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Case No. 6685-VCN

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 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,	)	
v.	)	**C.A. No. 6685-VCN**
LORD BALTIMORE CAPITAL CORPORATION and LOUIS B. THALHEIMER,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 16, 2012
Date Submitted: May 31, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Susan M. Blaustein ("Susan"), both individually and as the trustee of several trusts that she directs, asserts claims against Defendants Lord Baltimore Capital Corp. ("Lord Baltimore" or the "Company") and Louis B. Thalheimer ("Louis" and together, with Lord Baltimore, the "Defendants") arising out of Susan's decision to invest in Lord Baltimore.[1] The Defendants have moved to dismiss all of the claims asserted against them.

II. BACKGROUND[2]

A. *The Parties*

Lord Baltimore is a Delaware corporation. It holds substantial positions in individual securities, investment funds, and loans to certain entities affiliated with it. The Company also develops, owns, and manages commercial real estate properties.

Louis is a stockholder and Chief Executive Officer of Lord Baltimore, as well as Chairman of its board of directors (the "Board").

Susan controls 17.59% of the outstanding stock of Lord Baltimore.

[1] First names are used for convenience. No disrespect is intended.

[2] Except where noted, the background facts are drawn from the well-pled allegations of the Verified Complaint (the "Complaint" or "Compl.").

B. *Factual Background*

In the early 1900's, Louis Blaustein, Alvin Thalheimer, and Henry Rosenberg, Sr. were involved in the initial development of the American Oil Company, which later came to be known as Amoco. In the 1930's, another company, the American Trading and Production Corporation ("Atapco"), was formed to consolidate, expand, and diversify the business activities of the Blaustein, Rosenberg and Thalheimer families, whose personal fortunes had become substantial. In 1998, members of the Blaustein, Rosenberg, and Thalheimer families began to consider the possibility of splitting the assets of Atapco into separate companies that would be owned by different groups of the then-existing Atapco shareholders, and which would pursue different business models going forward. The Thalheimer family group, which includes Louis, Marjorie Thalheimer Coleman ("Marjorie"), and Elizabeth Thalheimer Wachs ("Elizabeth"), developed a plan whereby their share of the Atapco assets would be transferred to American Trading Real Estate Company, Inc., an existing corporation that would then change its name to Lord Baltimore Capital Corporation and make an election to become an "S" corporation under Section 1362 of the Internal Revenue Code. In order to be able to take advantage of certain tax benefits of being an "S" corporation, the Complaint alleges that Lord

Baltimore was required to retain the assets it received from Atapco for a period of ten years (the "10-Year Waiting Period").

Around October 27, 1998, before the Atapco assets were split up, Louis held a meeting to promote investments in Lord Baltimore (the "October 27 Meeting"). Marjorie, Elizabeth, Susan, and Susan's sister, Jeanne P. Blaustein ("Jeanne"), among others, attended the October 27 Meeting. At the October 27 Meeting and in other meetings during the fall of 1998, Louis expressly promised Susan and Jeanne that the assets transferred to Lord Baltimore from Atapco would be retained by Lord Baltimore throughout the 10-Year Waiting Period; and that, at least after the expiration of the 10-Year Waiting Period, Lord Baltimore shareholders, including Susan and Jeanne, would be allowed to withdraw the full *pro rata* value of their ownership interests in Lord Baltimore. The Complaint alleges that these promises, heard without objection by Marjorie and Elizabeth, were made to induce Susan and Jeanne to transfer their Atapco holdings to Lord Baltimore.

As of January 1, 1999, Susan, Jeanne, Louis, Marjorie, Elizabeth, and the trustees of their respective trusts executed the Lord Baltimore Capital Corporation Shareholders' Agreement (the "Shareholders' Agreement"), which established certain rights and duties of Lord Baltimore's shareholders. Susan and Jeanne inquired on several occasions as to whether the commitment to allow them to have their stock positions repurchased on a full value basis, after the 10-Year Waiting

Period, could be memorialized in the Shareholders' Agreement. Louis responded on each occasion that such commitment could not be memorialized in writing because doing so might jeopardize the tax benefits Lord Baltimore's shareholders stood to receive from Lord Baltimore's status as an "S" corporation. Louis nevertheless orally assured Susan and Jeanne that he understood their long-term investment goals and that the commitment to permit them, after the 10-Year Waiting Period, to withdraw from Lord Baltimore and receive the then-current value of their proportionate stock ownership interest, would be honored. The Complaint alleges that absent those assurances, Susan and Jeanne would not have agreed to become shareholders of Lord Baltimore.

Although the Shareholders' Agreement does not provide that Susan and Jeanne have a right to withdraw from Lord Baltimore and receive the then-current value of their proportionate stock ownership interest, the Shareholders' Agreement does address stock repurchases. Specifically, Section 7(d) of the Shareholders' Agreement 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.[3]

Various trusts established for the benefit of Louis, Marjorie, Elizabeth, and the members of their families collectively own approximately 65% of Lord Baltimore's outstanding stock. Thus, the Complaint alleges that Louis, Marjorie, and Elizabeth control Lord Baltimore. Moreover, the Complaint alleges that Louis is the one who typically makes decisions on behalf of the control group.

Within three years after Lord Baltimore was formed, Susan began looking for a way to extract her investment from the Company. Susan has had numerous discussions with Louis about converting her investment, but all of those discussions have been unproductive, both before and after the expiration of the 10-Year Waiting Period, because Louis has continually priced any repurchase of Susan's Lord Baltimore stock at 50% of her *pro rata* share of the then-current value of Lord Baltimore's assets. Notwithstanding Louis's continued insistence on a discount, the Complaint alleges that Susan has negotiated in good faith and has made several proposals to resolve the matter, but that none of her proposals has been presented to the Board because Louis has continued to insist on pricing

[3] Defs.' Br. in Supp. of their Mot. to Dismiss the Verified Compl., Ex. A ("Shareholders' Agreement"). "While, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint . . . ." *JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2012 WL 1524981, at *1 n.1 (Del. Ch. Apr. 26, 2012) (citing *Orman v. Cullman,* 794 A.2d 5, 15–16 (Del. Ch. 2002)). The Shareholders' Agreement is integral to and incorporated into the Complaint, and thus, the Court may properly consider it on a motion to dismiss.

formulas that improperly discount any repurchase price. The Complaint also alleges that Louis has caused Lord Baltimore to advance hundreds of millions of dollars to Lord Baltimore Investment Properties LP ("LBIP") in exchange for intercompany notes (the "Intercompany Notes"), and that the payment of interest and principal on the Intercompany Notes has been deferred indefinitely. LBIP is allegedly controlled by Louis, Marjorie, and Elizabeth, and thus, the Complaint argues that the transactions involving the Intercompany Notes constitute self-dealing.

III. CONTENTIONS

The Complaint consists of three counts. Count I purports to allege a claim for promissory estoppel against Lord Baltimore and Louis. Count II alleges that Lord Baltimore and Louis breached the implied covenant of good faith and fair dealing in numerous ways, including by: (1) failing to negotiate a repurchase of Susan's ownership interest in Lord Baltimore in good faith and consistent with the promises and representations made to induce her investment; (2) engaging in corporate transactions that favor the other shareholders of Lord Baltimore to Susan's detriment and that impede the ability of Lord Baltimore to repurchase Susan's stock for a fair and reasonable price; and (3) seeking to impose an unconscionable forfeiture of approximately half the value of Susan's holdings in Lord Baltimore by insisting on an inadequate repurchase price. Count III alleges

that Lord Baltimore was a joint venture among Louis, Marjorie, Elizabeth, Jeanne, and Susan, and that Louis, as a co-venturer of Susan, owes her fiduciary duties. Count III further alleges that Louis breached his co-venturer fiduciary duties in numerous ways, including by engaging in the three types of conduct highlighted in Count II.

Lord Baltimore and Louis have moved, pursuant to Court of Chancery Rules 12(b)(6) and 23.1, to dismiss the Complaint. The Defendants argue that Count I fails to state a claim for promissory estoppel because the promise Susan seeks to enforce contradicts the terms of the Shareholders' Agreement—an enforceable written contract. The Defendants argue that Count II fails to state a claim for breach of the implied covenant of good faith and fair dealing because the Shareholders' Agreement addresses shareholder repurchase rights and the implied covenant cannot be used to circumvent an enforceable contract or create a "free-floating duty" separate from a contract. With regard to Count III, Louis contends that it should be dismissed for essentially the same reason that Count II should be dismissed: namely, that the parties' rights and duties regarding share repurchases are expressly governed by the Shareholders' Agreement, and therefore, that Susan cannot look to fiduciary duty principles to vary those rights and duties.

In opposing the Defendants' motion to dismiss, Susan argues that even where the subject of a promise is generally addressed in a written agreement, a

claim for promissory estoppel can still be made as long as the promise is not inconsistent with the terms of the agreement. Moreover, according to Susan, the terms of the Shareholders' Agreement are not inconsistent with the promise Louis made to her at the October 27 Meeting, and thus, she argues that the Court can enforce Louis's promise. With regard to Count II, Susan asserts that the terms she seeks to imply in the Shareholders' Agreement are not inconsistent with the express terms of the Shareholders' Agreement, and that she has adequately pled the elements of an implied covenant claim. Finally, Susan argues that Count III states a claim against Louis for breach of his co-venturer fiduciary duties, and that the Shareholders' Agreement does not prevent Louis from being held liable for breaching his fiduciary duties in connection with a repurchase of Susan's stock.

IV. ANALYSIS

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[4]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[5]

[4] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (citation omitted).
[5] *Id.* at 536 (citation omitted).

"'The court . . . need not accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,' but as long as there is a reasonable possibility that a plaintiff could recover, a motion to dismiss will be denied."[6]

A. *Count I*

Count I purports to allege a claim for promissory estoppel against Lord Baltimore and Louis. "Under Delaware law, 'a party cannot assert a promissory estoppel claim based on promises that contradict the terms of a valid, enforceable contract.'"[7] As the Court explained in *Ameristar Casinos, Inc. v. Resorts International Holdings, LLC*:

> [I]f a contract covers the subject matter, the defendant's conduct either violates the contract or not. If the defendant did not violate the contract governing the subject of the dispute, then the plaintiff cannot attempt to hold the defendant responsible by softer doctrines, and thereby obtain a better bargain than he got during the contract negotiations.[8]

Section 7(d) of the Shareholders' Agreement lays out conditions to Lord Baltimore's repurchase of shares of its stock.[9] Specifically, Section 7(d) of the

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[6] *Frank v. Elgamal*, 2012 WL 1096090, at *7 (Del. Ch. Mar. 30, 2012) (quoting *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011)).
[7] *Olson v. Halvorsen*, 2009 WL 1317148, at *12 (Del. Ch. May 13, 2009) (quoting *Weiss v. Nw. Broad. Inc.*, 140 F. Supp. 2d 336, 345 (D. Del. 2001)), *aff'd*, 986 A.2d 1150 (Del. 2009).
[8] 2010 WL 1875631, at *13 (Del. Ch. May 11, 2010).
[9] *See* Shareholders' Agreement § 7(d) ("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

Shareholders' Agreement, which was signed on behalf of Lord Baltimore and by all of its shareholders, provides Lord Baltimore's shareholders with a specific benefit—Lord Baltimore will not repurchase any of its shares, and thereby deplete its assets, unless one of the two requirements prescribed in Section 7(d) is met. Susan, who has not challenged the validity of Section 7(d) (or any other part of the Shareholders' Agreement), seeks to deny the rest of Lord Baltimore's shareholders the benefits of Section 7(d) by requiring the Company to repurchase her shares at a specific price without any approval requirement.

Susan alleges that she reasonably relied on Louis's promise that after the 10-Year Waiting Period, she could withdraw the full *pro rata* value of her ownership interests in Lord Baltimore. Louis's alleged promise, however, is inconsistent with the process set forth in Section 7(d), which requires that either a majority of the Board or a super-majority of Lord Baltimore's shares vote to approve a given repurchase. Under the Shareholders' Agreement, a process must be followed before Lord Baltimore may repurchase any of its shares. In short, Susan seeks to use promissory estoppel to avoid the process mandated by the Shareholders' Agreement. She cannot do that. A promissory estoppel claim cannot be "based on

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(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.").

promises that contradict the terms of a valid and enforceable contract."[10] Therefore, Count I is dismissed.[11]

B. *Count II*

Count II alleges that Lord Baltimore and Louis breached the implied covenant of good faith and fair dealing. "The implied covenant inheres to every contract, and is 'best understood as a way of implying terms in the agreement.'"[12] "In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[13] "[T]he implied covenant only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the

[10] *Olson*, 2009 WL 1317148, at *12 (quoting *Weiss*, 140 F. Supp. 2d at 345 (D. Del. 2001), *aff'd*, 986 A.2d 1150 (Del. 2009). If Section 7(d) merely provided that Lord Baltimore may repurchase shares "upon terms and conditions agreeable to the Company," and did not specify that a repurchase needed to meet a specific approval requirement, then Section 7(d) would not preclude holding Louis to the promise he made at the October 27 Meeting. Section 7(d), however, provides for a specific process, and Susan cannot avoid that process through an invocation of promissory estoppel.

[11] Susan correctly cites *Addy v. Piedmonte*, 2009 WL 707641 (Del. Ch. Mar. 18, 2009), and *Grunstein v. Silva*, 2009 WL 4698541 (Del. Ch. Dec. 8, 2009), for the proposition that even where the subject of a promise is generally addressed in a written agreement, a claim for promissory estoppel can still be made as long as the promise is not inconsistent with the terms of the agreement. Here, however, the promise that Susan seeks to hold the Defendants to is inconsistent with Section 7(d) of the Shareholders' Agreement.

[12] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *14 (Del. Ch. Jan. 14, 2011) (quoting *E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).

[13] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998) (citation omitted).

contract."[14] "[Therefore, o]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement."[15]

Susan argues that the Defendants breached the implied covenant in "numerous ways," and she gives several examples of breach. Most of those examples are essentially arguments that Susan's Lord Baltimore stock has not been repurchased at her desired price. As stated above, however, Section 7(d) of the Shareholders' Agreement directly addresses when Lord Baltimore may repurchase a stockholder's shares, and Susan's claimed right to put her shares to Lord Baltimore at a specific price would contradict Section 7(d). That section provides that Lord Baltimore and any stockholder seeking a repurchase of her Lord Baltimore shares must agree on the purchase price. Although Lord Baltimore has discretion in determining at what price to repurchase shares, Susan has discretion in determining what price she will accept. Under Section 7(d), no repurchase of the stock can occur unless both Lord Baltimore and the stockholder who seeks to sell her stock agree on a price. This case does not present a situation where only one party to a contract has discretion, and thus, the other party must look to the implied covenant to obtain any sort of relief.[16] The status quo will continue unless

[14] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch. 2009) (citation omitted), *aff'd*, 976 A.2d 170 (Del. 2009).
[15] *Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).
[16] *See, e.g.*, *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146-47 (Del. Ch. 2009)

Susan agrees to a repurchase; Lord Baltimore cannot demand that a repurchase be at a particular price. 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.

Nonetheless, because the Shareholders' Agreement, which was signed on behalf of Lord Baltimore, provides that any repurchase must be approved either by a majority of the directors or a super majority of Lord Baltimore's shareholders, Susan has adequately pled that there might be an implied covenant in the Shareholders' Agreement requiring the Board to consider repurchases. Susan points out that none of her repurchase proposals has been "presented to, discussed at, or completely described for, the board of directors during any board meeting."[17] Instead, according to Susan, "Louis and counsel for the Thalheimer shareholders have continued to insist on pricing formulas that would improperly enhance the value of the Thalheimer shareholders' interest in Lord Baltimore at the expense of

("When a contract confers discretion *on one party*, the implied covenant requires that the discretion be used reasonably and in good faith.") (emphasis added) (citations omitted).

[17] Compl. ¶ 45.

Susan . . . ."[18] The Shareholders' Agreement does not anticipate that Louis, counsel representing his interests, or, for that matter, others, would act as roadblocks to the Board's consideration of any issue which is assigned to the Board for decision.[19] That approach effectively denies Susan an exit strategy set forth in the agreement. For example, Louis's apparent ability to frustrate her efforts, by precluding access to the Board, finds no support in the text of the agreement and was not a line of resistance that she could reasonably have foreseen.[20]

Given the composition of the Board, its consideration of Susan's repurchase proposals may provide her with little benefit. Nonetheless, 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 that implied covenant has been breached. To that extent, Count II may not be dismissed.[21]

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[18] *Id.*

[19] The question of repurchase, of course, may be resolved not only by the Board but also by a supermajority of shareholders.

[20] Although on another set of facts there might questions about how frequently the Board is required to consider proposals from serial repurchase requesters, Susan alleges that she has been seeking a repurchase of her stock for over a decade, and that none of her repurchase proposals has been presented to the Board. Compl. ¶ 45.

[21] To the extent Susan uses the implied covenant to challenge the issuance of the Intercompany Notes, that claim is dismissed. The implied covenant only operates "in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer." *Airborne Health*, 984 A.2d at 146. Susan has not suggested that any aspect of the Shareholders' Agreement speaks to Lord Baltimore's authority to loan money or engage in related-party transactions. Thus, Susan cannot adequately plead that there is an implied covenant in the Shareholders' Agreement constraining Lord Baltimore's ability to engage in transactions with LBIP or other affiliated entities.

C. *Count III*

Count III alleges that Louis breached his co-venturer fiduciary duties for the same reasons that he allegedly breached the implied covenant. As discussed above, those reasons are primarily based on Susan's contention that Lord Baltimore is not repurchasing her stock at the price to which, she argues, she is entitled.[22] The co-venturers of a joint venture owe each other "a fiduciary duty of utmost good faith, fairness and honesty with respect to their relationship to each other and to the enterprise . . . ."[23] It is unlikely, however, that a Delaware corporation, such as Lord Baltimore, would also be considered to be a joint venture. Once an entity incorporates, the persons with the power to make decisions on its behalf are likely subject to one set of fiduciary duty principles—those relating to corporations. Nevertheless, even assuming that Lord Baltimore is a joint venture,[24] co-venturers may contract for rights that they would not otherwise have at common law.

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[22] Susan has not argued that Louis's actions which are allegedly contributing to the Board's failure to consider Susan's repurchase proposals constitute a breach of his co-venturer fiduciary duties. Even if Susan had made that argument, it would be duplicative of her argument with regard to the implied covenant. To the extent Susan's interest in having the Board consider her repurchase proposals is worthy of protection, that interest will be protected through her claim under the implied covenant.

[23] *In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc.*, 386 A.2d 1162, 1166 (Del. Ch. 1978) (citing *J. Leo Johnson, Inc. v. Carmer*, 156 A.2d 499 (Del. 1959); *Pan Am. Trade and Inv. Corp. v. Commercial Metals Co.*, 84 A.2d 700 (Del. Ch. 1953)).

[24] *See Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 975581, at *2 (Del. Ch. Mar. 4, 2010) ("A joint venture is created where there is: '(1) a community of interest in the performance of a common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in the

With regard to repurchases, there is no co-venturer fiduciary duty that requires a joint venture to repurchase a co-venturer's stock at a specific price or through a specific procedure. Thus, co-venturers may validly contract for a specific repurchase procedure, and that is what the shareholders of Lord Baltimore did. Section 7(d) of the Shareholders' Agreement, which Susan has not challenged,[25] provides for a specific repurchase procedure. Susan seeks to avoid that procedure by claiming that Louis's co-venturer fiduciary duties should be interpreted as requiring him to cause Lord Baltimore to repurchase Susan's stock at a specific price. Even if, at common law, Louis would be required to cause Lord Baltimore to repurchase Susan's shares at a specific price determined by a particular methodology, co-venturers may validly provide for a specific repurchase procedure that displaces whatever the common law rule on repurchases may be.

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losses which may be sustained.'") (quoting *Wah Chang Smelting and Refining Co. of Am., Inc. v. Cleveland Tungsten Inc.*, 1996 WL 487941, at *4 (Del. Ch. Aug. 19, 1996)).

[25] It is important to note that Susan does not claim that Section 7(d) of the Shareholders' Agreement does not represent the parties' true bargain. She is not, for example, claiming that the parties to the Shareholders' Agreement came to a different agreement on repurchases than is provided for in Section 7(d), and thus, that the Court should reform the Shareholders' Agreement to reflect that true agreement. Moreover, Susan does not argue that Louis breached his co-venturer fiduciary duties by promising to repurchase Susan's stock at a certain price and then entering into an agreement, the Shareholders' Agreement, that was inconsistent with that promise. Rather, Susan argues that Louis's promise and the Shareholders' Agreement are not inconsistent, and that Louis's breach of duty occurred when Susan attempted to negotiate a repurchase of her shares, and Louis failed to agree to the price (the *pro rata* fair market value of her ownership interest in Lord Baltimore) he had previously promised her. That argument fails because Louis's alleged promise is inconsistent with Section 7(d) of the Shareholders' Agreement. Co-venturers, assuming that is what Louis and Susan are, may contract for rights, and, as a general matter, any promise made before those rights were contracted for and which is inconsistent with those rights, is unenforceable. *See supra* note 7 and accompanying text.

There is no fiduciary duty constraining the freedom of co-venturers to contract for repurchase as they might choose. If the way in which a repurchase occurred was a breach of fiduciary duty, for example because it was done unfairly or in bad faith, then a cause of action might lie, but a plaintiff 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 all of the co-venturers agreed. Therefore, to the extent Louis has any co-venturer fiduciary duties, he has not breached them by refusing to cause Lord Baltimore to redeem Susan's shares through a process that is inconsistent with Section 7(d) of the Shareholders' Agreement. Count III fails to state a claim, and it is dismissed.[26]

If Louis did make the promises that Susan claims he did, then his actions were far from best practices. But when people enter into a contract, that contract is

[26] To the extent Count III alleges that Louis breached his fiduciary duties to Lord Baltimore (by issuing the Intercompany Notes or otherwise), that claim is dismissed under Court of Chancery Rule 23.1 for failure to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." The Complaint does not allege that Susan made a demand on the Board to pursue an action against Louis for issuing the Intercompany Notes, and the Complaint also does not allege that demand would have been futile. To plead demand futility, the Complaint must allege particularized facts sufficient to raise a reasonable doubt that (1) a majority of the Board is disinterested and independent with respect to the challenged transaction; or (2) the challenged transaction was otherwise the product of a valid business judgment. *See, e.g.*, *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The Complaint alleges that four of the seven members of the Board were independent of Louis, Elizabeth and Marjorie, Compl. ¶ 7, and the Complaint makes no allegations with regard to interest or business judgment. Thus, to the extent Count III alleges a claim against Louis for breach of his fiduciary duties to Lord Baltimore, that derivative claim is dismissed under Court of Chancery Rule 23.1 for failure to make a demand or adequately plead demand futility.

the primary determinant of their rights and duties to each other. Moreover, when, as is the case here, contracting parties are sophisticated and represented by counsel, the Court should be extremely wary of holding one of the parties liable for a pre-contractual promise that is inconsistent with the terms of the contract. The Shareholders' Agreement provides a specific process for the repurchase of Susan's shares of Lord Baltimore stock, and Susan may not avoid that process.

V. CONCLUSION

For the foregoing reasons, 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. An implementing order will be entered.