



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

SUPERIOR VISION SERVICES, INC., :  
a Delaware corporation, :  
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 Plaintiff, :  
 :  
 v. : **C.A. No. 1668-N**  
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 :  
 RELIASTAR LIFE INSURANCE :  
COMPANY, :  
 :  
 :  
 Defendant. :

**MEMORANDUM OPINION**

Date Submitted: April 25, 2006  
Date Decided: August 25, 2006

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NOBLE, Vice Chancellor

## I. INTRODUCTION

A company agreed with its investors that it would not pay dividends; it has now concluded that it does not like the consequences of its agreement. The prohibition against the payment of dividends may be waived if the holders of two-thirds of its shares agree. Although the board of directors has authorized the payment of dividends, some dividends have not been paid because one investor, which owns 44% of the stock in the company, refuses to waive the contractual prohibition. The company—not the other investors who would have received the dividends if paid—brings this action and charges the investor who refuses to waive the contractual prohibition with breach of fiduciary duty as a “controlling” shareholder and with breach of the covenant of good faith and fair dealing implied in the investment agreements because, according to the company, there is no good reason for not acquiescing in the payment of dividends. Before the Court is the non-waiving investor’s motion to dismiss.

## II. BACKGROUND

Plaintiff Superior Vision Services, Inc. (“SVS”) is a privately-held Delaware corporation that provides vision insurance to its customers.<sup>1</sup> Pursuant to a series of Stock Purchase Agreements, SVS issued shares to its various investors,<sup>2</sup> including

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<sup>1</sup> Plaintiff’s Amended Complaint (“Am. Compl.”) ¶ 13.

<sup>2</sup> SVS executed three stock purchase agreements: (i) the November 6, 1997 Stock Purchase Agreement, (ii) the September 12, 1996 Stock Purchase Agreement, and (iii) the February 1,

Defendant ReliaStar Life Insurance Company (“ReliaStar”), SVS’s largest investor and holder of 44 percent of its stock.<sup>3</sup>

The Agreements prohibit payment of any dividend. Specifically, Section 8.4 of the Agreements provides:

Limitation on Dividends; Redemption. *The Company will not pay any dividend or make any distribution with respect to any of its equity securities or redeem or repurchase any of its equity securities except for required redemptions of the Series A Stock and/or Series B stock and repurchases, approved by the Company’s board of directors pursuant to the Stockholders’ Agreement.*<sup>4</sup>

The prohibition against payment of dividends may be waived. Section 12.8 governs waivers of the Agreements’ terms, including waivers of the dividend prohibition contained in Section 8.4. Under Section 12.8, “[w]ith the written consent of such Investors owning at least two-thirds of the Purchased Securities then owned by such Investors, the obligations of the Company under this Agreement may be waived.”<sup>5</sup> As a result of ReliaStar’s 44 percent ownership interest, the prohibition against dividend payments (Section 8.4) may only be waived with ReliaStar’s consent.

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1995, Stock Purchase Agreement. Am. Compl. ¶¶ 13, 26. Collectively, purchasers of shares under these agreements are referred to as the “Investors.” The provisions pertinent to the pending dispute appear in the 1996 and 1997 Stock Purchase Agreements (the “Agreements”). *Id.* ¶ 8. The Agreements are reproduced at Affidavit of Seth Barrett Tillman (“Tillman Aff.”), Exs. B & C. The Agreements (by Section 12.3) are to be construed under Delaware law.

<sup>3</sup> Am. Compl. ¶ 14.

<sup>4</sup> *Id.* ¶ 17 (emphasis added). Under SVS’s Restated Certificate of Incorporation, dividend payments are subject to the approval of two-thirds of the entire Board. *Id.* ¶ 3. The Restated Certificate of Incorporation appears at Tillman Aff., Ex. A.

<sup>5</sup> Am. Compl. ¶ 18.

The SVS Board has considered, and voted on, a proposed dividend payment on three occasions: (1) October 8, 2004, (2) May 6, 2005, and (3) July 25, 2005.<sup>6</sup> SVS contends that ReliaStar’s response in these instances demonstrates that “[i]t is ReliaStar’s practice to withhold its consent to dividends in order to strong-arm individual stockholders or SVS to further its own agenda.”<sup>7</sup>

1. The October 8<sup>th</sup> Dividend

The Board unanimously approved a dividend of \$1.30 per share on October 8, 2004.<sup>8</sup> Initially, ReliaStar refused to allow payment of the dividend, but it later consented.<sup>9</sup> SVS contends that ReliaStar withheld its consent in bad faith, evidenced by the fact that ReliaStar only changed its position after it reached an agreement with Dr. Charles D. Fritch (who held 32.6 percent of the stock of SVS).<sup>10</sup> Under this alleged agreement, ReliaStar consented to the dividend payout in exchange for Dr. Fritch’s promise to support a process to sell the corporation.<sup>11</sup>

2. The May 6<sup>th</sup> Dividend

On May 6, 2005, the Board approved (by a three to two vote) a dividend payment of \$1.60 per share.<sup>12</sup> The two ReliaStar directors voted against the

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<sup>6</sup> *Id.* ¶¶ 19-25.

<sup>7</sup> *Id.* ¶ 10.

<sup>8</sup> *Id.* ¶ 19.

<sup>9</sup> *Id.* ¶ 22.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 23. As an inducement to invest in SVS, ReliaStar acquired the right to appoint two directors to SVS’s five-member board. *Id.* ¶ 4.

dividend “on the ground that they needed more information regarding the Corporation’s financial requirements.”<sup>13</sup>

### 3. The July 25<sup>th</sup> Dividends

On July 1, 2005, the Board unanimously approved and adopted a dividend policy (the “Policy”).<sup>14</sup> Under the new Policy, the Board would declare and authorize quarterly dividend payments, during each fiscal year, subject to compliance with applicable law.<sup>15</sup>

Pursuant to the Policy, on July 25, 2005, the Board unanimously approved a \$0.67 per share dividend for the first quarter of 2005 and \$0.54 per share dividend for the second quarter of 2005 (the “July 25<sup>th</sup> Dividends”).<sup>16</sup> Under the terms of the Agreements, however, distribution of the dividends was contingent upon the approval by Investors holding at least two-thirds of SVS’s stock.<sup>17</sup> All of the other Investors’ consented to the dividend payout; ReliaStar did not give its consent.<sup>18</sup>

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<sup>13</sup> *Id.* ¶ 23. Without the approval of two-thirds of the Board, there was no reason to seek ReliaStar’s waiver. Whether the ReliaStar-designated directors acted appropriately in voting against payment of the dividend is beyond the scope of this action.

<sup>14</sup> *Id.* ¶¶ 5, 24.

<sup>15</sup> *Id.* ¶ 5. See generally 8 *Del.C.* § 170.

<sup>16</sup> Am. Compl. ¶ 6.

<sup>17</sup> *Id.* ¶ 7.

<sup>18</sup> *Id.* ¶ 8.

### III. CONTENTIONS

Frustrated by ReliaStar's failure to consent to the dividend payment, SVS petitioned this Court for declaratory relief.<sup>19</sup> In particular, SVS seeks: (1) a declaration that, subject to compliance with 8 *Del.C.* § 170, SVS is entitled to pay the July 25<sup>th</sup> Dividends; (2) a declaration that ReliaStar breached the fiduciary duties it owes to SVS;<sup>20</sup> and (3) a declaration that ReliaStar breached the covenant of good faith and fair dealing implicit in the Agreements.<sup>21</sup>

ReliaStar moves to dismiss the action on two grounds: (1) SVS lacks standing to prosecute the asserted claims; and (2) the amended complaint fails to state a claim for which relief may be granted. With respect to SVS's fiduciary duty claim, ReliaStar argues that (1) it is not a "controlling shareholder" and, thus, does not owe fiduciary duties; (2) even if it is a "controlling shareholder," it does not owe any fiduciary duty *to* SVS; and (3) in any event, its conduct cannot be viewed as violating any fiduciary duty. As to SVS's claim under the implied covenant of good faith and fair dealing, ReliaStar contends that SVS's allegations cannot be read to sustain that cause of action.

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<sup>19</sup> *Id.* ¶ 12.

<sup>20</sup> *Id.* ¶¶ 29-30.

<sup>21</sup> *Id.* ¶¶ 31-33.

## IV. ANALYSIS

A motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) will be granted “[i]f the Court determines with reasonable certainty that there is no set of facts which would entitle the plaintiff to relief.”<sup>22</sup> The Court must accept as true all of the well-pleaded allegations of fact and draw the reasonable inferences—that logically flow from the face of the complaint—in favor of the plaintiff.<sup>23</sup> However, the Court “is not required to accept every strained interpretation of the allegations proposed by the plaintiff.”<sup>24</sup>

### A. *Standing*

ReliaStar challenges SVS’s standing to pursue this action.

The term “standing” refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance. . . .

To establish standing, a plaintiff or petitioner must demonstrate first, that he or she sustained an “injury-in-fact”; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected.<sup>25</sup>

The plaintiff is charged with the burden of demonstrating standing because, unless the plaintiff has suffered a “direct injury,”<sup>26</sup> the disagreement between the parties cannot fairly be characterized “real and immediate.”<sup>27</sup> In short, judicial

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<sup>22</sup> *Palese v. Del. State Lottery Office*, 2006 WL 1875915, at \*2 (Del. Ch. June 29, 2006).

<sup>23</sup> *In re GM (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

<sup>24</sup> *Id.*

<sup>25</sup> *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003).

<sup>26</sup> *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991).

<sup>27</sup> *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992); *see also Rollins Int’l Inc. v. Int’l Hydronics Corp.*, 303 A.2d 660, 663 (Del. 1973).

resources should be not allocated to rendering “advisory or hypothetical opinions.”<sup>28</sup>

ReliaStar contends that SVS lacks standing to assert its claims because SVS has not pleaded the requisite injury-in-fact. According to ReliaStar, the alleged injury (SVS’s inability to pay a dividend as the result of ReliaStar’s conduct) did not harm, but, instead, enriched SVS, because ReliaStar’s veto allowed SVS to retain the cash intended for the payout.<sup>29</sup> Moreover, ReliaStar also rejects SVS’s allegation that, as a result of ReliaStar’s actions, SVS was “deprived . . . of its ability to govern corporate affairs . . . and the payment of dividends.”<sup>30</sup> ReliaStar insists that SVS suffered no such deprivation, because “corporations do not govern, boards of directors do.”<sup>31</sup>

Thus, ReliaStar, while properly noting that one would more likely expect shareholders who have been deprived of their dividends to bring actions of this nature, argues that SVS has alleged no direct harm. SVS certainly has not alleged grievous harm, but that, of course, is not the standard. SVS—which as a corporation acts at the direction of, and through its, Board—is thwarted by not

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<sup>28</sup> *Bebchuk v. CA, Inc.*, 2006 WL 2252012, at \*2 (Del. Ch. June 22, 2006) (applying ripeness doctrine).

<sup>29</sup> Defendant’s Opening Brief in Support of its Motion to Dismiss (“Def.’s OB”) at 10.

<sup>30</sup> Am. Compl. ¶ 9.

<sup>31</sup> Def.’s OB at 11.



being able to implement the Policy adopted by the Board for the payment of dividends. Thus, SVS wants to take a certain action, but it is constrained and precluded by ReliaStar. SVS's allegations are not rich in detail, but the restrictions on its actions imposed by ReliaStar are by themselves in the nature of a direct harm to the corporation. In addition, dividends are alleged as a likely obstacle to any future effort to raise additional capital. Finally, all of this, at least in part, is based upon a contract to which SVS and ReliaStar are parties. The question of whether the Agreements, especially when the implied covenant of good faith and fair dealing is considered, preclude SVS from taking actions authorized by its Board and, thus, unduly interfere with the normal corporate governance procedures anticipated by its corporate charter satisfies, however minimally, SVS's standing obligation.

#### *B. Breach of Fiduciary Duty*

SVS presents a remarkably unconventional cause of action. In this instance, it is the corporation—not its shareholders—alleging breach of fiduciary duty by an allegedly controlling shareholder. More importantly, SVS has not alleged any wrongdoing by ReliaStar through its designated directors; rather, the alleged harm stems *solely* from the purported abuse of ReliaStar's contractual right to withhold its consent and, thus, effectively to veto any dividend payments in contravention of its fiduciary obligations as a controlling shareholder. Specifically, SVS contends

that: ReliaStar owes a fiduciary duty to SVS and its stockholders with respect to the exercise of rights under the Agreements; ReliaStar, in violation of Delaware law, has knowingly, recklessly and in bad faith violated its duties of good faith, care, and candor owed; and ReliaStar has breached its fiduciary duties by, among other things, withholding its consent to the payment of dividends without any economic justification or other bona fide reason.<sup>32</sup>

A shareholder owes fiduciary duties in two instances: (1) when it is a “majority shareholder,” owning more than 50 percent of the shares, or (2) when it “exercises control over the business affairs of the corporation.”<sup>33</sup> ReliaStar holds a 44 percent interest in SVS; thus, fiduciary obligations will result only if it is deemed a “controlling shareholder.”

“[T]o be deemed a controlling stockholder for purposes of imposing fiduciary obligations, the plaintiff must establish the *actual exercise* of control over the corporation’s conduct by that otherwise minority stockholder.”<sup>34</sup> In order to append the label of “controlling shareholder,” pervasive control over the corporation’s actions is not required; indeed, a plaintiff “can survive the motion to dismiss by alleging actual control with regard to the particular transaction that is

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<sup>32</sup> Am. Compl. ¶ 29.

<sup>33</sup> See *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) (citations omitted).

<sup>34</sup> *Weinstein Enters. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) (emphasis in original).

being challenged.”<sup>35</sup> ReliaStar is a significant shareholder in SVS; it has the power to preclude the payment of dividends; and, in fact, it has prevented the payment of dividends. Thus, it has exercised “actual control” with regard to the payment of dividends. SVS, however, has not alleged that ReliaStar controlled the Board;<sup>36</sup> in fact, the Board, including ReliaStar’s designees, unanimously approved the Policy for payment of dividends.<sup>37</sup> The question here is whether the actual control must be over the Board or whether separately negotiated contract rights can supply the requisite degree of control.

Delaware case law has focused on control of the board. For example, in *In re Western National Corp. Shareholders Litigation*, the Court inquired as to whether the significant shareholder “in fact, exercise[d] actual control over the board of directors during the course of a particular transaction.”<sup>38</sup> In *Kahn v.*

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<sup>35</sup> *Williamson v. Cox Commc’ns, Inc.*, 2006 WL 1586375, at \*4 (Del. Ch. June 5, 2006).

<sup>36</sup> Surely, SVS’s pursuit of this action against ReliaStar suggests the contrary.

<sup>37</sup> That ReliaStar designated directors for SVS’s board does not, “without more, establish actual domination or control.” *Williamson*, 2006 WL 1586375, at \*4. Indeed, the source of ReliaStar’s power to preclude the payment of dividends is independent of the directors which it has designated. The source, indeed the exclusive source, of authority can be found in the Agreements.

<sup>38</sup> 2000 WL 710192, at \*20 (Del. Ch. May 22, 2000). The Court in *Western National* noted that, in order for a significant shareholder to be deemed a controlling shareholder, there must be “a judicial finding of actual control over the *business and affairs of the corporation*.” 2000 WL 710192, at \*8 (emphasis in original). That view may be pertinent for two reasons. First, the reference to the “business and affairs” of the corporation suggests something broader than one corporate act, such as the payment of a dividend. If so, SVS would be required to allege that ReliaStar’s control was more extensive, reaching beyond the payment of dividends. It has not done so. Second, the “business and affairs” of a Delaware corporation are under the direction of the board pursuant to 8 *Del.C.* § 141(a), as noted by the Court in *Western National*; that suggests that questions of control by a significant shareholder should be assessed at the board level in

*Lynch Communications Systems, Inc.*,<sup>39</sup> a 43% minority shareholder (Alcatel) was deemed a controlling shareholder of Lynch Communications Systems (“Lynch”) because of its influence over the Lynch board. As the Court observed, “[t]he [Lynch] management and independent directors disagreed with Alcatel on several important issues. However, when Alcatel made its position clear, and reminded the other directors of its significant stockholdings, Alcatel prevailed.”<sup>40</sup> Similarly, in *Williamson v. Cox Communications, Inc.*, minority shareholders, with their-designated members of the board constituting less than a majority, were able to benefit from the ongoing commercial relationships the company had with those shareholders to override the board’s independent judgment (or so it was alleged).<sup>41</sup> Accordingly, the focus of the inquiry has been on the *de facto* power of a significant (but less than majority) shareholder, which, when coupled with other factors, gives that shareholder the ability to dominate the corporate decision-making process. The concern is that the significant shareholder will use its power to obtain (or compel) favorable actions by the board to the ultimate detriment of other shareholders.

ReliaStar, by contrast, draws its power from a previously (and, at least from the Complaint, fairly) negotiated contract. It is not influencing or controlling any

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terms of whether the board’s capacity to exercise its judgment independently has been impaired. SVS, of course, has not challenged the conduct of its directors.

<sup>39</sup> 638 A.2d 1110 (Del. 1994).

<sup>40</sup> *Id.* at 1114.

<sup>41</sup> *Williamson*, 2006 WL 1586375, at \*5.

action by the Board; indeed, the Board has taken the action that it saw fit—approving dividends. ReliaStar does, however, have a contractual right that allows it to prevent implementation of the corporate dividend policy adopted by the Board. Under SVS’s view, any significant shareholder who, because of a contractual right, effectively blocks a particular corporate action would be considered a “controlling shareholder” with respect to that action. In essence, any strong contractual right, duly obtained by a significant shareholder (a somewhat elusive term in itself), would be limited by and subject to fiduciary duty concerns. In substance, SVS asks the Court to engraft upon ReliaStar’s specific and fairly negotiated contractual rights a limitation that ReliaStar cannot just consider its interests<sup>42</sup> whenever it decides whether to waive (or not) any provision which it obtained during the process of negotiating the Agreement. Here, ReliaStar is alleged to have taken advantage of its contractual rights for its own purposes. Without more, that is not sufficient to allege that ReliaStar is a “controlling shareholder” bound by fiduciary obligations.<sup>43</sup>

In sum, a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise

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<sup>42</sup> See, e.g., *Ivanhoe*, 535 A.2d at 1344 (“[I]t is well established law that nothing precludes [a 49.7% stockholder], as a stockholder from acting in its own self-interest.”).

<sup>43</sup> ReliaStar received a bundle of contractual rights—including the assurance that SVS would not pay dividends without its consent—when it invested in SVS. Now, after its funds have been paid to SVS, SVS wants to change the scope of ReliaStar’s contractual rights and the certainty for which ReliaStar thought it had successfully bargained.

would take, does not become, without more, a “controlling shareholder” for that particular purpose. There may be circumstances where the holding of contractual rights, coupled with a significant equity position and other factors, will support the finding that a particular shareholder is, indeed, a “controlling shareholder,” especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions. That confluence of factors is not alleged to be present in this matter and, accordingly, ReliaStar may not fairly be deemed a “controlling shareholder” with respect to the payment of dividends by SVS. With that conclusion, SVS’s claim against ReliaStar for breach of fiduciary duty fails.

### *C. Breach of the Implied Covenant of Good Faith and Fair Dealing*

SVS also contends that, “[b]y baselessly withholding its consent [to the payment of dividends,] ReliaStar . . . breached the . . . implied covenant of good faith and fair dealing, whereby ReliaStar promised to fairly, honestly and reasonably perform the terms and conditions of those agreements.”<sup>44</sup> “Under Delaware law, every contract includes an implied covenant of good faith and fair dealing—a promise of faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”<sup>45</sup> Thus, according to SVS, although the Agreements place no express limitation on ReliaStar’s discretion,

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<sup>44</sup> Am. Compl. ¶ 11.

<sup>45</sup> *Palese*, 2006 WL 1875915, at \*5 (internal quotation and citation omitted).

there is an implicit promise that ReliaStar will not use its right to decide whether or not to waive an express contractual term to advance unreasonably its own interests. The implied covenant of good faith and fair dealing, however, places no such obligation on ReliaStar in this instance:

The covenant of good faith and fair dealing, implied in every Delaware contract, arises from fundamental notions of fairness. It is a judicial convention designed to protect the spirit of an agreement when, *without violating an express term of the agreement*, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain. The Court, of course, may not substitute its notions of fairness for the terms of the agreement reached by the parties. Indeed, the implied covenant may only be invoked where 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 their agreement had they thought to negotiate with respect to that matter. Where the subject at issue is expressly covered by the contract, the implied duty to perform in good faith does not come into play. Finally, imposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare.<sup>46</sup>

This is not one of those rare instances. The Agreements explicitly prohibit SVS from paying dividends. The prohibition may be waived if Investors holding two-thirds of the shares consent, but, each Investor, including ReliaStar, has an unqualified right to waive or to refrain from waiving SVS's otherwise absolute duty not to pay a dividend. Contrary to SVS's assertion, the covenant of good faith and fair dealing does not impose upon an Investor the obligation to waive the

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<sup>46</sup> *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at \*28 (Del. Ch. Apr. 29, 2005) (emphasis added) (internal quotations and citations omitted).

contractual prohibition against the payment of dividends unless the Investor has a reasonable basis for withholding the waiver.

The facts alleged (and the favorable inferences that could be drawn from them) would not support a finding that an Investor's withholding of a waiver is implicitly limited by a condition that the waiver may not unreasonably be withheld, especially in light of the parties' sophisticated nature. "A court should not read a reasonableness requirement into a contract entered into by two sophisticated parties. It is imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain, so courts do not trump the freedom of contract lightly."<sup>47</sup>

Moreover, the Agreements suggest that a reasonableness requirement was deliberately omitted. It cannot reasonably be inferred that the parties "would have agreed to proscribe the act later complained of as a breach of their agreement had they thought to negotiate with respect to that matter"<sup>48</sup> because, in a similar (though unrelated) provision of the Agreements, the Investor's discretion to consent to a particular corporate act is expressly subject to a reasonableness requirement. For example, Section 8.1 (Limitation on Indebtedness) states:

The Company agrees not to incur or permit any Subsidiary to incur any indebtedness for borrowed money outstanding at any one time in

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<sup>47</sup> *Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at \*7 n.17 (Del. Ch. June 5, 2006) (applying summary judgment standard).

<sup>48</sup> *Frontier Oil Corp.*, 2005 WL 1039027, at \*28.



excess of \$25,000 *without the consent of the Investors; provided however, that the Investors shall not unreasonably withhold consent* to the incurrence of indebtedness for borrowed money necessary in order for the Company to secure reinsurance revenues.<sup>49</sup>

Even in the “plaintiff friendly” context of a motion to dismiss, the only rational or reasonable inference is that had the parties intended to place a similar limitation on the Investor’s discretion with regard to the payment of dividends, similar language would have been employed.<sup>50</sup>

It is the duty of the court to construe agreements as they are made by the parties and to give to language that is clear, simple and unambiguous the force and effect which the language clearly demands. The court may not, in the guise of interpreting the contract, make for the parties a better agreement than they themselves have been satisfied to make by affording to a party a measure of protection which the contract does not cover.<sup>51</sup>

The Agreements might be better if the condition sought by SVS to restrict ReliaStar’s discretion to refuse to waive the dividend prohibition had been imposed by the Court. It is not, however, the role of the Court to modify for that reason the terms of an agreement, one apparently carefully prepared by drafters with the demonstrated ability to impose such a limitation when it was intended.

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<sup>49</sup> Def.’s OB at Ex. B, Stock Purchase Agreement, Sept. 12, 1996 § 8.1 (emphasis added); Def.’s OB at Ex. C, Stock Purchase Agreement, Nov. 6, 1997 § 8.1 (emphasis added). This section of the Agreements was not discussed in the Amended Complaint. However, because other provisions of the Agreements were referenced in detail in the Amended Complaint (and, indeed, the Agreements form the very heart of this dispute), the Court may consider the Agreements in their entirety; the analysis ought not be limited to only those provisions proffered by SVS. *Hughes*, 897 A.2d at 169.

<sup>50</sup> Significantly, the “not to be unreasonably withheld” proviso in Section 8.1 does not apply to all borrowing; instead, the proviso is applicable only to borrowing for a specific purpose.

<sup>51</sup> *Palese*, 2006 WL 1875915, at \* 4.

Accordingly, the Amended Complaint also fails to state a claim with respect to the implied covenant of good faith and fair dealing.

## **V. CONCLUSION**

For the foregoing reasons, the Amended Complaint will be dismissed under Court of Chancery Rule 12(b)(6).<sup>52</sup> An implementing order will be entered.

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<sup>52</sup> With the conclusion that the Amended Complaint does not state a claim for breach of fiduciary duty or for breach of the implied covenant, it follows that SVS is not entitled to a declaration that it may pay dividends notwithstanding the unambiguous terms of the Agreements and the absence of consent by ReliaStar.