As to the Company's questioning of Petitioner's goals or objectives, the only case TransTech cited that denied a stockholder the right to an annual meeting, *Clabault v. Carribean Select, Inc.*,[25] is plainly distinguishable. There, the petitioner sought under § 211 to revive a bankrupt company with a voided charter that never properly had been dissolved under Delaware law, so that it could engage in a reverse merger with an operating company and thereby "circumvent important registration and disclosure elements of the federal securities laws."[26] TransTech has not shown that Petitioner here is pursuing a goal that offends public policy. To the contrary, it appears Petitioner disagrees with the actions of the current directors of the Company and seeks their ouster. That purpose falls comfortably within the scope of § 211.

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[23]TransTech did not articulate any way in which it would be materially prejudiced by the Court's granting Petitioner leave to supplement its petition as indicated.

[24]Supplement to Pet. to Compel Annual Meeting of S'holders, filed Apr. 9, 2009.

[25]805 A.2d 913 (Del. Ch. 2002), *aff'd*, 846 A.2d 237 (Del. 2003).

[26]*Id.* at 918.

Absent persuasive equitable considerations to the contrary, Petitioner appears to be entitled to a prompt shareholder meeting, because it has been more than thirteen months since the Company held any kind of stockholder vote. The only question is when to have the meeting relative to the vote on the proposed GHIL transaction: before, contemporaneous with, or after the GHIL vote? Petitioner seeks an annual meeting before or, at least, contemporaneous with the May 23 special meeting at which the stockholders will vote on the GHIL transaction. Measured from the date of my April 9 ruling, that would mean within a period of 44 days or less. The Company wants the annual meeting to be delayed to the end of June or for a period of 82 days. The primary reason is to allow the vote on the proposed business combination to proceed entirely independently of, and separated in time from, the annual meeting to elect directors.

The Company cites a number of cases where this Court has compelled a meeting for somewhere between sixty and ninety days from the date of its order. In response, Petitioner relies on a case that provided for a shorter time frame of 42 days. Specifically, in *Meredith v. Security America Corp.*,[27] this court ordered an annual meeting to occur within forty-two days of the decision, rejecting the company's request to hold the annual meeting after sixty-three days. The circumstances in *Meredith*, however, were materially different from this case in that all parties agreed the company was already "dead for all practical purposes."[28] Here on the other hand, there is a possibility that the shareholders will decide that the GHIL transaction is in their best interests, thus avoiding the demise of TransTech through dissolution and liquidation. Further, the *Meredith* court found that "rapidly developing events [placed the stockholder investments] in grave jeopardy."[29] In this case, Petitioner failed to present any evidence at trial that "grave jeopardy" will result to its or the other stockholders' funds, which are held in trust, if the election of directors occurs shortly after the Termination Date.

Next, the Company maintains that from a practical standpoint, it would be too difficult to prepare the proxy materials necessary to have an annual meeting before May 23, 2009. Based on the complexity of the issues expected to be presented to the stockholders at the special meeting regarding the GHIL transaction, TransTech's argument has some force. No evidence produced by either side, however, convinces me that the necessary proxy materials could not be prepared for an annual meeting within sixty days. Although in some circumstances compliance with SEC rules might be

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[27] 1981 WL 7634 (Del. Ch. Nov. 18, 1981).
[28] *Id.* at *1.
[29] *Id.* at *2.

relevant in setting the date of an annual meeting, I find TransTech's argument unpersuasive for a number of reasons. First, the Company signed the GHIL letter of intent on March 25, 2009 and yet the Company was able to file its Preliminary Proxy on April 6, 2009, less than two weeks later. Similarly, the Company has been on notice since at least early February that Petitioner seeks an annual meeting under § 211. Accordingly, the fact that a court might compel such a meeting on a relatively expedited basis hardly can come as a surprise.

Further, the Company itself is responsible for the time constraints it currently faces regarding the special meeting. TransTech did not sign the letter of intent with GHIL until March 25, 2009. Additionally, the Company elected for its own tactical reasons to include in its proxy materials for the special meeting five additional proposals beyond a bare vote on the acquisition of a controlling interest in GHIL.[30] Consequently, the Court is not overly sympathetic with the Company's argument in its letter dated April 9, 2009 that:

> The addition of alternative director slates, an unusual practice likely to receive considerable SEC scrutiny, to the proxy statement for the Special Meeting quite simply threatens to derail the Special Meeting and therefore the consummation of a business combination for which respondent was created.[31]

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[30]Indeed, as explained in the Preliminary Proxy, the voting scheme for the six proposals at the special meeting entails fairly complex contingent and conditional outcomes:

> It is important for you to note that in the event the Acquisition Proposal (Proposal 1) does not receive the necessary vote to approve such proposal, our board of directors will abandon the Name Change Proposal (Proposal 3) notwithstanding authorization thereof by TransTech's stockholders. In addition our Board of Directors will abandon the Amendment Proposal (Proposal 2) only if the Acquisition Proposal (Proposal 1) and the Proposal to Continue Existence (Pro-posal 4) are both not approved. You should further note that if either [sic] the Acquisition Proposal (Proposal 1) is approved, our board of directors will abandon the Proposal to Liquidate (Proposal 5) notwithstanding authorization thereof by the stockholders of the Company in accordance with Delaware Law.

DX 13 at 19. Similarly, the proposal to continue corporate existence (Proposal 4) seems to be dependent upon the acquisition proposal (Proposal 1) not being approved, because then "in case the Acquisition Proposal is not approved, TransTech can continue to operate as a shell company." *Id.* at 1.

[31]As previously indicated, the Court need not decide for purposes of this § 211 action whether the GHIL combination represents the type of business combination for which this business was created. Petitioner, for one, disputes that proposition. Indeed, the Preliminary Proxy acknowledges that stockholders might be able to seek rescission because the steel company involved in the GHIL transaction is not one of the types of companies contemplated by the IPO Prospectus as a

There appears to be a real risk, however, that Petitioner could cause delays in the proxy approval process that might derail the GHIL transaction without a stockholder vote. Such activity might impede the maximization of shareholder value and would put the interests of Petitioner ahead of those of the Company and its stakeholders. Conversely, unduly delaying the annual meeting until the end of June to suit TransTech's preference would create comparable risks in the other direction. Balancing these risks in the context of the purpose of § 211 leads me to conclude a separate annual meeting on an intermediate date is appropriate in these circumstances.

Thus, I will order the annual meeting to occur within sixty days from my oral ruling on April 9, 2009, *i.e.*, by June 8, 2009. This sixty-day time period for the annual meeting is consistent with timeframes this Court previously has imposed in terms of ordering an annual meeting.[32]

In my oral ruling, I also ordered the record date for the annual meeting to be set for a date earlier than the special meeting. I imposed this additional requirement to keep the playing field level. As described in note 29, *supra*, the voting at the special meeting will be complex and fairly contingent. Likewise, Petitioner expects the proxy statement for its slate of directors to address many of the same contingencies and conditions. Having a record date for the annual meeting on or after the date of the special meeting would compound those complexities unnecessarily and might unfairly favor the Company and the incumbent directors.

III. CONCLUSION

For the reasons stated, I grant Petitioner's request for an order compelling TransTech to hold an annual meeting and direct that the meeting be held on or before June 8, 2009. In addition, I order TransTech to set the record date for the annual meeting for a date prior to the date of the anticipated special meeting or May 23, 2009, whichever is earlier.

IT IS SO ORDERED.

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qualified business combination. *See* DX 13 at 3-4. Nevertheless, I express no opinion on that issue.

[32]*See, e.g., Frank v. Sunstates Corp.*, 1998 WL 326645, at *1 (Del. Ch. June 9, 1998) (ordering a meeting for the election of directors to be held "within 60 days" of the date of the Court's opinion); *Shay v. Morlan Int'l, Inc.*, 1983 WL 21108, at *4 (Del. Ch. July 29, 1983) (ordering a meeting for the election of directors "no later than seventy days from the date of th[e] opinion"); *J.P. Griffin Holding Corp. v. Mediatrics, Inc.*, 1973 WL 651, at *3 (Del. Ch. Feb. 14, 1973) (ordering a meeting for the election of directors "within the next sixty days of the Court's order").

RYAN v. GIFFORD

No. 2213-CC

Court of Chancery of the State of Delaware, New Castle

January 2, 2009

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Kevin G. Abrams, Esquire, and Nathan A. Cook, Esquire, of Abrams & Laster LLP, Wilmington, Delaware; and Steven M. Bauer, Esquire, Robert E. Sims, Esquire, David M. Friedman, Esquire, and Heather Thompson, Esquire, of Latham & Watkins LLP, San Francisco, California, of counsel, for Carl W. Jasper.

"J" Jackson Shrum, Esquire, of Archer & Greiner, P.C., Wilmington, Delaware; and Michael J. Ioannou, Esquire, and Lita M. Verrier, Esquire, of Ropers, Majeski, Kohn & Bentley, San Jose, California, of counsel, for nominal defendant Maxim Integrated Products, Inc.

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Christopher M. Wood, Esquire, of Coughlin Stoia Geller Rudman & Robbins LLP, San Francisco, California, of counsel; and Eric L. Zagar, Esquire, Robin Winchester, Esquire, and James H. Miller, Esquire, of Schiffrin Barroway Topaz & KessleR, LLP, Radnor, Pennsylvania, of counsel, for objector Elias J. Corey.

CHANDLER, *Chancellor*

This case, precipitated by a March 18, 2006 article in *The Wall Street Journal*, is a derivative action alleging that defendants breached their fiduciary duties by granting backdated stock options for the purchase of millions of shares of common stock. On September 16, 2008, after years of litigation and several opinions by this Court, the parties entered into a stipulation of settlement (the "Settlement"), which is alleged to be the second highest recovery among all of the numerous backdated options derivative actions that have been brought and settled throughout the country.[1] The parties now present the Settlement for court approval pursuant to Court of Chancery Rule 23.1. For the reasons stated below, I approve the Settlement.

I. BACKGROUND

A. The Parties and the Procedural History

Maxim Integrated Products, Inc. ("Maxim" or the "Company"), a publicly held Delaware corporation, is a technology leader in design, development, and manufacture of linear and mixed-signal integrated circuits used in microprocessor-based electronic equipment.

Plaintiffs Walter E. Ryan Jr., a Maxim shareholder since April 11, 2001, and Donna Conrad, a Maxim shareholder since October 29, 1997, (collectively "plaintiffs" or "Ryan plaintiffs") brought this derivative action on behalf of Maxim, alleging that certain of Maxim's officers and directors had granted backdated stock options for the purchase of millions of shares of the Company's common stock.[2] Plaintiffs charged that in doing so, defendants breached their fiduciary duties to Maxim and were unjustly enriched.

On August 2, 2006, defendants and Maxim moved to dismiss the action or to stay it in deference to derivative actions filed in state and federal

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[1]Pls.' Br. in Support of Fees at 2.

[2]The defendants named in this action are John F. Gifford, Carl W. Jasper, Tunc Doluca, Michael J. Byrd, James R. Bergman, B. Kipling Hagopian, A.R. Frank Wazzan, Eric P. Karros, and M.D. Sampels.