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

UNISUPER LTD., PUBLIC SECTOR SUPERANNUATION SCHEME BOARD, COMMONWEALTH SUPERANNUATION SCHEME BOARD, UNITED SUPER PTY LTD., MOTOR TRADES ASSOCIATION OF AUSTRALIA SUPERANNUATION FUND PTY LTD., H.E.S.T. AUSTRALIA LTD., CARE SUPER PTY LTD., UNIVERSITIES SUPERANNUATION SCHEME LTD., BRITEL FUND NOMINEES LIMITED, HERMES ASSURED LIMITED, STICHTING PENSIOENFONDS ABP, CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS, and THE CLINTON TOWNSHIP POLICE AND FIRE RETIREMENT SYSTEM,	)	C.A. No. 1699-N
Plaintiffs,	)	
v.	)	
NEWS CORPORATION, a Delaware corporation, K. RUPERT MURDOCH AC, PETER L. BARNES, CHASE CAREY, PETER CHERNIN, KENNETH E. COWLEY AO, DAVID F. DEVOE, VIET DINH, RODERICK EDDINGTON, ANDREW S.B. KNIGHT, LACHLAN K. MURDOCH, THOMAS J. PERKINS, STANLEY S. SHUMAN, ARTHUR M. SISKIND, and JOHN L. THORNTON,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 7, 2005
Date Decided: December 20, 2005

Stuart M. Grant, Megan D. McIntyre and Cynthia A. Calder, of GRANT & EISENHOFER P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Edward P. Welch, Robert S. Saunders, Edward B. Micheletti and T. Victor Clark, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

This case arises from a dispute between institutional shareholders and a company whose shares the investors owned and whose corporate governance they were monitoring. Plaintiffs filed this action on October 7, 2005, against defendant News Corporation ("News Corp." or "the Company") seeking to invalidate News Corp.'s extension of its poison pill and to prohibit any further extensions absent shareholder approval. Plaintiffs allege that News Corp. contracted, or else promised, that any extension of its poison pill would be put to a shareholder vote. When News Corp.'s board of directors extended the pill without a shareholder vote, plaintiffs filed this lawsuit. The individuals who were directors of News Corp. at the relevant times have also been named as defendants.[1] Defendants have filed a motion to dismiss. For the reasons set forth below, I deny defendants' motion on counts I and II, and I grant defendants' motion on counts III, IV and V.

I. BACKGROUND

On April 6, 2004, News Corp. issued a press release announcing a plan of reorganization that would include the reincorporation of News Corp.—then an Australian corporation—as a Delaware corporation.[2] The

[1] The Individual or Director defendants are: K. Rupert Murdoch, Peter L. Barnes, Chase Carey, Peter Chernin, Kenneth E. Cowley, David Devoe, Viet Dinh, Roderick Eddington, Andrew S.B. Knight, Lachlan K. Murdoch, Thomas J. Perkins, Stanley S. Shuman, Arthur M. Siskind, and John L. Thornton.
[2] Compl. ¶ 33.

reorganization would be contingent on a shareholder vote of approval by each class of News Corp.'s shareholders voting separately.[3] Because the shares beneficially owned by the Murdoch family voted as their own class, the public shareholders were in a position to prevent the reorganization if they voted as a class to reject it.

In late July 2004, the Australian Council of Super Investors Inc. ("ACSI") and Corporate Governance International ("CGI") met with News Corp. to discuss the reincorporation proposal. ACSI is a non-profit organization that advises Australian pension funds on corporate governance and CGI is an Australian proxy advisory firm.[4] During these meetings, ACSI and CGI informed News Corp. of their concerns about the reincorporation's impact on shareholder rights and other corporate governance issues.[5] One of the specific concerns mentioned by ACSI and GCI was that, under Delaware law, the Company's board of directors would be able to institute a poison pill without shareholder approval, while under Australian law shareholder approval is required.[6]

After these meetings, ACSI and CGI began to develop a set of proposed changes to News Corp.'s post-reorganization, Delaware certificate of incorporation. ACSI and CGI drafted these proposed changes in the form

[3] Compl. ¶ 34.
[4] Compl. ¶ 31.
[5] Compl. ¶ 37.
[6] Compl. ¶ 42.

of a "Governance Article." The Governance Article contained several provisions, including one providing that "the Board shall not have the power to, and shall not, create or implement any device, matter, or thing the purpose, nature, or effect of which is commonly described as a 'poison pill.'"[7] On August 20, 2004, ACSI sent a copy of the Governance Article to News Corp. and requested that the proposals be included in the charter of the new Delaware corporation.[8]

In late September 2004, News Corp. informed ACSI that the changes to the certificate of incorporation set forth in the Governance Article would not be adopted and that there would be no further negotiations. In response, ACSI issued a press release on September 27, 2004, recounting the negotiations with News Corp. and expressing ACSI's belief that the proposed reincorporation would result in the loss of shareholder protections.[9] ACSI's September 27, 2004, press release was widely circulated and had the effect of galvanizing institutional investor opposition to the reincorporation.[10]

On October 1, 2004, News Corp. reversed itself and initiated further negotiations with ACSI. The General Counsel for News Corp., Ian Phillip, contacted the President of ACSI, Michael O'Sullivan, and told O'Sullivan

[7] Compl. ¶ 39.
[8] Compl. ¶ 40.
[9] Compl. ¶ 43.
[10] Compl. ¶ 44.

that further negotiations were possible. At this stage of the negotiations, five key issues relating to News Corp.'s corporate governance remained in contention.[11] Three of these issues would be dealt with through the adoption of binding provisions in the new, Delaware certificate of incorporation. Only the poison pill voting issue would be dealt with through the adoption of a so-called "board policy."

The first issue was whether News Corp. would agree to retain its full foreign listing on the Australian Stock Exchange.[12] News Corp. ultimately agreed that its Delaware certificate of incorporation would include a provision requiring that News Corp. retain its full listing on the Australian Stock Exchange.[13] The second issue was whether News Corp. would agree to insert a provision into its Delaware certificate of incorporation stating that News Corp. would not issue new shares having more than one vote per share.[14] The parties ultimately agreed that such a provision would be added to the new certificate of incorporation.[15] With respect to the third issue, the parties agreed to add a provision to the certificate of incorporation providing that holders of 20 percent or more of the outstanding voting shares of News

[11] Compl. ¶ 45.
[12] Compl. ¶ 48. (Stating that the parties "reached a final agreement on all five areas of concern. The terms of that agreement were announced in [the October 6 Press Release.]") *See also* Pls.' Answering Br. Ex. C.
[13] Pls.' Answering Br. Ex. C.
[14] *Id.*
[15] *Id.*

Corp. could cause a special meeting of shareholders to be called.[16] The fourth issue was dealt with through a series of voting agreements entered into by Rupert Murdoch.[17] These agreements provided that Murdoch would not sell any of his voting shares to a purchaser if, following such sale, the purchaser would own more than 19.9 percent of News Corp., unless such purchaser agreed to purchase all the voting and non-voting shares of News Corp.[18] Murdoch further agreed that these voting agreements could not be terminated or amended without the affirmative vote of News Corp.'s shareholders, excluding Murdoch and his affiliates.[19] The fifth and final of the key issues was News Corp.'s ability under Delaware law to adopt a poison pill without a shareholder vote.[20]

During the negotiations on the fifth issue, ACSI again sought an amendment to the Company's Delaware certificate of incorporation that would require a shareholder vote approving the adoption of a poison pill.[21] In response to this request, Phillip told O'Sullivan that an amendment to the certificate of incorporation was impractical because there was not enough time.[22] Time was limited because of the need to hold the shareholder vote as

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Compl. ¶ 46.
[22] *Id.*

well as the need to have the reincorporation approved by an Australian court, as required by Australian corporate law. Phillip told O'Sullivan that, in the limited time remaining, it would be too difficult to draft and finalize an amendment to the certificate of incorporation that would encompass everything that might fall within the definition of "poison pill."[23]

Plaintiffs allege that during these conversations between ACSI and News Corp., someone on behalf of News Corp. proposed that, rather than instituting an amendment to the certificate of incorporation, the poison pill issue be addressed by means of the adoption of a board policy (the "Board Policy").[24] Plaintiffs allege that someone, on behalf of News Corp., further agreed that News Corp.'s board would not circumvent the voting requirement by "rolling over" a poison pill for successive one-year terms on substantially similar terms and conditions or to the same effect without shareholder approval.[25]

On October 6, 2004, the terms of the agreement were announced in a News Corp. press release. The press release stated:

> The [News Corp.] Board has adopted a policy that if a shareholder rights plan is adopted by the Company following reincorporation, the plan would have a one-year sunset clause unless shareholder approval is obtained for an extension. The policy also provides that

[23] *Id.*
[24] Compl. ¶ 47.
[25] *Id.*

> if shareholder approval is not obtained, the Company will not adopt a successor shareholder rights plan having substantially the same terms and conditions.[26]

On October 7, 2004, Phillip emailed the "agreed deal points" to ACSI reiterating that it was the board's policy to hold a shareholder vote on twelve-month old poison pills.[27] Also on October 7, 2004, News Corp. sent a letter to all of its shareholders and option-holders stating:

> [T]he board … has established a policy that if any stockholder rights plan (known as a 'poison pill') is adopted without stockholder approval, it will expire after one year unless it is ratified by stockholders. This policy will not permit the plan to be rolled over for successive one-year terms on substantially the same terms and conditions or to the same effect without stockholder ratification.[28]

On October 26, 2004, the shareholders and options-holders of News Corp. voted to approve the reorganization. The plaintiffs voted in favor of the reorganization and did not appear in court to object to the reorganization.

On November 8, 2004, Liberty Media Corporation ("Liberty Media") suddenly appeared as a potential hostile acquiror for News Corp.[29] Liberty Media announced it had entered into an arrangement with a third party allowing it to acquire an additional 8% of News Corp.'s voting stock,

[26] Compl. ¶ 48.
[27] Compl. ¶ 49.
[28] Compl. ¶ 51.
[29] Compl. ¶ 58.

thereby increasing its ownership to more than 17% of the voting stock.[30] In response to this threat, News Corp.'s board adopted a poison pill, which it announced in a November 8, 2004 press release.[31] In this press release, the board also announced that, going forward, it might or might not implement the Board Policy depending on whether it deemed the policy "appropriate in light of the facts and circumstances existing at such time."[32] One year later, on November 8, 2005, the board extended the poison pill without a shareholder vote, in contravention of the Board Policy.

Plaintiffs, a group of Australian institutional investors,[33] filed their complaint on October 7, 2005.[34] The complaint contains five counts. Count

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[30] *Id.*

[31] Compl. ¶ 59.

[32] Compl. ¶ 60. By the time of the November 8, 2004 press release, plaintiffs had already cast their votes in favor of the reincorporation.

[33] The plaintiffs are: UniSuper Ltd., Public Sector Superannuation Scheme Board, Commonwealth Superannuation Scheme Board, United Super Pty. Ltd., Motor Trades Association of Australia Superannuation Fund Pty. Ltd., H.E.S.T. Australia Ltd., CARE Super Pty. Ltd., Universities Superannuation Scheme Limited, Britel Fund Nominees Limited, Stichting Pensioenfonds ABP, Connecticut Retirement Plans and Trust Funds, and Clinton Township Police and Fire Retirement System.

[34] Plaintiffs allege that the board's ultimate decision to extend the poison pill was foreshadowed in early August 2005. On August 10, the Company's Form 8-K filing indicated that the poison pill would be extended for two years beyond its November 8, 2005 expiration date, without shareholder approval. The 8-K made no mention of the Board Policy or explained why it would not be followed. The plaintiffs also were aware of an article published by the CEO of News Limited on August 20, 2005, that explained the board's action as follows:

> The company said it would establish a policy which it did. The company did not claim to anyone at any time, verbally or in writing, that it would never change the policy. No agreement was breached, no promise was broken and there is no credible evidence to the contrary.

I is for breach of contract. Count II asserts a claim for promissory estoppel. Count III is a claim for fraud. Count IV is a claim for negligent misrepresentation and equitable fraud. Count V is a claim for breach of fiduciary duties against the individual defendants. As relief for these claims, plaintiffs seek a judgment declaring the Company's poison pill invalid and enjoining defendants from extending the pill without first obtaining approval from the Company's shareholders.[35]

II. ANALYSIS

A. Standard on a Motion to Dismiss

To survive a motion to dismiss, a complaint must allege facts that, if true, would establish the elements of a claim.[36] When considering a motion to dismiss under Rule 12(b)(6), I am required to assume the truthfulness of all well-pleaded allegations of the complaint. In addition, I am required to extend to plaintiffs the benefit of all reasonable inferences that can be drawn from the complaint. Conclusory statements without supporting factual averments will not be accepted as true for purposes of this motion.[37] Using this standard, I cannot order a dismissal unless it is reasonably certain that

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Plaintiffs allege that this statement betrays the illusory nature of the Board Policy. Had plaintiffs been aware of the fact that the board never intended to honor the Policy, they allege that they would have voted against the reorganization. Compl. ¶ 66.

[35] The Court earlier refused plaintiffs' request to schedule an expedited injunction hearing, concluding that it could afford plaintiffs' full relief even after the poison pill had been extended by requiring defendants to withdraw it.

[36] *See, e.g.*, *Lewis v. Honeywell, Inc.*, 1987 WL 14747, at *4 (Del. Ch. July 28, 1987).

[37] *Grimes v. Donald*, 673 A.2d 1207, 1214 (Del. 1996).

the plaintiffs could not prevail under any set of facts that can be inferred from the complaint.

With regard to plaintiffs' fraud claims, I apply the heightened pleading standard of Rule 9(b). Plaintiffs are required to plead particular facts of a fraud claim, *i.e.*, the pleading must identify the "time, place, and contents of the false misrepresentations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby."[38]

B. Count I – Breach of Contract

Plaintiffs' allege that defendants entered into a contract when plaintiffs agreed to vote in favor of News Corp.'s reorganization in consideration for News Corp.'s promise to submit any extensions of its poison pill to a shareholder vote. This contract allegedly provided that News Corp. would adopt a board policy and that the board policy would not be revocable.[39] Plaintiffs assert two legal theories for how the contract was

[38] *York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999) (internal quotations and citations omitted); *Metro Commc'ns Corp. BVI v. Advanced Mobilecomm Tech.*, 854 A.2d 121, 144 (Del. Ch. 2004).

[39] One aspect of plaintiffs' contract theory strikes me as problematic: Plaintiffs are sophisticated investors capable of negotiating enforceable agreements to protect their interests, as is demonstrated in this case by the certificate of incorporation amendments plaintiffs managed to extract from defendants. Of the five key issues that the parties negotiated over, three were dealt with through amendments to the certificate of incorporation, and another was specifically made binding absent a shareholder vote. Thus, it is not entirely clear why in this instance plaintiffs accepted a promise to adopt a board policy, which is a more transitory right than a charter provision, especially when sophisticated parties such as these must have understood the significant difference

formed. The first theory is that the parties entered into a written contract evidenced by the Press Release and the Letter to Shareholders. The second is that the parties entered into an oral agreement. The complaint asserts very few facts to support either of these theories. Because I am required to draw each crucial inference in plaintiffs' favor, however, I conclude that plaintiffs' breach of contract claim survives defendants' motion to dismiss.

i. Allegations of a Written Agreement: The Press Release and Letter to Shareholders

Defendants concede there was an agreement embodied in the Press Release and Letter to Shareholders by which News Corp. promised to adopt a board policy. They argue that the parties never discussed making the policy irrevocable and that, under Delaware law, a board policy is non-binding and revocable by the board at any time.[40] Plaintiffs counter that the contract in this case contemplated that the board would not be able to "roll over" the pill, *i.e.*, circumvent the shareholder vote by rescinding the Board Policy.

Defendants are correct that board policies, like board resolutions, are typically revocable by the board at will. They cite *In re General Motors*

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between a charter provision and a board policy. Nonetheless, assuming every reasonable inference in plaintiffs' favor, I cannot say at this stage that there is no set of facts that would entitle plaintiffs to prevail on their contract theory. Although plaintiffs' claim is sufficient to withstand a motion to dismiss because of the liberal standard applied in this context, it will be plaintiffs' burden going forward to demonstrate a factual and legal basis for this claim.

[40] Defs.' Opening Br. at 14.

(Hughes) Shareholders Litigation[41] in support of the proposition that board policies are always revocable, in every circumstance. The board in *General Motors* adopted a "Board Policy Statement" setting forth procedures to be followed in the event of a material transaction between General Motors ("GM") and one of its subsidiaries, Hughes Electronics Corporation ("Hughes"). The policy required that in the event of a transfer of material assets from Hughes to GM, the GM board would be required to declare and pay a dividend to the Hughes shareholders.

In *General Motors*, this Court stated in a footnote that *if* a board policy has the effect of a board resolution, it *might* be revocable by the board at any time.[42] This statement was phrased as a conditional statement because, as the Court noted, the complaint in *General Motors* contained no information with respect to the extent to which the GM board was bound to protect the rights granted to shareholders by the policy statement, *i.e.*, the extent to which the policy had an effect greater than a simple board resolution. In contrast, *the complaint in this case alleges that the News*

[41] 2005 WL 1089021 (Del. Ch. May 4, 2005)

[42] *In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021 at n.34 (the footnote states, in part:

> As opposed to the rights … set out in GM's Restated Certificate of Incorporation, which is binding upon the GM board, *there is no information* in the Complaint with respect to the extent to which the GM board was bound to protect the rights … granted by the Policy Statement. *If* the Policy Statement had *the effect* of a resolution adopted by the board, it *presumably* could be rescinded or amended by nothing more than another board resolution. (Emphasis added.))

Corp. board was contractually bound to protect the rights granted by the Board Policy. Plaintiffs allegation is precisely that, in contrast to the facts in *General Motors*, the Board Policy in this case had an effect *greater* than that of a resolution because the board was contractually bound to keep it in place.

This Court's statement about board policies in *General Motors* simply reiterates an elementary principle of corporate law: If the board has the power to adopt resolutions (or policies), then the power to rescind resolutions (policies) must reside with the board as well. An equally strong principle is that: If a board enters into a contract to adopt and keep in place a resolution (or a policy) that others justifiably rely upon to their detriment, that contract may be enforceable, without regard to whether resolutions (or policies) are typically revocable by the board at will.

On their face, the Press Release and the Letter to Shareholders state that the News Corp. board would adopt a board policy. If the Press Release and the Letter to Shareholders stated nothing more, I would be inclined to grant Defendants' motion with respect to the allegations of a written contract. But both the Press Release and the Letter to Shareholders go on to state that the board policy will not permit the pill to be rolled over. The plaintiffs are entitled to all reasonable inferences, including the inference that this part of the agreement expresses an intent that the Board Policy would not be rescinded before the shareholders had a chance to vote. On

this point, the meaning of the contract is ambiguous and both sides should have the opportunity to present evidence and make legal arguments concerning the proper interpretation of the agreement.[43] Whether plaintiffs will be able to adduce evidence in support of their allegations is for another day. But for now, it is sufficient that they have alleged the existence of an agreement, the existence of valuable consideration (their vote in favor of the reorganization), and that the board intentionally breached the agreement.

ii. Allegations of an Oral Contract

The complaint avers facts barely sufficient to state a claim that defendants made an oral contract with the shareholders during these conversations. The details of the alleged oral contract are not spelled out in the complaint, but what is clear is that the key term of the alleged oral contract was that shareholders would get to vote on any extension of a poison pill.

The operative sections of the complaint are paragraphs 46 and 47. The complaint makes reference to the conversations between Phillip and O'Sullivan and sets forth general facts about those conversations. Notwithstanding the dearth of factual detail about the oral contract, Rule

[43] There are other ambiguities inherent in the alleged agreement. For example, what is the term or duration of the Board Policy? Did the parties intend to preclude the board from *ever* modifying the Board Policy? If the shareholders voted not to extend the poison pill, would a future board of News Corp. also be disabled from adopting a poison pill? If plaintiffs are correct about the alleged agreement, then how could the agreement have left out these crucial details?

12(b) sets forth a "notice pleading" standard and I conclude that the complaint gives adequate notice, if barely so, as to when the alleged oral agreement was formed and as to its contents. Many of the ambiguities and gaps in the written agreement also infect the alleged oral agreement, if not more so. Nevertheless, at this early stage of the lawsuit, I must deny defendants' motion to dismiss plaintiffs' claim of an oral contract.

iii. Unenforceability

Defendants assert that, even if plaintiffs are right about the existence, substance and interpretation of the alleged contract, the contract is unenforceable as a matter of law.[44] Defendants offer two arguments in support of this proposition.

a. Section 141(a)

Defendants first argue the alleged agreement is inconsistent with the general grant of managerial authority to the board in Section 141(a) of the Delaware General Corporation Law.[45] According to defendants, Section 141(a) vests power to manage the corporation in the board of directors and requires that any limitation on this power be in the certificate of incorporation. Defendants contend that an agreement to hold a shareholder

[44] Defs.' Reply Br. at 14.

[45] Section 141(a) states:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

vote on poison pills (or any other issue affecting the business and affairs of the corporation) is unenforceable unless memorialized in the certificate of incorporation.

By definition, any contract a board could enter into binds the board and thereby limits its power. Section 141(a) does not say the board cannot enter into contracts. It simply describes who will manage the affairs of the corporation and it precludes a board of directors from ceding that power to outside groups or individuals.

The fact that the alleged contract in this case gives power to the shareholders saves it from invalidation under Section 141(a). The alleged contract with ACSI did not cede power over poison pills to an outside group; rather, it ceded that power to shareholders.[46] In effect, defendants' argument is that the board impermissibly ceded power *to the shareholders.* Defendants' argument is that the contract impermissibly restricted the board's power by granting *shareholders* an irrevocable veto right over a question of corporate control.[47]

Delaware's corporation law vests managerial power in the board of directors because it is not feasible for shareholders, the owners of the corporation, to exercise day-to-day power over the company's business and

[46] The contract required that the pill be put to a shareholder vote on a date twelve months after the pill's adoption. On that date, the shareholders would exercise their power either to approve or to reject the pill.
[47] Defs.' Reply Br. at 15.

affairs.[48] Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power—which is that of an agent's with regard to its principal—derives from the shareholders, who are the ultimate holders of power under Delaware law. [49]

b. Paramount, QVC, and Omnicare

Defendants cite three Supreme Court of Delaware cases[50] in support of their second argument that the agreement in this case should be unenforceable as a matter of law.[51] Generally speaking, these cases stand for the proposition that a contract is unenforceable if it would require the board to refrain from acting when the board's fiduciary duties require action.[52]

Stripped of its verbiage, defendants' argument is that the News Corp. board impermissibly disabled its fiduciary duty to shareholders by putting

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[48] Of course, the board of directors' managerial power is not unlimited; it is constrained by the directors' fiduciary duties and by shareholders' right to vote. The Delaware General Corporation Law gives shareholders an immutable right to vote on fundamental corporate changes. *See, e.g.*, 8 *Del. C.* § 242 (charter amendment); § 251 (merger); § 271 (sale of assets); § 275 (dissolution). In addition, the Delaware General Corporation Law vests shareholders with the power to adopt, amend or repeal bylaws relating to the business of the corporation and the conduct of its affairs. 8 *Del. C.* § 109.

[49] The alleged agreement in this case enables a vote by *all* shareholders. Private agreements between the board and a few large shareholders might be troubling where the agreements restrict the board's power in favor of a particular shareholder, rather than in favor of shareholders at large.

[50] Defendants cite *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 41-42 (Del. 1994); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998); and *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003).

[51] Defs.' Reply Br. at 3.

[52] *Id.*

into *shareholders'* hands the decision whether to keep a poison pill.[53] The three cases cited by defendants do not operate to invalidate contracts of this sort. Each of the three cases cited by defendants invalidated contracts the board used in order to take power *out* of shareholders' hands.

In *Paramount* the board agreed with an acquiror—Viacom—to adopt deal protective measures, including a no-shop provision, a termination fee, and a grant of stock options to the acquiror.[54] When a competing bidder—QVC—offered shareholders more for their shares, the target board refused to negotiate on the grounds that they were precluded from doing so by the contractual agreements with Viacom.[55] The Supreme Court held that these contractual provisions were invalid and unenforceable to the extent they limited the directors' fiduciary duties under Delaware law or prevented the directors from carrying out their fiduciary duties under Delaware law.[56]

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[53] Although they do not explicitly say so, defendants presumably envision a scenario where the board might conclude, in the face of a hostile takeover, that it was in the best interests of shareholders to extend the Company's poison pill. If the board had previously contracted to submit the pill to a shareholder vote and if that shareholder vote were looming on the horizon, then, defendants argue, the board would be unable to adopt an effective pill-defense. Alternatively, defendants could be arguing that in a situation where the shareholder vote on the pill had already taken place, then the board would be precluded from exercising its fiduciary duty if it determined that adoption of a poison pill was in the best interests of shareholders. Both versions of defendants' argument fail insofar as they are intended to suggest that the alleged agreement is contrary to a supervening directorial fiduciary duty.

[54] *Paramount*, 637 A.2d at 39.

[55] *Id.* at 48.

[56] *Id.*

In *Quickturn* the board amended the company's poison pill so that no newly elected board could redeem the pill for six months after taking office.[57] This "delayed redemption provision" was adopted as a defensive measure in response to a tender offer by a would-be acquiror.[58] The Supreme Court held that the provision was invalid and unenforceable because it would prevent a future board from rescinding the poison pill, even in circumstances where the future board concluded that redeeming the pill was in the best interests of shareholders.

The contracts in *Paramount* and *Quickturn* were defensive measures that took power out of the hands of shareholders.[59] The contracts raised the "omnipresent specter"[60] that the board was using the contract provisions to entrench itself, *i.e.*, to prevent shareholders from entering into a value-enhancing transaction with a competing acquiror.[61] In this case, the challenged contract put the power to block or permit a transaction directly into the hands of shareholders. Unlike in *Paramount* and *Quickturn*, there is no risk of entrenchment in this case because shareholders will make the

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[57] *Quickturn*, 721 A.2d at 1287 (Del. 1998).
[58] *Id.* at 1284.
[59] The board of directors in *Paramount* used the challenged contracts to make certain transactions more expensive in order to favor the board's preferred bidder. In *Quickturn*, the board of directors used the invalidated contracts to entrench itself.
[60] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *see also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986).
[61] *Omnicare*, 818 A.2d at 931.

decision for themselves whether to adopt a defensive measure or leave the corporation susceptible to takeover.

In *Omnicare* the board entered into a merger agreement with an acquiror.[62] As part of the merger agreement, the board agreed to submit the merger agreement to stockholders even if the board later determined the merger was not in the best interests of shareholders.[63] Also as part of the merger agreement, two directors who were shareholders irrevocably committed to vote in favor of the merger.[64] These two directors owned a majority of the company's voting power. The result of these deal protective measures was that the deal was completely locked-up.[65] The Supreme Court of Delaware held that the agreement to submit the deal to a shareholder vote was unenforceable because it resulted in the board disabling its ability to exercise its fiduciary duties to the minority shareholders.[66]

Omnicare does not invalidate the contract in this case. Unlike the board in *Omnicare*, the News Corp. board entered into a contract that empowered shareholders; it gave shareholders a voice in a particular corporate governance matter, *viz.*, the poison pill. It makes no sense to argue that the News Corp. board somehow disabled its fiduciary duties to

[62] *Id.* at 925.
[63] *Id.*
[64] *Id.* at 926.
[65] *Id.* at 918.
[66] *Id.* at 937.

shareholders by agreeing to let the shareholders vote on whether to keep a poison pill in place. This argument is an attempt to use fiduciary duties in a way that misconceives the purpose of fiduciary duties. Fiduciary duties exist in order to fill the gaps in the contractual relationship between the shareholders and directors of the corporation.[67] Fiduciary duties cannot be used to silence shareholders and prevent them from specifying what the corporate contract is to say.[68] Shareholders should be permitted to fill a particular gap in the corporate contract if they wish to fill it. This point can be made by reference to principles of agency law: Agents frequently have to act in situations where they do not know exactly how their principal would like them to act. In such situations, the law says the agent must act in the best interests of the principal. Where the principal wishes to make known to the agent exactly which actions the principal wishes to be taken, the agent cannot refuse to listen on the grounds that this is not in the best interests of the principal.

To the extent defendants argue that the board's fiduciary duties would be disabled after a hypothetical shareholder vote, this argument also

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[67] *See* Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92-93 (1998) ("... the fiduciary principle is a rule for completing incomplete bargains in a contractual structure …").

[68] I do not mean to suggest that the News Corp. directors have no fiduciary duties with respect to the shareholder vote. The directors have a duty to fully inform shareholders and to structure the vote so that, as much as possible, risks of improper coercion are reduced.

misconceives the nature and purpose of fiduciary duties. Once the corporate contract is made explicit on a particular issue, the directors must act in accordance with the amended corporate contract. There is no more need for the gap-filling role performed by fiduciary duty analysis.[69] Again, the same point can be made by reference to principles of agency law: Where the principal makes known to the agent exactly which actions the principal wishes to be taken, the agent must act in accordance with those instructions.

C. Count II – Promissory Estoppel

In order to assert a claim for promissory estoppel, plaintiffs must adequately allege: (1) a promise was made; (2) it was the reasonable expectation of the promisor to induce reliance or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) injustice can be avoided only by enforcement of the promise.[70]

The complaint does not describe with any detail when defendants allegedly promised that the poison pill would not be rolled over without a shareholder vote. But making all inferences in plaintiffs' favor, the complaint can be read to allege that an oral promise was made during conversations that ensued between representatives of News Corp. and

[69] See Easterbrook & Fischel, *supra* n.54, at 92-93 ("Because the fiduciary principle is a rule for completing incomplete bargains in a contractual structure, it makes little sense to say that "fiduciary duties" trump *actual* contracts" (emphasis in original).
[70] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

plaintiffs. For this reason, I conclude that plaintiffs' promissory estoppel claim survives defendants' motion to dismiss with respect to plaintiffs' allegations of an oral promise between Phillip and O'Sullivan.

D. Count III – Fraud

The plaintiffs' third claim is for fraud. In order to plead common law fraud in Delaware, plaintiffs must aver facts supporting the following elements: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance.[71] Fraud claims are subject to the heightened pleading standards of Rule 9(b).[72]

The complaint does not allege who made a fraudulent representation or the contents of that misrepresentation.[73] That a representation was even made is not directly alleged in the complaint but is an inference that can be drawn in plaintiffs' favor if the complaint is read very broadly. Because

[71] *Albert v. Alex. Brown Management Services, Inc.*, 2005 WL 2130607, at *7 (Del. Ch. Aug. 26, 2005).
[72] *Id.*
[73] *C.V. One v. Resources Group*, Del. Super., 1982 WL 172863, at *3 (Dec. 14, 1982) (dismissing fraud claim where "the person who made the misrepresentation is not named.")

plaintiffs fail to plead facts supporting a claim of fraud, I must grant defendants' motion as to this claim.

E. Count IV – Negligent Misrepresentation and Equitable Fraud

To successfully assert a claim for negligent misrepresentation, plaintiff must adequately plead: (1) the defendant had a pecuniary duty to provide accurate information; (2) the defendant supplied false information; (3) the defendant failed to exercise reasonable care in obtaining or communicating the information; and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information.[74] Plaintiffs have failed to assert with any specificity what false documents or false statements they relied upon in connection with the alleged injury or who produced them.[75] Plaintiffs' complaint suffers from a second problem: It fails to allege a pecuniary loss. In fact, plaintiffs state in their complaint that they "have no adequate remedy at law."[76] Because the complaint fails to allege who made the misrepresentation or the existence of a pecuniary loss, I must dismiss plaintiffs' claim of negligent misrepresentation.

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[74] *Steinman v. Levine*, 2002 WL 31761252 (Del. Ch. Nov. 27, 2002) (citing *Sanders v. Devine*, 1997 WL 599539, at *6-7 (Del. Ch. Sept. 24, 1997) and *Wolf v. Magness Constr. Co.*, 1995 WL 571896, at *2 (Del. Ch. Sept. 11, 1995), *aff'd*, 676 A.2d 905 (Del. 1996)).

[75] *See Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Aug. 6, 2002) (Dismissing negligent misrepresentation claim against multiple defendants where complaint failed to identify misrepresentations made by any particular director defendant.)

[76] Compl. ¶ 104.

Plaintiffs have also failed to adequately plead equitable fraud. Equitable fraud is subject to Rule 9(b)'s heightened pleading standard.[77] The complaint contains no more facts supporting a claim of equitable fraud than it does facts supporting a fraud claim. I grant defendants' motion to dismiss with respect to Count IV.

F. Count V – Breach of Fiduciary Duty

Count V of the complaint alleges the directors breached their fiduciary duties. The complaint is bereft of any facts that suggest a violation of the duty of loyalty. Plaintiffs do not allege that the decision to extend the pill without a shareholder vote was in any way self-interested.[78] The complaint also fails to allege any facts that support a claim for breach of the duty of care. Plaintiffs do not allege that the director defendants were uninformed about their decision to extend the poison pill without a shareholder vote or that they did so in bad faith.

Plaintiffs do not allege facts supporting a violation of either the duty of loyalty or the duty of care. As a result of these pleading deficiencies, I dismiss Count V of the complaint.

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[77] *Shamrock Holdings of California, Inc. v. Iger*, 2005 WL 1377490, at *7 (Del. Ch. June 06, 2005).

[78] Pls.' Answering Br. at 47 (acknowledging that "[p]laintiffs do not challenge the *bona fides* of the Pill.")

III. CONCLUSION

The complaint adequately states claims for breach of contract (count I) and promissory estoppel (count II). The burden is now on the plaintiffs to prove that a contract or promise was actually made that the Board Policy would be irrevocable. The motion to dismiss is granted with regard to plaintiffs' claims for fraud (count III), equitable fraud and negligent misrepresentation (count IV), and breach of fiduciary duty (count V).

IT IS SO ORDERED.