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Case Number 272,2013

IN THE SUPREME COURT 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 ITEM 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 Trustee SUSAN M. BLAUSTEIN, Plaintiffs Below, Appellants, v. LORD BALTIMORE CAPITAL CORPORATION and LOUIS B. THALHEIMER, Defendants Below, Appellees.	)	No. 272, 2013 APPEAL FROM THE OPINION AND ORDER DATED APRIL 30, 2013 AND THE OPINION AND ORDER DATED MAY 30, 2012 OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN C.A. NO. 6685-VCN

CORRECTED APPELLANTS' REPLY BRIEF

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ARGUMENT

I. INTERPRETATION OF THE SHAREHOLDER AGREEMENT AS PRECLUDING PLAINTIFFS' CLAIMS IS UNTENABLE

Defendants' principal argument is that the redemption provision of the Shareholder Agreement[1] precludes both Susan's fiduciary duty claim and her implied covenant claim. Appellees' Answering Brief ("AB") at 19-20, 28-29. Nothing in or about that provision inherently precludes Susan's claims.

The Shareholder Agreement provides a mechanism for any shareholder to exit the corporation. Susan was entitled to avail herself of that mechanism free from the influence of any conflict of interest, and with the expectation that Lord Baltimore would negotiate in good faith. Defendants, however, proffer an interpretation of the contractual redemption provision that would allow the Thalheimer Shareholders and their controlled directors to subvert the redemption mechanism to protect their purely personal interests while seeking to impose facially unconscionable redemption terms on Susan, with no recourse under Delaware law. There is nothing in the redemption provision that would countenance such an outcome.

Paragraph 7(d) contains a typical provision for shareholder redemptions to occur on terms that are mutually agreeable to Lord Baltimore and the withdrawing

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[1] Capitalized terms not defined herein have the same meaning as given in Appellants' Opening Brief ("OB").

shareholder. The shareholders agreed that approval of either four of the seven directors or shareholders holding 70 percent of company stock is required. The provision does not specify a price or particular pricing formula, but rather left that to future negotiation. A1451. The shareholders all agreed to this as well. Such a provision is not surprising in this context given that any redemption transaction would need to be delayed for at least ten years to avoid corporate-level taxes if a redemption were to involve the sale or distribution of "built-in gain assets" that had been transferred from a predecessor corporation to Lord Baltimore. A1446-47. Depending on the nature and mix of corporate assets and investments after the ten-year waiting period expired, any specific approach to redemption pricing at the outset might not have been practical or optimal a decade later. Reserving that for later negotiation was perfectly sensible. Indeed, the fact that all shareholders freely assented to this decision to delay the pricing discussion strongly underscores the inherent expectation that there would be good faith negotiation and decision-making when the time came. This is the common sense reading of the provision. The shareholders would not have read the provision as in conflict with, or as a negation of, an expectation of good faith future negotiation, or surely they would not all have signed it.

That Paragraph 7(d) reserves for later negotiation the specific price or pricing methodology of a redemption does not mean, as Defendants argue and the

Court of Chancery incorrectly found, that Defendants have the unfettered discretion to make personally conflicted decisions or take unconscionable positions regarding redemption. There is nothing in Paragraph 7(d) that eliminates the fiduciary duty of loyalty that directors and controlling shareholders owe to a minority shareholder, nor would such a provision, if it did appear in Paragraph 7(d), be enforceable under Delaware law. To the contrary, because Paragraph 7(d) provides the only agreed-upon mechanism for individual shareholders to exit the corporation, it inherently contemplates the exercise of good faith in conducting negotiations toward that end, and that final decisions by the Board will be devoid of personal conflicts of interest. Otherwise, the provision would be meaningless as it would utterly fail to offer a workable exit for any shareholder, as is the case here.

If the founding shareholders of Lord Baltimore did not intend to provide a workable exit mechanism, they would not have included Paragraph 7(d) in the Shareholder Agreement. There is no reason why a closely held corporation must have a redemption mechanism, and many do not. The fact that the founding shareholders of Lord Baltimore included such a provision, and that the provision presents the only possible exit mechanism for each of them, compels recognition, rather than rejection, of bedrock common law duties and doctrines that ensure fair and non-conflicted treatment of minority shareholders in the operation of such a mechanism.

Defendants echo the Court of Chancery's observation that Delaware does not recognize as a matter of statutory or common law any particular shareholder rights when it comes to redemption of stock in a corporation. But this does not end the analysis. It is precisely the absence of any such special protections that prompted this Court in *Nixon* to state that "[t]he entire fairness test, correctly applied and articulated, is the proper judicial approach" to evaluating conflicted board decisions regarding minority shareholder redemptions. *Nixon v. Blackwell*, 626 A.2d 1366, 1380-81 (Del. 1993). Delaware's "entire fairness test" does not require the creation of any special statutory measures or judicial doctrines, such as are found in other states, to remedy minority shareholder oppression by a conflicted majority.

Interpreting Paragraph 7(d) to eviscerate the fiduciary duty of loyalty, or any other applicable common law duties, would depart from the compelling common sense reading of the provision; nullify Susan's ability to exit this corporation on fair terms through the only mechanism she has; render this Court's admonition on the proper use of the entire fairness test in *Nixon* meaningless; and thus neutralize such protections as are recognized in Delaware for minority shareholders to receive fair treatment in seeking to exit a corporation.

II. SUSAN'S PROPOSED FIDUCIARY CLAIM HAS BEEN PROPERLY ALLEGED AND SHOULD BE ALLOWED TO PROCEED

As Plaintiffs demonstrated in their opening brief, the proposed Supplemented Complaint specifically alleges that the Thalheimer Shareholders control Lord Baltimore and its Board; that they have consistently taken the unyielding position that Susan may not redeem her shares unless she agrees to forfeit 52 percent of her shares' net asset value; that this position is intended to protect comparable discounts the Thalheimer Shareholders have taken on intra-family gifts of stock and other assets for personal estate planning and tax purposes; that this position is thus based on a personal conflict of interest; that the Thalheimer Shareholders are further conflicted by standing to personally benefit in the value of their own Lord Baltimore shares by every dollar left on the table by Susan; that the Thalheimer Shareholders caused the Board to make decisions regarding Susan's redemption proposals that are tainted by these conflicts; and that the Board failed to avail itself of well-settled mechanisms under Delaware law for mitigating such conflicts in the corporate decision-making process. OB at 5, 7-10, 12-14; A1440-72; A443-99.

The Court of Chancery took issue with none of the foregoing allegations, except for the allegation that the Board was controlled by the majority shareholders. The court assumed that the Thalheimer Shareholders constituted a control group while later in the decision contradictorily declined to find that the

complaint adequately alleged that the Board was controlled by the Thalheimer Shareholders. *Compare* 2013 Opinion at 26 *with id.* at 46 n.114. The combined force of the allegations, however, yields the inescapable inference that the majority did control corporate decision-making – especially as to Susan's redemption – and did so consistently through many years up to and including the July 5 Board meeting. Indeed, the extent and pervasiveness of this control is strikingly illustrated by the fact that personal counsel for the Thalheimer Shareholders conducted the negotiations with Susan for a corporate redemption throughout the relevant time period, and consistently declared that the Thalheimer Shareholders would not risk imperiling their personal tax planning by allowing the corporation to take a different approach to valuing Susan's shares in a redemption. A1453-57, A1458-60. The Supplemented Complaint thus alleges pervasive control of corporate decision-making. The Court of Chancery erred in failing to credit these allegations and the reasonable inferences that may be drawn therefrom.

In these circumstances, where a conflicted board makes a redemption decision involving a minority shareholder, such a decision is subject to entire fairness review and the defendants bear the burden of proving the legitimacy of their decision – here, demonstrating that they satisfied the duty of loyalty owed to the minority by the controlling shareholders and their controlled directors. *See* OB at 21-26.

Ignoring the principle that a conflict of interest requires entire fairness review of a claim for breach of the universal fiduciary duty of loyalty, Defendants merely repeat the erroneous treatment of Plaintiffs' fiduciary duty claim by the Court of Chancery, which turned on whether there could be found in Delaware law or in the Shareholder Agreement some kind of special fiduciary duty owed to Susan. Defendants thus argue that the proposed Thalheimer Shareholder and director defendants "do not owe Susan a special fiduciary obligation to accept her stock repurchase proposals" and do not owe her a fiduciary duty "to form a special committee to consider her repurchase proposals," relying on the absence of language that would support such purported duties in the Shareholder Agreement. AB at 19. The Court of Chancery erred in assuming that a special fiduciary duty was needed as the basis of Susan's fiduciary claim, and Defendants simply repeat and rely on that error.

A. The Court of Chancery Incorrectly Analyzed Plaintiffs' Fiduciary Claim

At no point did Plaintiffs allege in the Supplemented Complaint or in their legal arguments that anyone associated with Lord Baltimore owed Susan a special fiduciary obligation to accept her stock repurchase proposals. Nor does Susan need to make any such allegation in support of her fiduciary claim. Rather, Susan need only allege a breach of the duty of loyalty arising from a corporate decision made or caused by controlling shareholders and/or directors who were conflicted

by their own financial self-interest. This is precisely what Susan has alleged. When such allegations are made, the decision at issue is subject to entire fairness review, under which the controlling shareholders and/or directors are deemed to have discharged their fiduciary duties only upon demonstrating the entire fairness and legitimacy of the questioned act. *E.g.*, *Weinberger v. UOP, Inc*., 457 A.2d 701, 710 (Del. 1983) (conflicted directors "are required to demonstrate their utmost good faith and the most scrupulous fairness of the bargain"); *Zimmerman v. Crothall*, 2012 WL 707238, at *6 (Del. Ch.) ("Entire fairness is Delaware's most onerous standard and it requires the Director Defendants to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. * * * Given the fact-intensive nature of this enhanced scrutiny, a party bearing the burden of proving fairness faces a difficult road * * * .").

The Court of Chancery declined to follow this well-settled approach because it incorrectly concluded that Susan must plead some special fiduciary duty to accept a redemption proposal. 2013 Opinion at 35, 40, 46. Finding that no language in the Shareholder Agreement creates any such special fiduciary duty, the Court of Chancery erroneously dismissed Plaintiffs' claim as futile. *Id*. at 49. This approach to evaluating fiduciary claims that are based on conflicted decision-making would insert an unprecedented and irrelevant element into pleading such claims. Defendants' rely on *Riblet Products Corporation v. Nagy*, 683 A.2d 37

(Del. 1996), as support for the idea that a special fiduciary duty is required. See AB at 21-22. *Riblet* concerned dual claims for breach of an employment agreement and breach of fiduciary duty, brought by an employee who was also a minority shareholder against the corporation and its majority shareholders. The case arose solely from termination of plaintiff's employment, did not implicate his rights as a shareholder, and was thus an employment contract case, not a fiduciary duty case. 683 A.2d at 40. *Riblet* is inapposite.

The "proper judicial approach," as this Court stated in *Nixon*, is simply the "entire fairness test, correctly applied and articulated." 626 A.2d at 1381. The conflict of interest itself constitutes the potential for violation of the duty of loyalty, which in turn calls for the entire fairness test and the scrupulous factual scrutiny that the test requires in order to assure that the shadow cast by the conflict did not affect the validity of the act in question.

The Court of Chancery also erroneously analyzed Plaintiffs' request for a non-conflicted decision maker such as a special committee to consider Susan's repurchase proposals. The court similarly held that this request necessitates finding a specific fiduciary duty to form such a committee and that no such duty exists in common law or in the Shareholder Agreement. *See* 2013 Opinion at 32-33 & n.76. Defendants again rely blindly on the Court of Chancery's analysis in this regard (AB at 19-20), without addressing or even acknowledging that such an

independent decision-making committee is a long-accepted mechanism under Delaware law for a conflicted board to ensure that non-conflicted decisions are made. *See, e.g.*, *Ams. Min. Corp. v. Theriault ("Southern Peru")*, 51 A.3d 1213, 1241-43 (Del. Ch. 2012) (noting common practice of creating an independent special committee when the controlling shareholder is under a conflict of interest). Such a procedure exists not because there is a special fiduciary duty to form a committee, but rather because the influence of disinterested directors helps to ensure fairness and the proper discharge of the duty of loyalty.

Because it erroneously followed a "special fiduciary duties" analysis, the Court of Chancery (and Defendants) overstated the significance of the Shareholder Agreement's redemption provision. AB at 19-24. If the proper analysis really required finding a special fiduciary obligation to accept a minority shareholder's redemption proposals or to form a special committee to consider redemption proposals, then the Shareholder Agreement would be a logical place to look. But as such things are not required in a shareholder agreement, they are frequently not found. As a result, under this type of erroneous analysis neither Susan nor a great many other minority shareholders in other closely held corporations would ever have a fiduciary claim arising in the redemption context, regardless of how egregious the facts may be. Properly viewing Susan's claim as based not on any such special fiduciary duty but rather on the general duty of loyalty, with entire

fairness review triggered by a conflicted decision, it is evident that the redemption provision of the Shareholder Agreement neither creates nor precludes Susan's fiduciary claims. *See* Part I above.

It is axiomatic that the Paragraph 7(d) redemption provision, or the purported adherence by Lord Baltimore to the mechanism described therein, does not displace universal common law duties, such as the duty of loyalty. That was made clear in *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. 2013). As discussed in Plaintiffs' opening brief (OB at 19-21), and ignored by Defendants, the Court in *Gerber* rejected the notion that mere compliance with contractual procedures governing a particular type of transaction will eliminate common law duties such as the implied covenant of good faith and fair dealing. The Court rejected defendants' superficial adherence to the terms of a contractual safe harbor as insulating them from implied covenant claims, and allowed such claims to proceed where the plaintiff adequately alleged that the manner in which defendants purported to follow the safe harbor procedures was arbitrary and unreasonable. 67 A.3d at 422, 425-26.

Under the same reasoning, the common law fiduciary duty of loyalty cannot be waived or negated by simply following the redemption procedures in Paragraph 7(d) where, as here, the corporate decision makers were conflicted and failed to cure the conflict, such as by ensuring the decision would be made by non-

conflicted decision makers.

B. *Nixon v. Blackwell* Provides the Proper Analysis

In *Nixon v. Blackwell*, this Court noted the "basic dilemma of minority stockholders in receiving fair value for their stock as to which there is no market and no market valuation." 626 A.2d at 1379. Concluding that it would be inappropriate "for this Court to fashion a special judicially-created rule for minority investors * * * when there are no negotiated special provisions in the certificate of incorporation, bylaws, or stockholder agreements," the Court instructed instead that the "entire fairness test, correctly applied and articulated, is the proper judicial approach." *Id*. at 1380-81. *Nixon* thus mandates entire fairness review of Lord Baltimore's conflicted decisions regarding Susan's redemption proposals, particularly where, as here, the shareholders agreed that there would be no "negotiated special provisions" for redemption beyond the voting ratios set out in Paragraph 7(d) of the Shareholder Agreement. The decision to defer negotiation on redemption pricing for a later day was perfectly sensible and not indicative of any agreement to waive good faith and fiduciary duties in later negotiations. The provision simply does not in any way undercut the applicability of *Nixon* to a process tainted by an obvious and persistent conflict of interest.

Defendants' attempt to distinguish *Nixon* is unavailing. They point to language in *Nixon* indicating that entire fairness review applies to decisions by

controlling stockholders and directors that provide them a personal benefit not shared by the corporation or its stockholders generally, as if such language distinguishes *Nixon* from the present case. *See* AB at 22-23. To the contrary, this language clearly brings this case within the precise ambit of *Nixon*. The Thalheimer Shareholders and their controlled directors have made decisions expressly motivated by the desire to protect the Thalheimer Shareholders' aggressive personal tax strategy, which concerns only them and not the corporation or its shareholders generally. Due to that conflicting self-interest, the Thalheimer Shareholders and their controlled directors stand on both sides of the transaction, and for that reason, entire fairness review applies. *See Nixon*, 626 A.2d at 1375. Even apart from this potent conflict, Delaware law recognizes that stock redemptions in a closely held corporation typically involve an inherent "conflicting self-interested motivation" for directors to redeem stock "for an inadequately low price" because the lower the redemption price, the more their stock increases in value. *Gale v. Bershad*, 1998 WL 118022, at *4 (Del. Ch.).

The Court of Chancery in this case correctly found that Susan "adequately alleged that the Thalheimer Shareholders were self-interested in the decision not to accept Susan's repurchase proposals" and acknowledged that a 52 percent penalty to Susan in a redemption transaction seems "on its face" unfair. 2013 Opinion at 45. These allegations trigger entire fairness review under *Nixon*. This Court

should reject the erroneous approach taken by the Court of Chancery, clung to by Defendants, and remand the matter with instructions to allow Plaintiffs' fiduciary claim to proceed with judicial review under the entire fairness test.

C. Plaintiffs' Claim Is Not Derivative

Defendants' assertion that the fiduciary claim is derivative is without merit. AB at 24-25. Susan has properly pled a conflicted corporate decision causing her direct injury, in that she has been prevented from recovering her investment, constituting by far the majority of her assets, unless she accedes to an unconscionable 52 percent forfeiture as the price of withdrawal. In such circumstances, aggrieved minority shareholders have direct claims against controlling shareholders and/or corporate directors. *See, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 96-100 (Del. 2006) (allowing direct claims by minority shareholders against controlling shareholders).

III. SUSAN'S PROPOSED IMPLIED COVENANT CLAIM HAS BEEN PROPERLY ALLEGED AND SHOULD BE ALLOWED TO PROCEED

As demonstrated above, Susan's fiduciary claim is *not based on the contract* but rather on the default common law fiduciary duty of loyalty that all corporate fiduciaries owe, and is directed to conflicted corporate decisions. Susan may also simultaneously assert an implied covenant claim, which *is based on the contract* and the covenant implied in it, namely that there would be good faith negotiations when the redemption provision was invoked. *See PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *7 (Del. Ch.) (both claims coexist if there is an independent basis for each claim, even if both are related to the same conduct).

A. Susan Met the Pleading Standard for an Implied Covenant Claim

Contrary to Defendants' position (AB at 30-31), Susan's well-pled allegations meet the requisites for an implied covenant claim, as articulated in both *Gerber* and *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010). Her claim is not precluded by these cases but rather falls squarely within the ambit of *Gerber's* criteria for when such claims should proceed. The Court of Chancery's failure to permit amendment of Susan's complaint was therefore in error.

The implied covenant of good faith and fair dealing "seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them." *Gerber*, 67 A.3d at 418 (quoting *ASB Allegiance Real Estate Fund v. Scion*

Breckenridge Managing Member, LLC, 50 A.3d 434, 440–42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)). Terms will be implied when the "party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Nemec*, 991 A.2d at 1126. In analyzing the alleged facts, a court "must assess the parties' reasonable expectations at the time of contracting." *Id*. In so doing, a court should ask "whether it is clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith" had they negotiated with respect to the matter. *Gerber*, 67 A.3d at 418 (quoting *ASB Allegiance*, 50 A.3d at 440-42).

Susan's allegations squarely clear this pleading hurdle. Her claim is that Defendants breached the implied covenant by (i) refusing to negotiate redemption proposals in good faith, and (ii) insisting during negotiations on a price reflecting an unconscionable forfeiture of over half the value of Susan's shares to support the personal tax planning objectives of the Thalheimer Shareholders and to enrich them personally at Susan's expense. A1468-69.

Susan alleges that she and her sister wanted the flexibility to withdraw from Lord Baltimore in the future; that Louis assured all potential stockholders that they

could redeem on terms fairly reflecting their share of the then net asset value of the corporation; that Susan and her sister inquired about putting specific language in the agreement about redemption pricing but Louis declined citing tax reasons relating to the "built-in gain" assets; that all the shareholders agreed to defer redemption pricing to a later day; that Susan did not consider the resulting Paragraph 7(d) to be inconsistent with her ability to withdraw from Lord Baltimore on fair terms and always expected good faith negotiations toward that end; that for personal, not legitimate corporate, reasons Louis and Lord Baltimore acted unreasonably and in bad faith by continuously insisting on an unconscionable 52 percent discount in any redemption transaction; and that Defendants thereby frustrated Susan's expectation of future withdrawal on reasonable terms and thus her ability to control her inheritance. A1448-51, A1453-61, A1470. These allegations fit squarely within the standard described in *Gerber* and *Nemec*.

Moreover, as discussed in Part I, the redemption mechanism set out in Paragraph 7(d) cannot possibly be read to sanction bad faith in negotiating redemption terms. It is only *Paragraph 6* that imposes a substantial financial penalty – forced redemption at a heavily discounted price – and then only for an attempted transfer of shares that would jeopardize the corporation's tax status. A1450. Susan could not have expected that Lord Baltimore and Louis would insist on pricing for a Paragraph 7(d) redemption that would even approach, let alone be

more punitive than, the draconian penalty for shareholder wrongdoing set out in Paragraph 6. Accordingly, "it is clear from what was expressly agreed upon" that the parties "would have agreed to proscribe" bad faith insistence on absurd and confiscatory redemption discounts had the matter been explicitly addressed in the agreement. *See Gerber*, 67 A.3d at 418.

The Court of Chancery acknowledged that the failure to negotiate toward a "reasonable price" could be significant "where a party has an obligation to negotiate in good faith," and that a 52 percent penalty to Susan in a redemption transaction seems "on its face" unfair. 2013 Opinion at 15-16, 45. Nevertheless, the court held that, no matter how low the price or what the motive, Defendants would be in literal compliance with Paragraph 7(d) if they declined to redeem her according to the prescribed voting mechanism, which would then automatically preclude Susan's good faith claim. This Court should look beyond literal compliance with Paragraph 7(d) and hold, as it did in *Gerber*, that abuse of contractual provisions in bad faith while superficially complying with them, as the allegations here demonstrate, gives rise to an implied covenant claim.

B. Susan Does Not Argue For an Implied Right to "Put" Her Stock Back to Lord Baltimore

Contrary to Defendant's mischaracterization (AB at 31-32), Susan does not claim an absolute right to sell back her shares at a particular price, and hence does not claim an option to "put" her stock to Lord Baltimore. Rather, she asserts that

Lord Baltimore has an implied duty to negotiate in good faith, which means that it should not unreasonably refuse to redeem her shares absent a confiscation of 52 percent of their value. Requiring Lord Baltimore to negotiate in good faith, either directly or through an independent committee or referee, would not create a right to "put" Susan's stock back to the corporation.

C. Defendants Apply the Wrong Standard for Evaluating the Sufficiency of the Supplemented Complaint

Defendants urge rejection of the amended implied covenant claim based on Chancery Rule 15(aaa) and purported "facts" proffered in their summary judgment motion, which was directed to the original claim, and not the amended claim. AB at 32-35. In considering the amended claim the court should have accepted all well-pled allegations as true, drawn therefrom all reasonable inferences favorable to Susan, and allowed amendment under the permissive standard of Rule 15(a).

The necessary predicate for application of Rule 15(aaa) is dismissal of a claim. Here, the court did not dismiss the original implied covenant claim for failure to present Susan's proposals to the Board. Because an implied covenant claim survived dismissal, Susan could seek to amend that claim to add another basis for breach of the implied covenant – the failure to negotiate in good faith – under the permissive standard of Rule 15(a). Rule 15(aaa) is not applicable.

Moreover, the court erred if it relied on "facts" in the summary judgment motion directed to the original claim in rejecting as futile the amended claim.

Defendants' purported showing that the 52 percent discount was supported by third-party analysts cannot rebut the well-pled allegations that such reports were prepared to support the Thalheimer Shareholders' tax position and are not relevant to a redemption, as was explicitly affirmed by one of Defendants' own directors. Likewise, Defendants' proffer of selected "facts" out of context regarding other transactions or how the mandatory 52 percent discount compares to the penalty provision of Paragraph 6, cannot be used to evaluate the sufficiency of the Supplemented Complaint – the question that was properly before the court.

CONCLUSION

Plaintiffs' fiduciary duty and implied covenant claims were properly pled. The decision below should be reversed and the case remanded for further proceedings on the merits of those claims.

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