IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSAN M. BLAUSTEIN; HILDA K. BLAUSTEIN TRUST, F/B/O SUSAN M BLAUSTEIN, U/A DATED 8/2/72, by and through its Trustee SUSAN M. BLAUSTEIN; MORTON K. BLAUSTEIN TRUST U/W ITEM XVII-A F/B/O SUSAN M. BLAUSTEIN, by and through its Trustee SUSAN M. BLAUSTEIN; MORTON K. BLAUSTEIN TRUST U/W XVII-B F/B/O SUSAN M. BLAUSTEIN, by and through its Trustee SUSAN M. BLAUSTEIN; MORTON K. BLAUSTEIN TRUST U/W ITEM XVII-C F/B/O SUSAN M. BLAUSTEIN, by and through its Trustee SUSAN M. BLAUSTEIN; and MORTON K. BLAUSTEIN TRUST U/W ITEM XVIII-C F/B/O SUSAN M. BLAUSTEIN, by and through its Trustees SUSAN M. BLAUSTEIN,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 6685-VCN**
LORD BALTIMORE CAPITAL CORPORATION and LOUIS B. THALHEIMER,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: January 17, 2013
Date Submitted: April 30, 2013

Peter J. Walsh, Jr., Esquire and Matthew D. Stachel, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and Nicholas T. Christakos, Esquire of Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Plaintiffs.

S. Mark Hurd, Esquire and Adam M. Kress, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendant Lord Baltimore Capital Corporation.

John L. Reed, Esquire of DLA Piper LLP (US), Wilmington, Delaware, and Shale D. Stiller, Esquire and James D. Mathias, Esquire of DLA Piper LLP (US), Baltimore, Maryland, Attorneys for Defendant Louis B. Thalheimer.

NOBLE, Vice Chancellor

Plaintiff Susan M. Blaustein ("Susan"), individually and on behalf of the various trusts that she directs, has asserted contract and fiduciary duty claims against Defendant Lord Baltimore Capital Corporation ("Lord Baltimore" or the "Company"), and Defendant Louis B. Thalheimer ("Louis"), arising from her investment in Lord Baltimore and her repeated attempts to liquidate that investment. In essence, she argues that the Defendants are unreasonably denying her an exit opportunity from her investment in Lord Baltimore. As a minority investor in a closely-held Delaware corporation, Susan's predicament—for better or worse—is largely tied to the terms of the shareholders' agreement which she entered into on January 1, 1999, with other Lord Baltimore stockholders (the "Shareholders' Agreement").

The Court granted in part and denied in part the Defendants' motion to dismiss.[1] The Court dismissed Susan's promissory estoppel claim, her co-venturer fiduciary duty claim, and her implied covenant of good faith and fair dealing claim to the extent that it purported to require Lord Baltimore to "repurchase Susan's stock at a specific price."[2] However, the Court was concerned that Louis might have been acting as a "roadblock[] to the Board's consideration of" Susan's repurchase proposals, none of which, she alleged, had been presented to, discussed

[1] *Blaustein v. Lord Baltimore Capital Corp.*, 2012 WL 2126111 (Del. Ch. May 31, 2012) (the "May Opinion").
[2] *Id.* at *5.

by, or considered by the Lord Baltimore board.[3] Because this alleged conduct might have "effectively denie[d] Susan [the] exit strategy set forth in the agreement," the Court held that "Susan has adequately alleged that there might be an implied covenant in the Shareholders' Agreement requiring repurchase proposals to be presented to the Board, and that [the] implied covenant has been breached. To that extent, [Susan's implied covenant claim] may not be dismissed."[4]

Lord Baltimore and Louis have now moved for summary judgment on what they contend is her sole surviving claim. Susan has other ideas. In addition to opposing the Defendants' motion, Susan seeks leave to (1) amend her Verified Complaint (the "Complaint") to restate and recast her surviving claims, and (2) supplement her Complaint with an additional cause of action arising from a Lord Baltimore board meeting held on July 5, 2012, six weeks after the May Opinion, during which the Lord Baltimore board (the "Board") considered, and a majority of directors rejected, Susan's latest repurchase proposals (the "July Board meeting").[5] Susan's proposed supplemental complaint asserts breach of fiduciary duty claims against the directors who voted to reject her proposal, namely, Elizabeth Thalheimer Wachs ("Elizabeth"), William Coleman ("Coleman"),

[3] *Id*. at *5.
[4] *Id*. at *6.
[5] Proposed Pls.' Am. & Supplemental Verified Compl. ("Suppl. Compl.").

Donald Kilpatrick ("Kilpatrick"), and Louis (collectively, the "Director Defendants"), and Marjorie Thalheimer Coleman ("Marjorie"), a stockholder whom Susan alleges is part of a control group that also includes Louis and Elizabeth (together the Director Defendants and Marjorie are referred to as the "Individual Defendants"). The Defendants have also filed a motion for a protective order, which Susan contests.

This opinion will proceed as follows. First, the Court will address Lord Baltimore and Louis's motion for summary judgment on the claim or claims that survived their motion to dismiss. Second, the Court will consider Susan's motion to supplement her Complaint and add Elizabeth, Marjorie, Coleman, and Kilpatrick as Defendants. Because the Court grants Louis and Lord Baltimore's motion for summary judgment, and because the Court denies Susan's motion to supplement her Complaint, the Defendants' motion for a protective order is moot. Therefore, the Court need not address that motion.

I. BACKGROUND[6]

A. *The Parties*

Susan controls approximately 17.5% of the voting stock in Lord Baltimore, a Delaware corporation. Her sister, Jeanne Blaustein ("Jeanne"), also has a 17.5%

[6] Except where noted, the background facts are drawn from the well-pleaded allegations of the Complaint. In contesting the Defendants' motion for summary judgment, Susan has relied upon the Complaint's verified allegations, as well as some from her proposed supplemental complaint. The Defendants have bolstered the record by affidavit. There are no disputes of fact that matter for present purposes.

interest in Lord Baltimore, which owns, develops, and manages commercial real estate properties and has substantial holdings in securities and investment funds. The Board is comprised of Louis, Elizabeth, Coleman, Jere McGaffey ("McGaffey"), Henry Bubel ("Bubel"), Martin Krall ("Krall"), and Kilpatrick.[7] Susan and Jeanne, each have a right to appoint a board designee under the terms of the Shareholders' Agreement. McGaffey is Susan's appointee to the Board and Bubel is Jeanne's designee. Susan and Jeanne also have the right to jointly appoint one "independent" director to the Board; they have selected Krall.

Kilpatrick was appointed to the Board by Louis, Elizabeth, and Marjorie (the "Thalheimer Shareholders"), who together also have the right to appoint one "independent" director to the Board. The Thalheimer Shareholders own or control approximately 65% of Lord Baltimore's voting stock. The remaining directors are appointed individually by Louis, Marjorie (the wife of Coleman), and Elizabeth, each of whom has a right to appoint one director.

B. *Background Facts*

In the early twentieth century, Louis Blaustein, along with his sons-in-law, Alvin Thalheimer, and Henry Rosenberg, Sr., were involved in the development of the American Oil Company, which later became known as Amoco. As their fortunes grew, the Blaustein, Thalheimer, and Rosenberg families formed Atapco

[7] First names are sometimes used for convenience and for consistency with the May Opinion. No disrespect is intended.

in the early 1930's to expand and diversify their business activities. Over time Atapco's businesses included real estate, office products, security communications, electronics, and the tanker business. In or around 1998, however, the Blaustein, Thalheimer, and Rosenberg families decided to split Atapco into separate companies so that they could each pursue their own business objectives going forward. The Thalheimer family group, which included Louis, Elizabeth, and Marjorie, decided to transfer its share of Atapco's assets to American Trading Real Estate Company, Inc., an existing corporation, and then change its name to Lord Baltimore and become an "S" corporation under Section 1362 of the Internal Revenue Code.

Susan and Jeanne joined with the Thalheimer group instead of investing their wealth with other members of the Blaustein family. According to Susan, she was enticed by Louis's plan, which he represented would have "significant regular and substantial dividend distributions." Louis also allegedly represented that after a ten-year waiting period, Lord Baltimore would purchase Susan's and Jeanne's shares at the full *pro rata* value of their ownership interests. This alleged commitment, however, was never memorialized in the Shareholders' Agreement because Louis claimed that doing so would jeopardize the "S" corporation tax status of Lord Baltimore as well as the "Section 355 tax-free treatment of the

transactions that had resulted in the division of Atapco's assets among its shareholders and the formation of Lord Baltimore."[8]

The Shareholders' Agreement between and among Louis, Marjorie, Elizabeth, Susan, and Jeanne and their respective trusts was executed on January 1, 1999. In addition to restricting the transfer of shares to certain limited circumstances, it imposes a substantial penalty if a shareholder either (1) ceases to be an eligible shareholder (as defined by the agreement) or (2) attempts to transfer shares in violation of the agreement. The penalty is a forced repurchase of stock by Lord Baltimore at roughly a 50% discount plus the obligation to cover any adverse tax consequences that might result.

Although Susan's ability to transfer her shares in Lord Baltimore is constrained, Section 7(d) of the Shareholders' Agreement explicitly addresses stock repurchases. It provides:

> Notwithstanding any other provision of this Agreement, the Company may repurchase Shares upon terms and conditions agreeable to the Company and the Shareholder who owns the Shares to be repurchased provided that the repurchase is approved either (i) by a majority, being at least four, of all of the Directors of the Company then authorized (regardless of the number attending the meeting of the Board of Directors) at a duly called meeting of the Board of Directors or (ii) in writing by Shareholders who, in the aggregate, own of record or beneficially 70% or more of all Shares then issued and outstanding.[9]

[8] Compl. ¶ 23.
[9] Transmittal Aff. of Adam M. Kress ("Kress Aff.") Ex. 9 (Shareholders' Agreement) § 7(d).

Shortly after the execution of the Shareholders' Agreement, Susan became aware that Lord Baltimore, under Louis's direction, began making substantial investments in illiquid, long-term securities, leading her to wonder if Lord Baltimore would have difficulty paying out substantial dividends, as she expected, and whether it would be able to fund a buyout of Susan's interest at the end of the ten-year waiting period, as she was allegedly promised. In the fall of 2001, Susan and Jeanne began talking with Louis about securing an early buyout from Lord Baltimore. At first, negotiations went nowhere because the sale or distribution of built-in-gain assets occurring within the ten-year waiting period would have had substantial corporate-level tax liability that would trickle through to each stockholder. Several years later, in October 2005, Susan proposed transferring Lord Baltimore assets and securities to a newly created Lord Baltimore subsidiary, which in theory would enable Susan (and Jeanne) to redeem their shares without incurring significant tax consequences. Her proposed transaction was like the Atapco transaction, which avoided taxation on the corporate or shareholder level, and would have permitted Susan, as well as the other shareholders, to obtain the full value of their holdings. According to Susan, Louis rejected this proposal because he did not want to go through the lengthy process necessary to obtain and effectuate another Section 355 transaction.

As Susan continued to press other alternatives to liquidate her investment in Lord Baltimore, Louis continued to resist with additional excuses or limitations. For example, he stated that any redemption could not exceed the discounted per share price valuations that the Thalheimer Shareholders were claiming for federal gift and estate tax purposes for gifts of Lord Baltimore stock to younger family members. If those stock valuation discounts were undermined, Louis was worried that the Internal Revenue Service ("IRS") might disallow them.

In the spring of 2006, after a new round of discussions, Louis, acting on behalf of Lord Baltimore, offered to redeem Susan's holdings at a discount of approximately fifty-two percent of her *pro rata* share of the book value of Lord Baltimore's net assets. The discount was allegedly based on certain "investment dislocation" costs that Lord Baltimore would incur in raising the funds for the buyout and the tax burdens that would ultimately occur as a result of the redemption. Notwithstanding Susan's objection to the investment dislocation adjustments and her offer to indemnify the other shareholders for certain tax liabilities that might result, Louis continued to object to a higher priced redemption. Frustrated, Susan gave up hope that she would obtain redemption of her shares before the ten-year waiting period expired.

To her chagrin, the expiration of the ten-year waiting period on January 1, 2009, did not help her cause. Louis persisted in his requirement that any stock redemption be priced at roughly a fifty-two percent discount, notwithstanding his alleged promise that her shares would be redeemed at full value at the expiration of the ten-year waiting period. Susan contends that this requirement is an "unconscionable penalty" and *prima facie* evidence of bad faith.

The Complaint also alleges that Susan's proposals were never presented to, or discussed by, the Board. Susan's supplemental complaint attempts to restate (or perhaps recast) that claim by asserting that Louis and Lord Baltimore failed and refused to "present to the full Board for *formal consideration* any of Susan's stock repurchase proposals . . . at any time prior to the July 5 Board meeting."[10] Defendants have submitted minutes of various board meetings which show unequivocally that some of Susan's proposals—although not formally voted on—were presented to, and discussed by, the Board.

For example, the minutes of the Board's November 11, 2005 and January 19, 2006 meetings show that Louis circulated to the Board correspondence between him and Susan's counsel regarding her "split-off" transaction proposal. The minutes relate that Louis reviewed Susan's proposal and his response with the

[10] Supp. Compl. ¶ 73 (emphasis added).

Board and that the directors engaged in a thorough discussion of the proposal "with all Board members participating in the discussion."[11]

Susan's proposals and her discussions with Louis regarding the redemption of her common stock after the ten-year waiting period were also presented to, and discussed by, the entire Board. This fact is confirmed by the minutes of numerous Lord Baltimore board meetings.[12] As one example, the minutes of the Board's January 20, 2011 meeting show that Louis presented to the Board a report on the "status of discussions regarding the potential redemption of the Corporation's Series D [*i.e.*, Susan's] common shares."[13] That report included a summary of Louis's negotiations with Susan dating as far back as March 2010 as well as the reasons why management did not believe that a transaction on Susan's terms was in the best interest of Lord Baltimore. It further noted that Susan's proposals were inconsistent with the Company's business plan, and that Lord Baltimore did not intend to pursue further a redemption transaction with Susan.[14]

On July 5, 2012, the Board also met to discuss and vote on Susan's latest repurchase proposals, which had been outlined in a letter from her counsel, dated June 16, 2010. Her "Proposal A" called for Lord Baltimore to redeem all of her

[11] Kress Aff. Ex. 14 at 8 & Ex. 15 at 5.
[12] The minutes of Lord Baltimore's board meetings on May 21, 2010, September 23, 2010, November 18, 2010, and January 20, 2011 show that the negotiations between Louis and Susan (and their counsel) were presented to, and discussed by, the entire Board. Kress Aff. Ex. 18 at 3-4, Ex. 19 at 3-4, Ex. 20 at 6, & Ex. 21 at 4, 7-10.
[13] Kress Aff. Ex. 21 at 4.
[14] Kress Aff. Ex. 21 at 7-10.

shares at approximately 85% of her *pro rata* interest in the Company's book value. "Proposal B" contemplated a plan whereby Lord Baltimore would convert itself to a limited liability company and allow all stockholders the one-time opportunity to redeem their shares at full book value.[15] During the board meeting the directors considered each of Susan's repurchase proposals. Their discussions were informed by materials and a presentation prepared by independent, outside advisors, including a stock appraisal by the American Appraisal Associates and an investment analysis performed by Cambridge Associates.[16] The Board also reviewed the Company's financial statements, circulated Susan's position statement, and considered previous discounts that were taken from prior distributions or redemptions.[17]

After what appeared to be a lengthy consideration, the Board voted four-to-two, and in one case, four-to-three, to reject Susan's repurchase proposals. In each case, the Director Defendants voted against the proposals. Their reasons for voting against Susan's proposals are disputed. The Individual Defendants have defended the decision as having been made in the Company's best interests. Susan, in

[15] Kress Aff. Ex. 24 (letter from Susan's counsel to Louis).
[16] Kress Aff. Exs. 28-30.
[17] Kress Aff. Exs. 25-27.

contrast, asserts that it was merely to preserve the favorable tax treatment afforded to the Thalheimer Shareholders.[18]

II. THE DEFENDANTS' SUMMARY JUDGMENT MOTION

A. *Contentions*

The Defendants now contend that the undisputed facts show that Susan had ample access to the Board and that her proposals were presented to, and discussed by, the Board. Although conceding that no formal vote was taken before the July 5, 2012 board meeting, they assert that Susan, through her board designees, could have requested a "formal consideration" of her repurchase proposals at any time but did not. Even if Susan and her proposals were somehow denied formal consideration by the Board before this action was filed, the Defendants claim that the July board meeting cured any breach of the implied covenant of good faith and fair dealing arising from the Shareholders' Agreement.[19]

Susan retorts that the July 5, 2012 Board meeting compounded, rather than cured, Louis's failure to submit her redemption proposals to the Board for formal consideration. She asserts that the July board meeting was a preordained sham that evinces Louis's (and the Individual Defendants') bad faith conduct. Susan also contends that the Court did not dismiss her claim that Louis and Lord Baltimore failed to negotiate her stock redemption in good faith by "insisting on an

[18] Kress Aff. Ex. 22 at 10-12.
[19] Defs.' Br. in Supp. of Their Mot. for Summ. J. ("Defs.' Br.") 2.

unconscionable and unjustifiable discount of over half the value of her stock as a penalty for her redemption."[20]

In response, the Defendants assert that her "good faith" or "reasonable price" claim was dismissed in the May Opinion. Even if it somehow was not dismissed, the Defendants argue that it cannot be added now under Court of Chancery Rule 15(aaa), and because such an amendment would be futile.[21] The Defendants also point out that Susan has not submitted any evidence showing that Louis "roadblocked" the Board's consideration of her proposals or that he somehow precluded Susan access to the Board.

B. *Legal Standard*

Summary judgment is granted properly when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[22] "The moving party initially has the burden of showing that no material fact issues exist" and that it is entitled

[20] Pls.' Consolidated Br. in Supp. of Pls.' Mot. for Leave to File Am. & Supplemented Verified Compl. & in Opp'n to Defs.' Mot. for Summ. J. & Mot. for Protective Order ("Pls.' Br.") 30.
[21] Defs.' Consolidated Br. in Opp'n to Pls.' Mot. to Am. and Supplement the Compl. & in Further Supp. of Defs.' Mot. for Summ. J. & for Protective Order 21-22.
[22] Ct. Ch. R. 56(c); *see Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, at *3 (Del. Ch. Sept. 28, 2012).

to judgment as a material of law.[23] To successfully oppose a summary judgment motion, the nonmoving party need only show—by setting forth specific facts—that "there are genuine issues of material fact that require resolution at trial."[24] In determining whether "there is any dispute of material fact," the court must "draw inferences from the record 'in the light most favorable to the nonmoving party.'"[25]

C. *Did Louis Preclude Susan Access to the Board in Violation of the Implied Covenant of Good Faith & Fair Dealing Arising from Section 7(b)?*

Before the July Board meeting, the record is replete with instances in which Louis discussed with the Board the ongoing negotiations between Susan and Lord Baltimore for the repurchase of her shares. Susan has not challenged those facts, either by affidavit, deposition, or otherwise. Instead, her supplemental complaint attempts to characterize Louis's actions as precluding "formal consideration" –*i.e.*, a formal vote—by the Board. She also argues that the July Board meeting—far from curing any breach—was merely a sham that belies any good faith consideration.

[23] *Grunstein v. Silva*, 2012 WL 3870529, at *1 (Del. Ch. Aug. 24, 2012) (internal quotation marks omitted) (quoting *Great-W. Investors LP v. Thomas H. Lee P'rs, L.P.*, 2012 WL 19469, at *5 (Del. Ch. Jan. 4, 2012)).
[24] *Id*. (internal quotation marks omitted) (quoting *Great-W. Investors LP*, 2012 WL 19469, at *5).
[25] *Winshall v. Viacom Int'l Inc.*, 2012 WL 6200271, at *4 (Del. Ch. Dec. 12, 2012) (quoting *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005)).

Susan's problem is that the record amply demonstrates that the Board was more than aware of the buyout discussions between her and Louis. Indeed, the Board was receiving timely updates on those talks and had the opportunity to discuss the proposals in a number of board meetings. As important, Susan's representatives on the Board could have—at any time—requested a vote on Susan's offers. Their ability to do so undermines her claim. This is not a situation in which Louis withheld knowledge of her repurchase proposals from the Board or denied the Board the opportunity to vote on the proposals. Nor do the facts indicate that Susan's board designees were ever prevented from advocating her interests. Rather, the undisputed facts show that the Board was informed about the repurchase discussions and considered them.

The July Board meeting does not materially alter that analysis. On the whole, the July Board meeting supports Lord Baltimore's contention that Susan was not denied access to the Board. The Board's decision not to accept her supposedly "reasonable" proposals might implicate a separate implied covenant under the Shareholders' Agreement, but the Defendants' conduct, even if a sham, does not show that Susan was denied access to the Board. Accordingly, the Court concludes that Susan has not set forth evidence sufficient to dispute the Defendants' recitation of the facts. Accordingly, the Defendants are entitled to

judgment as a matter of law on Susan's implied covenant claim that Louis had precluded Susan access to the Board.

D. *Susan's Implied Covenant Claim for Failure to Negotiate in Good Faith*

The parties disagree over the extent to which the May Opinion dismissed Susan's implied covenant claim. Susan relies on the Court's language that, in her view, seemingly limits the dismissal: "there is no implied covenant in the Shareholders' Agreement requiring Lord Baltimore to repurchase Susan's stock at a specific price, and, *to that extent, Count II is dismissed*."[26] She correctly points out that the Court did not specifically address whether the Defendants breached the implied covenant of good faith and fair dealing by failing to negotiate in good faith toward a reasonable price. Because the claim was not addressed, she contends that it survived the Defendants' motion to dismiss. If it was not properly alleged, she seeks leave to amend her Complaint to add that cause of action.

There may be a distinction between a "specific price" and a "reasonable price," especially where a party has an obligation to negotiate in good faith. However, for whatever reason,[27] the May Opinion did not address the distinction between the two. The Court's analysis focused primarily on whether Lord Baltimore had an obligation to repurchase Susan's stock at a specific price:

[26] *Blaustein*, 2012 WL 2126111, at *5 (emphasis added).
[27] There may be an argument that Susan failed to make this claim in her Complaint. Even if it was made, it may not have been properly or adequately addressed by either of the parties.

> In sum, an obligation that Lord Baltimore repurchase Susan's stock for a specific price (namely, the *pro rata* fair market value of her ownership interest in Lord Baltimore) would contradict Section 7(d) of the Shareholders' Agreement. Therefore, there is no implied covenant in the Shareholders' Agreement requiring Lord Baltimore to repurchase Susan's stock at a specific price, and, to that extent, Count II is dismissed.[28]

The Defendants point to the conclusion of the May Opinion as evidence that this claim, if even alleged, was dismissed: "the Defendants' motion to dismiss is granted, except as to Susan's claim that there is an implied covenant in the Shareholders' Agreement requiring that repurchase proposals be presented to and considered by the Board, which is not dismissed."[29]

Even if this claim was not dismissed, the Court concludes that the Defendants are entitled to judgment as a matter of law.[30] Susan implies that her repurchase proposal at a fifteen percent discounted price was reasonable because it "would easily offset any investment dislocation-type costs that might be incurred by the company."[31] She further asserts that the Defendants' refusal to consider any other proposal with terms less "unconscionable" than the fifty-two percent discount is indicative of bad faith.[32] In essence, Susan would have the Court hold that Section 7(d) of the Shareholders' Agreement "implies that Lord Baltimore

[28] *Id.*
[29] *Id*. at *7.
[30] If it was not alleged, Susan's motion to amend her Complaint would fail because such an amendment would be futile for failure to state a claim.
[31] Pls.' Br. 31-32.
[32] Susan also asserts that Louis's reliance on prior tax valuations as evidence of the fair market value of her Lord Baltimore holdings is indicative of bad faith.

must negotiate in good faith and that the terms proposed by Lord Baltimore must be good faith terms."[33]

Susan relies primarily on *The Liquor Exchange, Inc. v. Tsaganos* ("*Liquor Exchange II*")[34] for the proposition that where contractual language contemplates mutual agreement among the parties for an extension of a contract, the covenant of good faith and fair dealing imposes a duty on the parties to negotiate in good faith.[35] In a prior *Liquor Exchange* opinion ("*Liquor Exchange I*"), the Court denied the landlord's summary judgment motion against a tenant that had alleged that the landlord had failed to negotiate in good faith for an extension of the lease. The Court observed that the disputed contract provision was more akin to a "right to first negotiation" than a right of first refusal. The relevant provision stated:

> In the event other leaseable space becomes available for rent in the Summit Village Shopping Center at any time during the first one-year term and any of the four one-year option periods, if any, of this Lease, the Tenant shall have the first chance and opportunity to rent the additional leaseable space provided the Landlord and Tenant agree upon all terms of the lease for the additional leaseable space.[36]

In *Liquor Exchange II*, the Court observed that the covenant of good faith and fair dealing "requires only that [the landlord], in good faith, give the Tenant the opportunity to negotiate for new space and that [the landlord] present and discuss

---

[33] *Id*. at 33.
[34] 2004 WL 5383907 (Del. Ch. Nov. 16, 2004) ("*Liquor Exch. II*").
[35] *Id*.
[36] *The Liquor Exch., Inc. v. Tsaganos*, 2004 WL 1254166, at *1 (Del. Ch. June 2, 2004) ("*Liquor Exch. I*").

good faith terms at any negotiation."[37] Though it recognized an implied covenant, the Court emphasized that the parties retained discretion to complete a deal on their own terms, subject to that implied covenant: "[t]here is no requirement that [the Landlord] must alter his good faith terms to reach an agreement with the Tenant."[38]

As the Defendants point out, the facts in *Liquor Exchange I* that precluded summary judgment are materially different from the facts asserted by Susan. The Court in *Liquor Exchange I* denied the tenant's motion for summary judgment because the tenant had put forth verified facts that (1) the landlord had stated "that he would do everything in his power" to make the tenant leave the complex, and (2) the landlord had "rented space under terms which were not the same as offered to [t]enant."[39] In contrast, Susan has not put forth any facts from which the Court could infer that Lord Baltimore has decided that it would never repurchase Susan's shares or that it would repurchase shares on terms not offered to Susan. At best, Susan's conclusory allegation that a fifty-two percent discount is unconscionable is supported only by her assertion that Lord Baltimore's offer is substantially the same as the penalty imposed under the Shareholders' Agreement for transferring improperly one's shares. Yet that assertion is challenged by the fact that Susan has

[37] *Liquor Exch. II*., 2004 WL 5383907.
[38] *Id*. The Court ultimately found that it was unnecessary to determine if the landlord had acted in bad faith. Tenant's requested relief—specific performance—was "inappropriate with respect to the Tenant's right of 'first negotiations' because the Court would be forced to supply material terms for the new lease." *Id*.
[39] *Liquor Exch. I*, 2004 WL 1254166, at *2.

previously accepted similar discounts in other transactions with Lord Baltimore and that the fifty-two percent discount was supported by independent third party analysis.

Susan's reliance on *Liquor Exchange II* is further misplaced because the contractual provision at issue in that case differs materially from Section 7(d) of the Shareholders' Agreement. In contrast to Section 7(d), the lease agreement in the *Liquor Exchange* cases included a specific right to negotiate first. That specific right to negotiate first provided a reasonable basis for the Court to imply a covenant of good faith and fair dealing in the lease agreement that required the landlord to negotiate in good faith toward reasonable terms. Here, in contrast, there is no similar right (or obligation). The only similarity between the contractual provision in the *Liquor Exchange* cases and Section 7(d) is that both provisions affirm that the parties have bilateral discretion. Unlike *Liquor Exchange II*, that discretion is not limited to the same extent by the covenant of good faith and fair dealing because there is no right (or obligation) to negotiate at all.

Section 7(d) contains specific language regarding the rights of Lord Baltimore and its shareholders to the repurchase of shares. As this Court observed before, those rights afford "Lord Baltimore . . . discretion in determining at what price to repurchase shares . . . [and] Susan . . . discretion in determining what price

she will accept."[40] Equally important is that the obligation that the Court is asked to advance would contradict the language and purpose of the Shareholders' Agreement, which is to afford the parties bilateral discretion in determining whether to buy or sell their shares. Accordingly, for the foregoing reasons, the Defendants are entitled to judgment on Susan's implied covenant of good faith and fair dealing claim for failure to negotiate in good faith toward a reasonable repurchase price.[41]

III. MOTION TO SUPPLEMENT

A. *Court of Chancery Rule 15*

Court of Chancery Rule 15(d) governs when a party may supplement its complaint. The Court may "permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[42] The supplemental claims, however, must "relate to the original claims."[43]

"As a general rule, leave to amend is freely given . . . and there is no apparent reason why the same liberality should not apply to a motion to

[40] *Blaustein*, 2012 WL 2126111, at *5.
[41] There is no implied covenant obligating the Defendants to negotiate or to accept a reasonable repurchase proposal.
[42] Ct. Ch. R. 15(d).
[43] *BabyAge.com, Inc. v. Weiss*, 2009 WL 3206487, at *1 (Del. Ch. Oct. 1, 2009).

supplement."[44] Thus, the standards that inform when a Court should grant a party leave to amend are also applicable to a determination of whether a party should be allowed leave to supplement. Typically, a motion to amend is granted unless the non-moving party can demonstrate "prejudice or bad faith by the moving party."[45] Also, the Court will not grant a motion to amend "if the amendment would be futile."[46]

B. *The Supplemental Fiduciary Duty Claims against the Individual Defendants*

The proposed supplemental complaint alleges that the Individual Defendants breached their fiduciary duty when, at the July Board meeting, they voted to reject both Susan's reasonable repurchase proposals and McGaffey's (Susan's board designee) proposal to form an independent committee to consider impartially her proposals.

Louis, in response to the May Opinion, convened a board meeting on July 5, 2012, to consider formally Susan's repurchase proposals. Susan alleges that the "outcome of such purported consideration was preordained" and that the Individual Defendants "sought merely to manufacture an argument that they have remedied the breach of the implied covenant."[47] According to Susan, Louis circulated to the other directors a set of materials to review only three business days before the

[44] *Parnes v. Bally Entm't Corp.*, 2000 WL 193112, at *2 (Del. Ch. Feb. 8, 2000) (internal quotation marks omitted).
[45] *Cartanza v. Lebeau*, 2006 WL 903541, at *2 (Del. Ch. Apr. 3, 2006).
[46] *Id*.
[47] Suppl. Compl. ¶ 56.

meeting was to be held. Without Susan's or McGaffey's input, Louis set the agenda for the meeting and determined which proposals would be presented to the Board. A few days before the board meeting, Susan submitted to each director a position statement that called for her Proposal A to be considered by an independent committee (*e.g.*, a committee comprised of Krall, Kilpatrick, and a third outside party).[48]

During the board meeting, Susan alleges, her position statement was never discussed or considered by the Board except with respect to what was raised by McGaffey and Krall. She further asserts that Cambridge Associates, hired by Louis to "purportedly add legitimacy to the preordained ultimate decision," opined that Susan's "proposals would adversely affect expected investment returns and liquidity."[49] McGaffey expressed concern that the Company was missing an "attractive opportunity" to redeem shares because of certain shareholders' personal tax interests.[50] Apparently, there was some consensus among directors that the appraisal reports—which had been used for tax purposes—and were used to justify the fifty-two percent discount based on a lack of control and limited marketability, were not "very helpful in this situation."[51] McGaffey also proposed the appointment of an independent committee, but Louis tabled that proposal until

[48] *Id.* at ¶ 59.
[49] *Id*. at ¶ 61.
[50] *Id*. at ¶ 63
[51] *Id*. at ¶ 64.

after a vote on Susan's repurchase proposals was completed. When her proposals were rejected by the Director Defendants, McGaffey renewed his motion for an independent committee, but it "was rejected without further discussion."[52]

As the Court interprets the supplemental complaint, Susan's fiduciary duty claims in Count II are based, in part, on the premise that the three Thalheimer Shareholders constitute a control group, and thus, owe fiduciary duties to Susan as a minority stockholder. Her claims may also implicate fiduciary duties owed to her as a stockholder by the Director Defendants. She alleges that the Individual Defendants breached their duty of loyalty in at least four instances: (1) they were conflicted by their own self-interest when considering her repurchase proposals; (2) they rejected a process by which her proposals could have been fairly considered (*i.e.*, through an independent committee); (3) they voted to reject her reasonable repurchase proposal that was in the best "interest of Lord Baltimore and all of its shareholders;" and (4) they acted in an unfair manner to Lord Baltimore and its shareholders throughout the negotiation and consideration of her proposals.[53]

[52] *Id*. at ¶ 67.
[53] *Id*. at ¶ 79.

C. *Analysis*

Notably, the Defendants do not maintain that Susan's supplemental claim is asserted untimely, that it results in prejudice to them, or that it is unrelated to her prior claims. Instead, they argue that Susan's fiduciary claims are futile, which if true, would require the Court to deny her leave to supplement the Complaint. Futility, of course, is governed by the reasonable conceivability standard.[54]

The Defendants assert that Susan's fiduciary duty claims are futile because they are foreclosed by the Shareholders' Agreement. In other words, they argue that the Shareholders' Agreement fully governs the obligations that the Individual Defendants owe to Susan as they relate to her repurchase proposals. According to the Defendants, any fiduciary duty claims arising from the same conduct are negated or superseded by the Shareholders' Agreement.[55] Notwithstanding the Defendants' argument, Susan stresses that the Board's decision to reject her proposals was plagued by self-interest and thus, necessarily implicates the Director Defendants' fiduciary obligations and entire fairness. She further contends that the Thalheimer Shareholders, who collectively own approximately sixty-five percent

[54] *See FS Parallel Fund L.P. v. Ergen*, 2004 WL 3048751, at *2 (Del. Ch. Nov. 3, 2004), *aff'd*, 879 A.2d 602 (Del. 2005). The Court will accept all well-pleaded allegations in the Complaint as true and draw all reasonable inferences in favor of the plaintiff. A claim is not futile if there is a reasonably conceivable set of circumstances in which the plaintiff could recover. *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *5 (Del. Ch. Jan. 13, 2013).

[55] *See Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010) (noting that the "Chancellor found that the Stock Plan created contract duties that superseded and negated any distinct fiduciary duties arising out of the same conduct that constituted the contractual breach.").

of Lord Baltimore, constitute a controlling shareholder group and thus owe her fiduciary duties.[56]

Her contention that the Thalheimer Shareholders exercised actual control over the affairs of the corporation is premised on several allegations. Most importantly, Susan contends that the Thalheimer Shareholders rejected her proposals because they were united—if only informally—to preserve certain tax positions that they had taken for federal gift and estate tax purposes. As a further indicium of control, Susan points to how counsel for the Thalheimer Shareholders, instead of Lord Baltimore's counsel, negotiated with Susan for the redemption of her shares.[57] She also partially attacks the independence of Kilpatrick, the director appointed by the Thalheimer Shareholders. On the one hand, Susan seemingly concedes that Kilpatrick is an independent director by suggesting that he serve on

[56] The Court assumes, but does not decide, that the Thalheimer Shareholders constitute a control group. Under Delaware law, a controlling shareholder generally exists when he or she owns over 50% of the voting power of the corporation or "exercises control over the business and affairs of the corporation." *Dubroff v. Wren Hldgs., LLC*, 2009 WL 1478697, at *3 (Del. Ch. May 22, 2009) (internal quotation marks omitted). Control is not limited to a single shareholder. "Delaware case law has recognized that a number of shareholders, each of whom individually cannot exert control over the corporation (either through majority ownership or significant voting power coupled with formidable managerial power), can collectively form a control group where those shareholders are connected in some legally significant way-e.g., by contract, common ownership, agreement, or other arrangement-to work together toward a shared goal." *Id.* (citing *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006)). Here, Louis, Elizabeth, and Marjorie collectively own 65% of Lord Baltimore and each designates a board representative. While there is no allegation that they were connected by agreement, contract, or otherwise, the supplemental complaint seems to presume that the family relationship is sufficient to establish that they were "connected in [a] legally significant way."

[57] Pls.' Reply Br. in Supp. of Pls.' Mot. for Leave to File Am. & Supplemented Verified Compl. 4.

her proposed independent committee. On the other hand, she argues that, because he owes his position to the Thalheimer Shareholders, he is therefore beholden to them.[58]

Susan also claims that the Individual Defendants were self-interested in at least two ways. First, she asserts that their unreasonable insistence on a fifty-two percent discount to any share repurchase (which she insists is an "unconscionable discount") was motivated by the personal tax concerns of the Thalheimer Shareholders. Second, Susan maintains that they were self-interested in any repurchase transaction because "they stood to personally benefit from the substantial enhancement in the value of their own Lord Baltimore stock" if Susan's shares were redeemed at a fifty-two percent discount.[59] For the latter contention, Susan cites *Gale v. Bershad*[60] for the proposition that "directors [who own common shares] ha[ve] a conflicting self-interested motivation to redeem" existing preferred shares "for an inadequately low price, because the lower the Redemption price, the more that the [c]ommon [shares] would increase in value."[61]

Susan's claims raise at least two key issues. One concerns the interplay between contractual and fiduciary duties. The other involves the question of what duties, if any, do controlling stockholders and the directors of a corporation owe to

[58] *Id*. at 4-5.
[59] *Id*. at 5.
[60] 1998 WL 118022 (Del. Ch. Mar. 4, 1998).
[61] *Id*. at *4.

a minority stockholder when the minority shareholder seeks to sell her shares to the company.

D. *Does the Shareholders' Agreement Foreclose Susan's Fiduciary Duty Claims?*

The first issue requires an examination of the Shareholders' Agreement. Section 7(d) of the Shareholders' Agreement provides that "the Company may repurchase Shares upon terms and conditions agreeable to the Company and the Shareholder who owns the Shares to be repurchased," provided that the repurchase is approved either (1) by at least four directors or (2) by the holders of at least 70 percent of the shares. At first glance, this provision—devoid of the approval procedure—does not seem to afford any rights or impose any obligations that would not have otherwise existed. To put it another way, with or without that clause, Lord Baltimore and Susan could only complete a share repurchase if they mutually agreed on the terms.[62] The question here is whether Section 7(d) negates or supersedes any fiduciary duty claims arising from the Board's decision to reject the repurchase proposals. In other words, is the Board's discretion to agree to or to reject a share repurchase proposal under Section 7(d) limited by fiduciary duties? May the Board just say no, regardless of its reasons?

[62] Section 7(d) can be read as both a procedure for and a condition on share repurchases. The requirement to have at least four directors approve the repurchase proposal partially constrains the Board from adopting other methods in which it might give its approval. The alternative approval mechanism—obtaining the consent of 70 percent or more of the stockholders—seems to contemplate approval by both the Company (*i.e.*, the "agreeable to the Company") and a supermajority of shareholders.

It is an established principle under Delaware law that "where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary duty claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."[63] That statement appears in *Nemec*,[64] a case in which the plaintiffs, former officers and stockholders of Booz Allen, alleged that the directors improperly caused the company to redeem their shares before the closing of a spin-off transaction.[65] Because the redemption both furthered the directors' own economic self-interest and resulted in a significant financial detriment to the plaintiffs, they accused the directors of breaching their duty of loyalty.[66] Importantly, the company's right to redeem their shares was governed by an Officers Stock Rights Plan, which gave the company the "right to redeem, at any time, part or all of the retired officer's stock at book value" beginning two years after the officer had retired.[67]

The Court observed that the "fiduciary duty claim . . . arises from a dispute relating to the exercise of a *contractual* right—the Company's right to redeem the shares of retired nonworking stockholders."[68] The Court reasoned that the "right

[63] *Nemec*, 991 A.2d at 1129.
[64] *Id*.
[65] *Id*. at 1124-25.
[66] *Id*. at 1128.
[67] *Id*. at 1123.
[68] *Id*.

was not one that attached to or devolved upon all the Company's common shares generally . . . ." Because the "right was solely a creature of contract[,]" the Court concluded that "the nature and scope of the Directors' duties when causing the Company to exercise its right to redeem shares covered by the Stock Plan were intended to be defined solely by reference to that contract."[69] Thus, the Court held that "any separate fiduciary claim" arising out of the company's exercise of that right was foreclosed.

Similarly, in *Blue Chip Capital Fund*,[70] the plaintiffs—minority preferred stockholders in a Delaware corporation—alleged that the directors breached their fiduciary duty when they calculated improperly a preference payment (called the Makewell amount) that was triggered by the sale of substantially all of the company's assets. The company's certificate of incorporation provided the formula for that payment, which the minority stockholders alleged was consciously misapplied to their detriment and to the benefit of other preferred stockholders.[71] The Court noted that "the fiduciary claim that the board breached its duty of loyalty when it improperly interpreted the Makewell provision is substantially the same as the implied covenant contract claim that the board failed to determine the

[69] *Id*.
[70] *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827 (Del. Ch. 2006).
[71] *Id*. at 832.

Makewell amount in good faith."[72] Notwithstanding the allegation that the directors were self-interested, the Court held that contract, not fiduciary, principles governed because plaintiffs' claim arose from "contractual rights and obligations under the certificate of incorporation, a binding contract between the company and its preferred stockholders."[73] Other cases—such as *Gale v. Bershad*[74] and *Madison Realty Co.*[75]—have similarly foreclosed the assertion of a fiduciary claim where it arose out of the same conduct as a contract claim and where the dispute related to obligations expressly governed by contract.

---

[72] *Id*. at 833.
[73] *Id*. at 834.
[74] 1998 WL 118022. In *Gale*, the plaintiff alleged that the board members breached their duty of loyalty to preferred shareholders because the board redeemed the preferred shares at an unfair value and miscalculated the redemption price. *Id*. at *2. The directors were allegedly self-interested because they held substantial amounts of common stock, and the lower the redemption price, the more valuable the common stock would be post-redemption. *Id*. at *4-5. The redemption provision was contained in the certificate of incorporation, and it provided certain methods—based on availability—for the board to calculate the redemption price. Because the preferred shares were not traded on any market, the default provision required that the board determine the fair value of the preferred shares by its own chosen method. *Id*. at *1. In addition to the fiduciary claim, the plaintiff asserted a contract claim and an implied covenant claim. In deciding whether the duty to be enforced was contractual or arose from a fiduciary relationship, the Court noted that it "must determine whether [the plaintiff's] claimed right to a fair valuation of the Preferred arises from the Certificate provision governing the terms of the Preferred, or whether it is a right or obligation created not by virtue of any preference, and is shared equally with the Common." *Id*. at *5. Finding that the claimed right to a fair valuation arose from the Certificate provision, the Court dismissed the fiduciary duty claim as superfluous. *Id*.
[75] *Madison Realty P'rs. 7, LLC v. AG ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001). In *Madison*, the fiduciary duty claim was based on a breach of a 120-day notice provision in the partnership agreement. The Court held that the breach of fiduciary duty claims could not be maintained independently of the breach of contract claims because the "fiduciary claims relate to obligations that are expressly treated by the Partnership Agreement and are the subject of breach of contract claims in the complaint." *Id.*

Susan maintains that the Individual Defendants breached their fiduciary duty when they rejected McGaffey's request to form an independent committee to consider her proposals. That allegation, however, runs counter to the Shareholders' Agreement, which provides an explicit process by which the parties intended for share repurchases to occur.[76] Indeed, just as in *Nemec* and *Blue Chip*, the fiduciary duty claim here arises from the Company's exercise of (or failure to exercise) a contractual right. Under Section 7(d), Lord Baltimore may repurchase shares when approval is obtained from either (1) at least four of the directors (a majority) or (2) 70 percent or more of all the beneficial shareholders.

Where, as here, a contractual provision governs the specific duty to be enforced, the fiduciary duty claim is precluded by contract. That is simply because "[t]o allow a fiduciary duty claim to coexist in parallel with an implied contractual claim, would undermine the primacy of contract law over fiduciary law."[77] Moreover, as the Court observed in its May Opinion, Susan "cannot claim that a repurchase process is unfair or being done in bad faith when it is she who seeks to avoid the procedure to which" she agreed in the Shareholders' Agreement.[78] Thus, to the extent that she complains about the procedure employed by the Board in

[76] Indeed, the creation of an independent committee would, as the Defendants argue, sanction "a process that is inconsistent with Section 7(d) of the Shareholders' Agreement." *Blaustein*, 2012 WL 2126111, at *6.
[77] *Gale*, 1998 WL 118022, at *5.
[78] *Blaustein*, 2012 WL 2126111, at *6. Susan does not challenge the validity of the Shareholders' Agreement. *See id*. at *6 n.25.

considering her repurchase proposals, that claim is foreclosed by the plain language of the Shareholders' Agreement, which governs the parties' dispute in this respect.[79]

Susan also complains that the Individuals Defendants did not act in the best interest of Lord Baltimore when they collectively rejected her "reasonable" repurchase proposal.[80] This claim closely resembles Susan's implied covenant claim discussed above—where the Court held that there was no implied covenant on behalf of Lord Baltimore to accept a reasonable repurchase proposal or to engage in negotiations at all. Both claims arise from a common nucleus of operative facts. Because the contract affords bilateral discretion and because the stock redemption procedure is explicitly addressed by contract, it would be tempting, and perhaps not unreasonable, to conclude that the contractual provision governs, displacing any fiduciary duty claims based on the same facts.[81]

---

[79] Indeed, had the Thalheimer Shareholders deviated from the Shareholders' Agreement, they may have breached their fiduciary duty. *See* 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5811 (Sept. 2012) ("A controlling shareholder breaches his or her fiduciary duty in purchasing another shareholder's stock contrary to an existing stock redemption agreement.").

[80] She further alleges that the Individual Defendants were unfair to her, were self-interested, and acted in bad faith when they superficially considered and rejected her repurchase proposals at the July Board meeting. Those claims, to the extent that they are separate claims, are controlled by the outcome of Susan's reasonable repurchase claim.

[81] Even if the Shareholders' Agreement governs and, thus, precludes Susan's fiduciary duty claims, the outcome would not be any different because, as discussed further, Susan's claims are all dismissed.

However, the bilateral discretion component of Section 7(d) of the Shareholders' Agreement differs in an important way from the repurchase procedure. Lord Baltimore may repurchase shares—when it is "agreeable to the Company"—which may occur (as the contract specifies) when four directors—a majority of the Board—approve the stock repurchase. Unlike the contractual provisions that governed and displaced the fiduciary duty claims in *Blue Chip*, *Nemec*, and *Gale*, the bilateral discretion clause does not create a specifically defined contractual right—such as the right to buy back shares at a specific price. Instead, it contemplates Lord Baltimore acting—through Board approval—just as it would act when making a business decision. A contract that merely states that an action requires board approval does not displace or negate fiduciary duties with respect to that approval.[82] Consequently, the Shareholders' Agreement does not necessarily foreclose Susan's fiduciary duty claim that alleges that the Board had a duty to accept a reasonable repurchase proposal.

[82] *See Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *5-7 (Del. Ch. July 14, 2009). In *Stockman*, the Court was required to interpret a requirement in the partnership agreement which stated that "[n]o advances shall be made by the Partnership . . . without the prior written approval of the General Partner." *Id*. at *5. The Court noted that, "[a]s written, any discretion granted to the General Partner through the written approval requirement must necessarily be exercised in accordance with the General Partner's fiduciary duties." *Id*. at *6. The Court compared that provision with other clauses which delegated certain decisions to the "discretion," "sole discretion," and "absolute discretion" of the General Partner—terms which were defined in the agreement to give the General Partner the ability—without violating fiduciary duties—to consider his own personal interests when exercising that discretion. *Id*. at *6-7.

E. *Does Susan Have a Right to be Bought Out?*

The question then turns to whether the Director Defendants and the Thalheimer Shareholders owed a fiduciary duty to Susan, as a minority shareholder, to accept her reasonable repurchase proposal.

The protections afforded to minority stockholders in closely-held corporations under Delaware common law are no different than those in publicly-held corporations. While other jurisdictions have recognized special fiduciary duties among stockholders in closely-held corporations,[83] the Delaware courts have not adopted a similar approach.[84] Instead, utilizing general corporate law

[83] *See Wilkes v. Springside Nursing Home, Inc*., 353 N.E.2d 657 (Mass. 1976). In *Wilkes*, the Massachusetts Supreme Judicial Court was confronted with a typical "freeze-out" scheme. Four men (including Wilkes) invested proportionally in a nursing home called Springside. At the time of incorporation, the parties understood that each would be a director of the company, each would actively participate in the management of the company, and each would receive money from the company in equal amounts as long as they continued to participate in the business. *Id*. at 659-60. Sixteen years after the formation of Springside, Wilkes had a falling out with the other three shareholders. Wilkes was removed from the board of directors and discharged from his employment. Having never paid any dividends, the Company effectively denied Wilkes any further return on his investment. *Id*. at 661. The court reaffirmed that stockholders in a close corporation "owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another"—which duty is the utmost good faith and loyalty. *Id*. (internal quotation marks omitted) (quoting *Donahue v. Rodd Electrotype Co., Inc*., 328 N.E.2d 505, 515 (Mass. 1975)). The court went on hold, however, that "when minority stockholders in a close corporation bring suit against the majority alleging a breach of the strict good faith duty owed to them by the majority . . . [i]t must be asked whether the controlling group can demonstrate a legitimate business purpose for its action." *Id*. at 663. The court concluded that the majority stockholders violated their fiduciary duty to Wilkes because they had no legitimate business purpose for firing him and removing him from the board. *Id*. at 663-64. *See also In the Matter of Judicial Dissolution of Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984) (noting that a majority breaches its fiduciary duty to the minority when its actions "substantially defeat[] the 'reasonable expectations'" of the minority).

[84] *See Riblet Products Corp. v. Nagy*, 683 A.2d 37, 39 (Del. 1996) (noting that "*Wilkes* has not been adopted as Delaware law").

principles, they have mostly relied on entire fairness as a means of protecting minority stockholders.[85] A brief overview of that jurisprudence follows.

In *Ueltzhoffer v. Fox Fire Development Co.*,[86] a minority stockholder named Ueltzhoffer alleged, among other things, that the majority stockholders (the Marta family) breached their fiduciary duty when they terminated his employment.[87] Although he had no employment agreement with the corporation, he argued that "his termination amounted to a wrongful freeze out of his stock interest" and he sought a buyout of his stock interest in the company. The Court held that the Marta family members did not breach their fiduciary duty because they had a legitimate business purpose in terminating Ueltzhoffer, even though the Court believed that he had been performing his job competently. The Court also questioned whether the Marta family even owed a fiduciary duty to Ueltzhoffer with respect to his employment.[88] The Court also held that Ueltzhoffer (and his wife) were not "entitled to have their shares bought out" because minority stockholders have certain rights, and "*under the facts as I find them*, those rights do

[85] *See Nixon v. Blackwell*, 626 A.2d 1366, 1381 (Del. 1993) ("The entire fairness test, correctly applied and articulated, is the proper judicial approach."); *see also* Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 Wash. U. L. Q. 1099, 1134-35. (1999).

[86] 1991 WL 271584 (Del. Ch. Dec. 19, 1991), 17 Del. J. Corp. L. 1297.

[87] *Id*. at 1308-10.

[88] *Id*. at 1309 ("I conclude that [the Marta family] had no obligation to continue Ueltzhoffer as construction superintendent" and they did not act "wrongfully in terminating his employment . . . . Her fiduciary duties did not require that she continue in business with Ueltzhoffer."); *see also* Ragazzo, *supra* note 85, at 1122 (noting that the "Ueltzhoffer court also questioned the very existence of special shareholder duties").

not include the right to be paid for their proportionate interest in . . . the company."[89]

A few months later, in *Litle v. Waters*,[90] this Court was confronted with allegations much more akin to an oppressive freeze-out scheme. There, Waters and Litle had formed two corporations. In return for providing the needed capital, Waters had received a two-third interest in both companies. Litle, in return for managing the companies, received a one-third interest in both entities.[91] Litle alleged that he agreed with Waters to convert one of the companies to an S-corporation in exchange for Waters' assurance that the "company always would make available sufficient funds . . . to cover any taxes incurred as a result of the company's S-corp. election."[92] A few years later, Waters fired Litle from his positions as president and CEO of the two companies and then merged the two companies into one entity that retained the same ownership structure. Thereafter, Waters allegedly refused to pay dividends so that he could use the entity's profits to pay down debt that one of the companies had owed to him. Waters also allegedly refused to pay dividends to force Litle, who was then unable to pay his significant tax liability, to sell his shares at a substantial discount.

---

[89] *Ueltzhoffer*, 1991 WL 271584, 17 Del. J. Corp. L. at 1310 (emphasis added).
[90] 1992 WL 25758 (Del. Ch. Feb. 11, 1992); 18 Del. J. Corp. L. 315.
[91] *Id*. at 318-19.
[92] *Id*. Litle also claimed that the board issued Stock Appreciation Rights to key officers so that they would not be hurt by the no-dividend policy. *Id*. at 319-20.

Litle alleged that the directors' refusal to declare dividends breached their fiduciary duties to stockholders by (1) favoring one group of stockholders over others and (2) engaging in an oppressive freeze-out scheme that constituted a gross and oppressive abuse of discretion. The defendants moved to dismiss the complaint on grounds that the business judgment rule applied to the board's decision to grant or withhold a dividend. However, the Court held that the entire fairness standard governed Litle's first cause of action because a majority of the directors acted in self-interest in the decision not to pay dividends.[93] As to the second claim, the Court held that it also stated a claim for relief, finding that the defendants had potentially violated the reasonable expectations of the minority stockholder by effectively attempting to freeze-out Litle.[94]

[93] *Id.* at 321-24. Entire fairness applied in *Litle* because a majority of the directors stood to receive a personal and material financial benefit that did not devolve upon all of the stockholders generally. *Id.* at 323. By not disbursing dividends, the majority stockholder was able to "receive a greater share of the cash available for corporate distributions via loan repayments." *Id.* Because the other director's substantial financial interest was arguably dependent on his support of the majority shareholder, there was a reasonable inference that he was not independent. *Id.* at 323-24.

[94] *Id.* at 328-39. Interestingly, the *Litle* court seemed to accept implicitly the proposition that a majority stockholder in a closely-held corporation has a special fiduciary duty of fairness to a minority stockholder. The reasonable expectation test utilized in *Litle* was adopted from New York law. *See* supra note 83. *But see Garza v. TV Answer, Inc.*, 1993 WL 77186 (Del. Ch. Mar. 15, 1993); 19 Del. J. Corp. L. 290, 304. ("I do not read *Litle* as establishing an independent cause of action for 'oppressive abuse of discretion' distinct from a cause of action based on a breach of fiduciary duty. *Litle* appears merely to reiterate the well-established principle of law that, under Delaware law, the declaration of a dividend, like any action of the directors, rests in the discretion of the directors, but that the business judgment rule does not protect the directors if they grossly or fraudulently abuse the discretion entrusted to them by the shareholders.")

The case of *Nixon v. Blackwell*, upon which Susan relies, offers further insight into the protection (or lack thereof) afforded minority stockholders against oppressive freeze-out tactics. There, the minority shareholders of a closely-held corporation challenged the company's deployment of (1) an employee stock option plan (ESOP), which provided the employee-stockholders (including the directors) with a means to cash out their illiquid shares, and (2) certain key man life insurance policies, which may have facilitated the ability of the company to repurchase shares from the estates of deceased stockholders.[95] Because the defendant directors "benefited from the ESOP and could have benefited from the key man life insurance beyond that which benefited other stockholders generally," the Court concluded that the directors were on "both sides of the transaction" and entire fairness applied.[96] Perhaps surprisingly, the Court ultimately concluded that the directors' unequal treatment of different shareholders was, in fact, entirely fair.

The Delaware Supreme Court framed the question of whether "there should be any special, judicially-created rules to 'protect' minority stockholders of closely-held Delaware corporations."[97] The Court went on to set forth its view that:

[95] *Nixon*, 626 A.2d at 1371-72.
[96] *Id*. at 1375.
[97] *Id*. at 1379.

> The case at bar points up the basic dilemma of minority stockholders in receiving fair value for their stock as to which there is no market and no market valuation. It is not difficult to be sympathetic, in the abstract, to a stockholder who finds himself or herself in that position. A stockholder who bargains for stock in a closely-held corporation and who pays for those shares . . . can make a business judgment whether to buy into such a minority position, and if so on what terms. One could bargain for definitive provisions of self-ordering permitted to a Delaware corporation through the certificate of incorporation or by-laws by reason of the provisions in 8 *Del. C.* §§ 102, 109, and 141(a). Moreover, in addition to such mechanisms, a stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate earnings tests, buyout provisions, voting trusts, or other voting agreements.
>
> The tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. *It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted*.[98]

Nixon, thus, implied that under Delaware law the directors of a corporation (or controlling stockholders) do not have a special fiduciary duty to minority stockholders or a general duty to buy them out.[99]

---

[98] *Id.* at 1379-80 (emphasis added) (footnotes omitted).

[99] *See also* 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5811 (Sept. 2012) ("Majority shareholders have no obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation in the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of incorporation or by laws."); *Thorpe v. Cerbco, Inc.*, 19 Del. J. Corp. L. 942, 956 (1993) ("Controlling shareholders, while not allowed to use their control over corporate property or processes to exploit the minority, are not required to act altruistically towards them.").

Finally, in *Riblet Products Corp. v. Nagy*, the Seventh Circuit certified to the Delaware Supreme Court a question of Delaware law, which the Court restated as follows: "Whether majority stockholders of a Delaware corporation may be held liable for violation of a fiduciary duty to a minority stockholder who is an employee of the corporation under an employment contract with respect to issues involving that employment."[100] The Court answered the question in the negative, concluding that the employment contract completely governed.[101]

Significantly, the Court reaffirmed *Nixon* by noting that the fact that the Delaware corporation—Riblet Products Corp.—is "closely-held does not, for this purpose, alter the duties of stockholders *inter se* from those which prevail for publicly-held corporations."[102] The Court then stated:

> This is not a case of breach of fiduciary duty to Nagy *qua* stockholder. To be sure, the Majority Stockholders may well owe fiduciary duties to Nagy as a minority stockholder. But that is not the case here. Nagy does not allege that his termination amounted to a wrongful freeze out of his stock interest in Riblet, nor does he contend that he was harmed as a stockholder by being terminated.[103]

From these cases several conclusions can reasonably be drawn. First, *Nixon* and *Nagy* confirm that Delaware law does not recognize that a majority stockholder has a special fiduciary duty to minority stockholders in a closely-held

[100] 683 A.2d 37 at 39.
[101] *Id*. at 40.
[102] *Id*.
[103] *Id*.

corporation. Delaware courts have declined to follow other jurisdictions which have adopted such a doctrine.[104] Thus, the fiduciary duties that a controlling stockholder owes to minority stockholders are those duties that the directors of a publicly-held corporation owe to all shareholders generally,[105] and those duties shift only when there is a controlling stockholder because the board's ability to direct and manage the affairs of the corporation independently has been marginalized.

Second, both *Nixon* and *Ueltzhoffer* offer support for the proposition that a controlling stockholder generally does not have a fiduciary duty to buy back a minority stockholder's shares. On the facts before it, the *Ueltzhoffer* court declined to find that a minority stockholder had a right to be bought out. And *Nixon*, even more forcefully, disclaimed any judicially-created rule that would result in a court imposed buyout.[106]

---

[104] *See supra* note 84.

[105] *See Gilbert v. El Paso Co.*, 1988 WL 124325 (Del. Ch. Nov. 21, 1988), 14 Del. J. Corp. L. 727, 743 (noting that "directors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups."); *see also* 1 Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties for Corporate Directors* 1171 (6th ed. 2009) (a controlling shareholder owes fiduciary duties to minority shareholders and the corporation, and "may not use corporate assets to advantage itself to the corporation's disadvantage.") (internal quotation marks omitted) (quoting *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 555 (Del. Ch. 2000)).

[106] This Court in *Nixon* also distanced itself from implying that there is a duty to repurchase a minority stockholder's shares. *See Blackwell v. Nixon*, 1991 WL 194725 (Del. Ch. Sept. 26, 1991), 17 Del. J. Corp. L. 1083, 1092 ("By this ruling, I am not suggesting that there is some generalized duty to purchase illiquid stock at any particular price.").

That conclusion also makes sense under the facts of this case. Lord Baltimore and Susan were engaged in an arms-length negotiation over the terms by which the Company might repurchase her shares—a process that likely mirrored the parties' negotiations over the Shareholders' Agreement. Susan's interest in obtaining a higher redemption price was in opposition to the interests of Lord Baltimore and its shareholders generally. That circumstance is not one that, by itself, would give rise to a fiduciary relationship:

> [T]he concept of a fiduciary relationship, which derives from the law of trusts, is more aptly applied in legal relationships where the interests of the fiduciary and the beneficiary incline toward a common goal in which the fiduciary is required to pursue solely the interests of the beneficiary in the property.[107]

All that Susan has alleged is that she has been deprived of a reasonable exit opportunity from her investment in Lord Baltimore. She has not asserted that she has been terminated as a director.[108] Nor has she offered facts suggesting that Lord Baltimore has not paid her dividends or has attempted to freeze-out her interest in the Company. Susan does not claim, as was alleged in *Litle*, that she has been unable to pay her tax liability because of a lack of dividends. Indeed, except for the constraints on liquidating her shares in Lord Baltimore *(to which she agreed)*, Susan's financial interest in Lord Baltimore has not been impaired. Just like the

[107] *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 495 (Del. 2003) (noting that a "typical insurance contract does not create fiduciary duties because the interests of the plan participants and those of [the insurance company] are not perfectly aligned").

[108] Counsel suggested that the directors of Lord Baltimore or the Thalheimer Shareholders do not have the power to remove Susan as a director under the Shareholders' Agreement.

plaintiff in *Nagy*, Susan has not alleged a financial freeze-out claim that might otherwise warrant a finding that the controlling stockholders owed her a fiduciary duty. Without more, granting Susan the right to be bought out would turn the relationship between majority and minority stockholders on its head.[109] Susan cannot leverage her status as a minority stockholder to compel the Company to offer her favorable repurchase terms.

The Shareholders' Agreement also does not provide another means by which Susan can assert a fiduciary duty claim. The contract provides Lord Baltimore with discretion in deciding whether to repurchase shares. As explained above, there is no express contractual right or implied covenant of good faith and fair dealing to accept Susan's "reasonable" repurchase proposals. Susan was represented by sophisticated and well-respected counsel when she negotiated the Shareholders' Agreement. The parties to that agreement specifically addressed share repurchases. They crafted a provision which provides certain limitations on when share repurchases can be effectuated. Notably, neither the Thalheimer Shareholders nor Susan and her sister have the ability to authorize independently a

[109] In the Court's view, it would inequitably alter the balance of power for a minority stockholder to be able to offer a repurchase proposal to a company and then, if it rejects the offer, obtain review of that decision under entire fairness review upon making a vague allegation of self-dealing.

share repurchase.[110] This carefully negotiated structure was surely designed to protect both Susan and the Thalheimer Shareholders.

Susan now seeks to force a share repurchase on terms that she characterizes as reasonable. Those terms may or may not be reasonable, but under the Shareholders' Agreement it does not matter. In seeking to have her shares repurchased at a reasonable price, Susan is attempting to acquire—through fiduciary principles—an additional right that she was unable to obtain through an arms-length negotiation with the Thalheimer Shareholders.[111] When viewed from that perspective, the unfair treatment that Susan alleges is not so inequitable.

To be sure, Susan's predicament is real and difficult. Perhaps it is easy to be sympathetic to her situation, especially where she has adequately alleged that the Thalheimer Shareholders were self-interested in the decision not to accept Susan's repurchase proposals.[112] On its face, a fifty-two percent discount seems unfair. Susan argues that this conflict of interest is enough under *Nixon* to trigger entire

[110] Under this structure the Thalheimer Shareholders cannot cause Lord Baltimore to repurchase shares without the consent of Susan or Jeanne or one of the independent directors (*i.e.*, Krall or Kilpatrick).

[111] *See eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 39-40 (Del. Ch. 2010).

[112] As one example, Susan alleges that counsel for the Thalheimer Shareholders stated, in a letter to Susan, that "Louis does not want to take a risk that he will be imperiling his own tax planning and the tax planning of other shareholders" by taking a different approach to valuing Susan's shares. Supp. Compl. ¶ 38. Susan has also alleged that the Thalheimer Shareholders were self-interested in maximizing the value of their shares. Even if that were true, however, that interest would have been shared by all of the stockholders generally, including Susan's sister. Where the interests of directors and shareholders are aligned, a conflict of interest is typically not present. *See In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) ("Generally speaking, a fiduciary's financial interest in a transaction as a stockholder . . . does not establish a disabling conflict of interest when the transaction treats all stockholders equally . . . .").

fairness review. *Nixon*, she contends, signals, or perhaps, even compels, entire fairness review in the context of an oppressed minority shareholder.

But entire fairness only applies where there is a fiduciary duty, and even then it does not necessarily apply "any time a corporate action affects directors or controlling stockholders differently than minority stockholders."[113] In this case, Susan has not shown—as a matter of law—that there is a special fiduciary duty owing to her particularly, as opposed to all shareholders generally. Moreover, she has not alleged a reasonable possibility that she has a right to be bought-out. Nor has she alleged the type of oppressive, inequitable conduct that might otherwise justify relief.[114]

F. *Has Susan Adequately Alleged a Derivative Claim?*

One reading of Susan's supplemental complaint is that she has alleged, in effect, that Lord Baltimore shareholders were deprived of a valuable investment opportunity (the purchase of her shares at the discount she offered) because of the

[113] *eBay*, 16 A.3d at 37.

[114] Even if there were a fiduciary relationship in this respect, entire fairness review would still not apply because Susan has not adequately challenged the independence or disinterestedness of Kilpatrick. Susan challenges his independence by asserting that he owes his position entirely to the Thalheimer Shareholders, and thus, is beholden to them. She further contends that he is not independent because he has voted with them on the share repurchase proposals. In the Court's view, such allegations are not sufficient to challenge Kilpatrick's independence. *See Khanna v. McMinn*, 2006 WL 1388744, at *15 & n.92 (Del. Ch. May 9, 2006) (noting that, without more, allegations that the defendant was appointed to the board by the interested director and had a similar voting pattern as the interested director are insufficient to challenge the director's independence).

self-interest of the Individual Defendants.[115] Unlike her previous claims, this allegation is derivative because the corporation suffered an alleged harm and would benefit from any recovery of monetary damages.[116] Consequently, Susan would be required to make a demand on the Board, which she has not done, or explain why demand is excused, which she has not adequately demonstrated.

Susan has not adequately pleaded why demand is excused. To do so, she must offer particularized facts so as to raise a reasonable doubt that a majority of the board is disinterested and independent.[117] A reasonable doubt exists that the directors Elizabeth, Coleman, and Louis were self-interested because of personal tax concerns. However, Susan has not sufficiently alleged why Kilpatrick is either self-interested or lacks independence. All that she has alleged is that he owes his seat on the Board to the Thalheimer Shareholders and has voted with them on the share repurchase proposals. Under Delaware law, those allegations fall short of the type of allegations needed to rebut the presumption that a director—when

[115] The Board's failure to accept a valuable investment opportunity in this context might give rise to a fiduciary claim. This Court has before recognized that a board is subject to fiduciary duties when deciding to reject a merger proposal. *See Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009) (noting that a "board's decision not to pursue a merger opportunity is normally reviewed within the traditional business judgment framework. In that context the board is entitled to a strong presumption in its favor, because implicit in the board's statutory authority to propose a merger, is also the power to decline to do so."). The decision not to enter into a transaction is subject to a two-prong test: "First, did the Board reach its decision in the good faith pursuit of a legitimate corporate interest? Second, did the Board do so advisedly?" *Id*.

[116] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

[117] *See Beam v. Stewart*, 845 A.2d 1040, 1048-49 (Del. 2004) ("[D]irectors are entitled to a *presumption* that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption."). *See* Ct. Ch. R. 23.1.

assessing a demand request—would be faithful to his or her fiduciary duties. Thus, the Court cannot conclude that a reasonable doubt exists as to Kilpatrick's independence and Susan has failed to attack the independence or disinterestedness of the other directors. Thus, any derivative claim she might have asserted is dismissed on those grounds.[118]

IV. CONCLUSION

Susan's predicament is not enviable, but she must live with the Shareholders' Agreement for which she bargained. She had an opportunity to negotiate specific buyout terms. Her attorneys were sophisticated and well-regarded. The Court cannot read into the Shareholders' Agreement obvious terms that she did not secure during the bargaining process. Nor can the Court, on these facts, utilize fiduciary principles to help her case.

Lord Baltimore and Louis moved for summary judgment against what they believed was Susan's sole remaining claim. Because Susan has not raised a dispute of material fact and because they are entitled to judgment as a matter of law, the Court grants their motion. They are also entitled to judgment with respect to the implied covenant claim to accept a "reasonable" repurchase proposal or to negotiate in good faith. As to Susan's motion for leave to supplement her

[118] To the extent that Susan may have sought to allege a due care claim, that claim is also futile. The allegations of the supplemental complaint show that the Director Defendants received (and heeded) the advice of independent experts and consulted with counsel. Susan has not alleged that the Director Defendants were not informed or unreasonably relied on the experts' advice other than conclusorily allegations to that effect.

Complaint, that motion is denied. Susan's new fiduciary claims are precluded in part by the explicit terms of the Shareholders' Agreement. Those claims that are not foreclosed are also dismissed as futile. Based on the facts alleged, Susan does not have a right to be bought out. In sum, the Defendants' motion for summary judgment is granted and the Plaintiffs' motion to amend and supplement the Complaint is denied. The Defendants' motion for a protective order is now moot.

An implementing order will be entered.