IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

A.R. DEMARCO ENTERPRISES, INC., Individually and Derivatively on behalf of Ocean Spray Cranberries, Inc.,	)	
Plaintiff,	)	
v.	)	C.A. No. 19133-NC
OCEAN SPRAY CRANBERRIES, INC., SHERWOOD J. JOHNSON, H. ROBERT HAWTHORNE, DOUGLAS R. BEATON, BENJAMIN A. GILMORE, II, RAY E. HABELMAN, JEROME J. JENKO, STEPHEN V. LEE, III, RALPH A. MAY, WILLIAM G. PIETERSEN, FRANCIS J. PODVIN, MARTIN B. POTTER, and RAY E. SMITH, JR.,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: October 3, 2002
Decided: November 26, 2002
Revised: December 4, 2002

Daniel V. Folt and Gary W. Lipkin, of COZEN O'CONNOR, Wilrnington, Delaware; OF COUNSEL: H. Robert Fiebach, David M. Doret, and Kristine Maciolek, of COZEN O'CONNOR, Philadelphia, Pennsylvania, Attorneys for Plaintiff.

Jesse A. Finkelstein, Catherine G. Dearlove, and J. Travis Laster, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

The crux of this action is a dispute over the strategic vision of Ocean Spray, Inc. Plaintiff believes that selling or merging all or part of the company would best serve the interests of the shareholders. Defendants believe they can continue to operate Ocean Spray as an independent entity and conduct a viable turnaround of the company.

Plaintiff filed a complaint alleging various breaches of disclosure, fiduciary duties, and implied contractual duties, as well as common law fraud. Defendants moved to dismiss the complaint and to strike one of the plaintiffs requested forms of relief, characterized as an order directing the sale of the company. For reasons set forth in this opinion, I deny in part defendants' motion to dismiss Count I. The motion is granted, however, with respect to all other counts, as well as Count I in part, except that Counts III, V, and VI are dismissed without prejudice. Since plaintiffs request for an order instructing the directors to pursue a sale or merger,' and to fully cooperate with a bona fide purchaser, is not an available remedy in these circumstances, the motion to strike is moot and is also denied.

I. BACKGROUND FACTS'

Ocean Spray is a Delaware Corporation that operates as an agricultural cooperative. Ocean Spray processes, markets, and distributes the products of its growers. There are approximately 750 cranberry growers and 150 citrus growers who own shares in Ocean Spray. Plaintiff A.R. DeMarco Enterprises, Inc. ("DeMarco") is one of the larger cranberry growers and a (roughly) three percent shareholder of Ocean Spray.

The shares of Ocean Spray are not traded publicly. The growers are the shareholders. Growers obtain shares at par value in proportion to the average amount of crop produced over a three-year period. The number of shares is adjusted every three years to account for changes in production. Shares are purchased or redeemed at par value. Ocean Spray's certificate of incorporation requires each grower to be party to a cooperative marketing agreement with Ocean Spray. The cooperative marketing agreement provides for the issuance and redemption of shares at par value.

Growers are required to deliver to Ocean Spray all agricultural products ("product") grown on designated lands in return for their

[1] As required under Court of Chancery Rule 12(b)(6), the facts alleged in plaintiffs complaint are assumed to be true for the purposes of defendants' motions. Therefore, all facts are drawn from that complaint and the materials incorporated by reference in the complaint.

proportion of shares. Ocean Spray then processes. markets, and distributes the product. Ocean Spray also lobbies for legislation in support of its growers, seeks to develop new markets for its products, and works to expand its current markets and increase the consumption of Ocean Spray products.

During the mid-l 990's, the cranberry business was booming and reached a high of $60 per barrel in 1996. As in most agricultural markets, however, the boom did not last forever. At the time of the complaint, there was an oversupply of cranberries, a stagnant market, and increased competition by producers of other fruits. In addition, cranberry growers who are not Ocean Spray stockholders have been competing aggressively with Ocean Spray. The result was that the return from the 1999 crop was $10.75 per barrel, with no real change in sight. The cost of production is around $35 per barrel, so plaintiff was operating at a loss at the time the complaint was filed.

In response to the problems in the cranberry market, the United States Department of Agriculture ("USDA") reduced the amount of cranberries allowed to be produced by thirty-five percent.[2] Ocean Spray lobbied the

[2] The USDA is responsible for setting allowable levels of production for several crops, including cranberries and citrus products. The complaint only addresses the USDA production order as it relates to cranberries. Citrus products are covered by other USDA production orders not addressed in the complaint.

USDA for this reduction in an effort to counter the over-supply of cranberries because Ocean Spray's business has suffered during the product glut. Furthermore, an important distribution contract with PepsiCo was lost when PepsiCo purchased Tropicana, and the increasing competition in the beverage and food industry has stifled growth. Ocean Spray has countered by introducing a new product line, the Craisin, but that has not been enough to reverse the downward trend.

Ocean Spray's board of directors retained several consultants in 1999 to help determine a course of action for the company. Plaintiffs president and chief executive officer, J. Garfield DeMarco ("Mr. DeMarco"), was on the board of Ocean Spray at that time. All of the consultants allegedly encouraged a sale or merger transaction for Ocean Spray, including Bain & Company, a financial consulting firm, and Merrill Lynch, an investment banking firm.

The board at that time consisted of twenty-five directors. By a vote of thirteen to eleven, the board voted against pursuing a sale or merger and for keeping the consultants' reports confidential. As a board member, Mr. DeMarco voted for a sale or merger and against keeping the reports confidential. The board also later decided not to follow a recommendation for a straw poll of the shareholders as to the consideration of a sale or

merger because the poll would be purely hypothetical and not based on a concrete transaction.

In 2000, the board proposed resolutions reducing the number of directors from twenty-five to fifteen and allowing the removal of directors without cause. Mr. DeMarco voted against changing the composition of the board and allowing removal of directors without cause. The shareholders, however, voted to approve the change and Mr. DeMarco was removed from the board.[3] The board now consists of eleven growers, the Ocean Spray CEO, and three persons not affiliated with Ocean Spray.[4] According to the complaint, the board consists primarily of persons "known to be unsympathetic to sale or merger?

DeMarco, along with other shareholders equaling approximately fifteen percent of Ocean Spray, offered proposed resolutions to be placed on the ballot for the 2001 annual meeting. Ocean Spray resisted the resolutions

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[3] After the 2000 annual meeting where the shareholders approved the change in board composition, Mr. DeMarco refused to resign. He was then removed from the board without cause. Compl. ¶ 96.

[4] Three different slates of directors were nominated-a company slate, a pro-merger slate, and an anti-merger slate. It is unclear from the pleadings which slate of nominees was elected. Also, defendants state that the actual resolution reduced the board to nine to twelve directors with the authority to increase the board to fifteen, which they later did by appointing the three directors not affiliated with Ocean Spray. The facts in the complaint, however, are all that the Court is allowed to consider upon a motion to dismiss. Recognizing that the end result was the fifteen directors mentioned in the complaint, the difference between plaintiffs assertions and defendants' is inconsequential.

[5] Compl. ¶ 96.

and sought to rewrite them. The shareholders brought suit against the board in Massachusetts (the "Massachusetts action") to place their resolutions on the agenda. The suit was later withdrawn without prejudice in light of a settlement with Ocean Spray to include the resolutions on the agenda for the 200 1 annual meeting. The agreement allegedly provided that representatives of both Merrill Lynch and Bain would be present, as well as an independent teller to participate in counting the votes. Nevertheless, none of these representatives were present at the 2001 annual meeting.

The resolutions to be presented to the shareholders involved directing the board to pursue a sale or merger of Ocean Spray. At the 2001 meeting, management made presentations in opposition to the resolution. Management also presented the information Merrill Lynch and Bain had provided to the board. As will be discussed later, the information the board presented was allegedly misleading, incomplete, and inaccurate with respect to Merrill Lynch's and Bain's recommendations. Management's prospects for a turnaround were also allegedly misleading in that they failed to highlight Ocean Spray's reserve supply of cranberries!

[6] Plaintiff argues that even if Ocean Spray's actions decreased the cranberry glut, the reserve supply would still prevent the growers from increasing their yield and obtaining the benefit of Ocean Spray's actions to decrease the glut. Compl. ¶ 117(b).

After the presentations were made, a vote was taken and the shareholders rejected the resolution to pursue a sale or merger by a vote of sixty-two percent to thirty-eight percent. The vote tally for the directors, however, appeared flawed in that one director was said to have received all but just under 55,000 votes in his favor, even though DeMarco alleges that it voted, but did not vote its 120,000 votes for that candidate.

In September of 200 1, plaintiff filed this action. Defendants moved to strike plaintiffs request for a court order directing the board to pursue a sale or merger of the company, and moved to dismiss all seven counts of the complaint.

II. STANDARD OF REVIEW

The standard governing a motion to dismiss is well established. A party is entitled to dismissal of the complaint only where it is clear from its allegations that the plaintiff would not be entitled to relief under any set of facts that could be proven to support the claim. Moreover, the Court is required to accept all of plaintiffs factual allegations as true and give plaintiff the benefit of all inferences that may be drawn from the facts.

III. ANALYSIS

Plaintiffs complaint lists seven counts against defendants. All of the counts allege direct claims except for Count II, which alleges a derivative claim.

A. Defendants ' Motion to Strike

Defendants move to strike plaintiffs request for an order compelling the sale of Ocean Spray. Rule 12(f) requires that the matter to be stricken be "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[7]

Section 141 of the Delaware General Corporation Law ("DGCL") provides that the board of directors shall manage the business and affairs of the corporation. A request for an order to compel the sale of Ocean Spray cannot be granted. Plaintiff cites no authority for the proposition that this Court might properly order a sale of a company in these circumstances, and this Court is aware of none.

Plaintiffs request, however, does not fall under the criteria listed in Rule 12(f). Instead, I believe the motion to strike is unnecessary, as the

[7] Court of Chancery Rule 12(f).

underlying claim for relief itself must be dismissed under Rule 12(b)(6). 1 therefore deny the motion to strike.

B. Count I-Breach of the Duty of Disclosure

Plaintiff alleges that the management of Ocean Spray presented false and misleading information to the shareholders with respect to the vote on a shareholder proposal for a resolution directing the board to research the viability of a sale or merger. Specifically, the complaint alleges:

(1) Shareholders were misled by a statement that Merrill Lynch concluded Ocean Spray had not lost value over the past year. Plaintiff adequately alleges that that statement is misleading because a Merrill Lynch report clearly states that cranberry prices dramatically affect the corporation's value. Since cranberry prices had changed over the past year, it is reasonable to infer that the value of Ocean Spray changed as well.

(2) Shareholders were misled by a statement that the Bain report did not state that a sale was the best financial move, when plaintiff alleges that the report in fact said otherwise.

(3) Shareholders were misled by a management statement that Bain presented a dismal view of a post-sale Ocean Spray, when, allegedly, Bain never addressed that issue in its report.

(4) Shareholders were misled by management as to the viability of its predictions regarding the turnaround plan, including the existence of the two-year cranberry reserve.

These four allegations state a claim that survives a motion to dismiss under Rule 12(b)(6). The complaint also alleges misleading disclosures with respect to board nominees, legal requirements for merger or sale, and issues related to those topics. These broad and conclusory characterizations that almost all of the board's communications with the shareholders were materially false do not state a claim upon which relief can be granted. Therefore, the motion to dismiss Count I is granted except for the four allegations listed above. These four allegations survive for the following reasons.

Defendants request dismissal on the grounds that the resolution was precatory, and did not constitute shareholder action. Thus, defendants state that no duty to disclose existed, so no duty of disclosure violation occurred. Defendants also state that if a duty to disclose existed, the information was stale because it was two years old. The age of the information, defendants argue, made it no longer material.

Directors owe a duty not to mislead or deceive shareholders.[8] "The directors' fiduciary duties include the duty to deal with their stockholders honestly. Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors they elect to manage the corporate enterprise."[9] "Delaware law also protects shareholders who receive false communications from directors even in the absence of a request for shareholder action. When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty."[10]

Thus, the presence or absence of shareholder action in this context is irrelevant. Even if no duty of disclosure existed, once the board decided to provide information to the shareholders, it had to do so honestly and in good faith. In addition, the fact that some of the information may have been dated does not mean the board may pick and choose from information (based on its age) and thereby arguably present a less than complete picture regarding

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[8] *See Malone v. Brincat, 722* A.2d 5, 10-l 1 (Del. 1998).

[9] *Id.* (citing *Mar-hart, Inc. v. CalMat Co.,* 1992 Del. Ch. LEXIS 85 at *9 (Del. Ch.)).

[10] *Id.* at 14. *Malone* states that the only difference resulting from the presence or absence of shareholder action involves what elements the plaintiff must prove. If shareholder action is present, then plaintiff need not prove reliance, causation, or damages. When shareholder action is absent, plaintiff must show reliance, causation, and damages.

an issue of great interest to stockholders. Qualifying the information because of its age, or adding appropriate disclaimers may have been appropriate.

In any event, accepting the truth of these allegations, as I must at this stage, plaintiff has adequately stated a claim upon which relief can be granted for the above four disclosure allegations. It is important to note, however, that of the relief requested, the only relief available under these allegations is a new vote on the shareholder proposal, should plaintiff prevail in its disclosure claim. Accordingly, the motion to dismiss is denied with respect to those four allegations in Count I. The motion to dismiss is granted as to the remaining alleged disclosure violations in Count I.

C. Count II-Breach of Fiduciary Duties (Derivative Claim)

Plaintiff alleges a derivative claim, but did not make demand upon the board. Since it is a derivative claim, demand must be made on the board., or be excused based upon futility. [11]

To determine "demand futility the Court of Chancery in the proper exercise of its discretion must decide whether, under the particularized facts

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Therefore, the board's duty to be honest has not changed, only what the plaintiff must show at trial to prove a breach of the duty of disclosure. ***Id.*** at 11.

[11] See Court of Chancery Rule 23.1.

alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[12]

Plaintiff alleges that the directors fail to meet the first prong of *Aronson v. Lewis* because they voted against the shareholder resolution to pursue a sale or merger of Ocean Spray. According to plaintiff, the directors must be acting in their own self-interest because they are not pursuing a sale or merger. A mere allegation that the board decided not to pursue a sale or merger is not enough to show that the individual directors were not independent or were interested. There must be allegations of interest or lack of independence that lead an individual board member to reject pursuing a sale or merger. A presumption that the directors must be self-dealing simply because they have not done what a plaintiff wants them to do is not a proper basis for demonstrating demand futility. These allegations fail to show demand futility as required under *Aronson.*

Plaintiff also alleges lack of independence because the directors receive compensation for serving on the board. It is well established in Delaware law that ordinary director compensation alone is not enough to

[12] *Aronson v. Lewis, 4'73* A.2d 805, 8 14 (Del. 1984).

show demand futility. [13] Accordingly, demand is not excused under the first prong of *Aronson.*

As for the second prong of *Aronson,* plaintiff alleges that the board's failure to pursue a sale or merger is beyond the scope of what a reasonable person would decide. Plaintiff alleges that failure to pursue a sale or merger will result in less affluent shareholders going out of business and having to redeem their Ocean Spray stock. The fact that not all shareholders may survive in the current economic climate does not meet *Aronson*'s standard, since the board is to act for the benefit of Ocean Spray as a whole and may not advance the interests of a few shareholders exclusively. No facts are alleged which even suggest that the Ocean Spray directors' actions were not in the best interest of the corporation except that plaintiff thinks they are not. Finally, the naked allegation that management is entrenched is not enough to meet *Aronson* 's second prong. [14] That, again, is too conclusory to warrant excusal of demand.

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[13] *See Grobow v. Perot, 539* A.2d 180,188 (Del. 1988). This is true as long as the compensation does not exceed customary bounds, but "the disqualifying effect of such fees might be different if the fees were shown to exceed materially what is commonly understood and accepted to be a usual and customary director's fee." *Orman v. Cullman,* 794 A.2d 5, 29 n.62 (Del. Ch. 2002).

[14] *Grobow, 539* A.2d at 188.

Plaintiff has failed to show demand futility. Accordingly, Count II is dismissed under Rule 23.1 for failure to make demand upon the board.

D. Count III-Breach of Fiduciary Duties (Direct Claim)

Plaintiff alleges a direct claim based on special injuries:

(1) Plaintiff is adversely affected by defendants' actions in not pursuing a sale or merger, which will result in a forced redemption of its shares. Plaintiffs specific geographical, distributive, and product situations, as compared to other shareholders, causes it to have specific and individual money damages not borne by other shareholders.

(2) Defendants' actions in lobbying to reduce the amount of product plaintiff could grow without reducing the amount of production needed for it to maintain its shares results in a forced divestiture of its stock to the benefit of the unaffected shareholders.

(3) The forced divestiture causes plaintiff to suffer voting power dilution.

The basis of plaintiff's allegations is that Ocean Spray will redeem its shares and cause plaintiff to lose economic and voting rights. But, nothing in the complaint alleges that Ocean Spray actually has sought to redeem plaintiff or any other shareholder. Section 8(f) of the Cooperative Marketing Agreement ("CMA") between Ocean Spray and DeMarco provides that "[a]t

the written request of the Cooperative, the Grower agrees to present for redemption at par value any Common Shares of the Cooperative in excess of one hundred percent (100%) of the shareholdings required under Subsection (a) of this Section 8."[15]

Until redemption is actually sought, these allegations are not ripe. As mentioned above, nothing in the complaint alleges that Ocean Spray has attempted (or even threatened) redemption. This asserted harm is, therefore, entirely hypothetical. "Courts in this country generally, and in Delaware in particular, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate?[16] Because this Court cannot issue advisory opinions that purport to decide an issue before it is ripe, Count III is dismissed without prejudice.

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[15] Section 8(a): "The Common Stock Equity Quota currently is Twenty-Six Dollars ($26.00) per barrel delivered. During the term of this Agreement, Grower agrees to work toward, achieve, or maintain (as the case may be) holdings of Common Shares of the Cooperative having a par value equal to the amount resulting from multiplying the Common Stock Equity Quota by the average of the number of barrels of the three (3) most recent crops produced by the Grower on the land described in Exhibit A. The Common Stock Equity Quota may be increased or decreased in reasonable amounts by the Board of Directors of the Cooperative and any changes shall become effective upon written notice to the Grower."

[16] *Stroud v. Milliken Enterprises, Inc., 552* A.2d 476, 480 (Del. 1989) ("Unless a controversy is 'ripe for judicial determination,' a court may simply be asked to render an advisory opinion. The law is well settled that courts will not lend themselves 'to decide cases which have become moot, or to render advisory *opinions.')(citing State v. Mancari, 223* A.2d 81, 82-83 (Del. 1966)).

E. Count IV-Election Relief under $225

Count IV fails to state a claim upon which relief can be granted. Plaintiff alleges that the 2001 elections were improper because

(1) the slate of nominees was improperly chosen;

(2) the proxy statement was false and misleading;

(3) misrepresentations/omissions occurred in connection with the votes at the meeting;

(4) the shareholders were not given enough information to make an informed vote;

(5) management denied supporters of the proposed sale or merger access to corporate records;

(6) Ocean Spray failed to honor the agreement in the Massachusetts action by

(a) failing to fairly disseminate the consultants' information regarding sale and merger;

(b) failing to disclose the directors favoring each approach; and

(c) failing to allow an independent observer to serve as teller of the votes;

(7) the vote tabulation was flawed.

The first allegation-that the slate of nominees was improperly chosen-does not state a claim because the board has the authority to submit its own slate of nominees and is not required to disclose why other nominees were not selected. Also, opposing slates were available to the shareholders; the board did not give the shareholders an all or nothing choice. Thus, this allegation in Count IV fails to state a claim and is dismissed.

The allegations relating to the Massachusetts action also fail to state a claim. The Massachusetts agreement was not part of the complaint, and the complaint fails to allege any nonconclusory details as to how that agreement was binding upon Ocean Spray. Plaintiff fails to allege that a failure to honor the alleged agreement constitutes a proper § 225 claim. This portion of Count IV is also dismissed.

The remaining allegations in Count IV fare no better. I note, initially, that rather than bring an action challenging the results immediately and seeking expedited review as § 225 contemplates, plaintiff waited eight months after the election process to file its complaint. Thus, the allegations regarding the allegedly flawed vote tabulation and the misrepresentations/omissions in connection therewith are insufficient as a matter of law. Specifically, plaintiff states that it voted over 120,000 shares, and none of them were for Director Pietersen. The voting results from the

2001 election, however, indicate that Pietersen received all but just less than 55,000 of the votes cast, or 3,486,084 votes, which constituted 98% of the vote. Even assuming for the sake of argument that plaintiff is correct regarding its 120,000 votes, Pietersen still received 95% of the vote, far in excess of the majority needed to prevail in the election.

Ultimately, the complaint fails to assert any flaws that would call the 2001 election into question. No improprieties in the election process are alleged. Nor is it alleged that the opposition slate in fact won the election. The only allegation is that an immaterial number of votes were miscounted. That is not sufficient, in my opinion, to state a claim under § 225.

The remaining parts of Count IV-alleging that the shareholders were misinformed when voting-are just reiterations of the four allegations that survive under Count I. Count IV does not properly allege a $225 claim with respect to these allegations since the appropriate relief-a new vote on the shareholder proposal-is properly requested under Count I and not Count IV. Thus, Count IV is dismissed.

F. Count V-Declaratory Judgment

Count V fails to state a claim upon which relief can be granted because the allegations are not yet ripe. Plaintiff seeks a declaratory judgment that:

(1) only a simple majority is needed to sell the assets of the company; and

(2) the provisions requiring involuntary redemption by plaintiff due to changes by the USDA and short term market conditions are invalid because they conflict with the certificate of incorporation.

The first request is not ripe because no transaction has been proposed against which to assess this statement. Any decision by this Court on this question would be advisory. The Court can only determine the vote required when a transaction is proposed and the board takes a position regarding the required vote.[17]

The second request is also not ripe. Ocean Spray has yet to ask for an involuntary redemption of Plaintiffs shares. As noted earlier, until that occurs the issue is not ripe. Accordingly, Count V is dismissed without prejudice.

G. Count VI-Contractual Remedies

Count VI fails to state a claim upon which relief can be granted because it is not yet ripe. Plaintiff alleges Ocean Spray violated its implied contractual duties of good faith and fair dealing by lobbying for a reduction

[17] See *Stroud, 552* A.2d at 480 (discussed *supra* at n. 16).

in the amount of crop that plaintiff can produce and then implementing a provision that will cause forced divestiture of plaintiffs shares due to decreased production. Plaintiff also alleges that Ocean Spray failed to exclude the 2001-2002 growing year in the calculations to determine share ownership, as requested, even though it had done so in the past. The harm of these actions, however, does not occur until Ocean Spray seeks redemption. Plaintiff concedes in its complaint that no redemption has occurred.[18]

Until Ocean Spray seeks redemption, the allegations in the complaint are not ripe. The Court will not determine if a contract violation occurred before the alleged violation is even attempted.[19]

Additionally, plaintiff states in its complaint that "Ocean Spray functions as an industry trade association, promoting the legislative agenda of growers."[20] If Ocean Spray is required to lobby on behalf of the cooperative, it seems incongruous to suggest that such lobbying violates an implied duty. Plaintiff admits that there is a glut of cranberries,[21] so it is reasonable to expect Ocean Spray to lobby to reduce that glut. Plaintiff

[18] See Compl. ¶ 197-198.
[19] See *Stroud*, 552 A.2d at 480 (discussed *supra* at n.16).
[20] Compl. ¶ 29.
[21] Compl. ¶ 47.

agreed to comply with any federal regulations concerning the production of cranberries in paragraph six of the Cooperative Marketing Agreement. In fact, paragraph six states that "the Grower specifically agrees that it will not be entitled to any compensation or proceeds for cranberries not complying with the above requirements.. ." Where an express provision that has not been violated discusses the area of the alleged implied breach, it is unlikely that such a breach occurred.[22]

The complaint fails to allege any implied contractual breach. The harm alleged has also not occurred. Accordingly, Count VI is dismissed without prejudice.

H. Count VII-Common Law Fraud and Misrepresentation

Count VII fails to state a claim upon which relief can be granted. Plaintiff alleges fraud by the defendants through material misrepresentations and omissions designed to cause plaintiff to vote against the shareholder resolution to direct the board to pursue a sale or merger of Ocean Spray. Plaintiff also alleges that the fraud caused it to rely on that information to its economic detriment. Plaintiff admits that it voted for the shareholder resolution to direct the board to pursue a sale or merger. Plaintiff also

[22] *See, e.g., Shenandoah Life Ins. Co. v. Valero Energy Corp,* 1988 Del. Ch. LEXIS 84 (Del. Ch.).

admits that it knew the correct information in light of the material misrepresentations because Mr. DeMarco, plaintiffs CEO, was on the Ocean Spray board when the board learned the allegedly correct information.

A claim for fraud must meet the following five elements:

> 1) a false representation, usually one of fact, made by the defendant;
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
> 3) an intent to induce the plaintiff to act or refrain from acting;
> 4) the plaintiffs action or inaction taken in justifiable reliance upon the representation; and
> 5) damage to the plaintiff as a result of such reliance.[23]

Plaintiff did not act in accordance with the defendants' recommendation, but instead voted *fur* the shareholder resolution. Thus, no justifiable reliance can be shown.

Plaintiff argues alternatively that justifiable reliance is shown by the fraud to those shareholders who in fact voted *against* the resolution. But the reason fraud and misrepresentation claims are not suitable for class treatment is because reliance must be established on an individual basis.[24] DeMarco cannot establish reliance here.

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[23] *Gaffin v. Teledyne, Inc.*, **611 A.2d 467,472 (Del. 1992).**
[24] *Id.* **at 472-73.**

I?‘. CONCLUSION

The motion to dismiss with respect to Count I is denied in part. The four allegations listed earlier in the opinion state a claim for breach of the duty of disclosure. Should the four disclosure allegations prove. to be material and false, plaintiffs requested remedy of a new vote on the shareholder proposal is the only relief that survives the motion to dismiss. Count I is dismissed as to all other disclosure allegations.

Plaintiffs allegations with respect to Counts III, V, and VI are not yet ripe. The divestiture alleged by DeMarco has not occurred, so a judicial determination cannot be made on these counts. Count VI also fails to properly plead a breach of any implied contractual duty. Counts III, V, and VI are dismissed without prejudice.

Count II is dismissed for failure to make demand upon the board and failure to adequately plead demand futility. Counts IV and VII are dismissed for failure to state a claim upon which relief can be granted. The motion to strike is denied because it is moot.

IT IS SO ORDERED.