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

SUMMIT INVESTORS II, L.P., and SUMMIT VENTURES II, L.P.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 19400
SECHRIST INDUSTRIES, INC., a Delaware corporation, THE JAMES RONALD SECHRIST TRUST, JAMES RONALD SECHRIST, A. EDWIN WENINGER and CLIFFORD SECHRIST,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: September 13, 2002
Decided: September 20, 2002

Kenneth J. Nachbar, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; James L. Messenger, Esquire, Jennifer H. Yen, Esquire, HUTCHINS, WHEELER & DITTMAR, Boston, Massachusetts, *Attorneys **for** Plaintiffs.*

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LAMB, Vice Chancellor

I.

This action arises out of an agreement that allowed the plaintiffs to require the defendants, a Delaware corporation and two parties who acted as secondary obligors, to purchase the plaintiffs' stock in the Delaware corporation upon proper notice. Notice was given, yet the defendants refused to purchase the plaintiffs' shares. The plaintiffs filed a complaint against the Delaware corporation and the two co-obligors, as well as against the Delaware corporation's directors seeking enforcement of the agreement and an injunction requiring the directors to comply.

The defendants who were parties to the agreement (other than the Delaware corporation) have moved to dismiss the complaint based on lack of personal jurisdiction. The corporation's directors have moved to dismiss the complaint against them for failure to state a claim upon which relief can be granted. The defendants have also filed a counterclaim alleging that a third-party defendant director breached his fiduciary duty to the defendant corporation by failing to disclose material information, and also alleging a breach of contract by plaintiffs for failure to provide proper notice. The plaintiffs have filed a motion to dismiss these counterclaims for failure to state a claim upon which relief can be granted.

The plaintiffs' complaint must be dismissed as to the co-obligors of the agreement (aside from the Delaware corporation), because this court may not properly exercise personal jurisdiction over them. These defendants lack the requisite contacts with Delaware necessary to satisfy constitutional due process requirements. The complaint must also be dismissed as to the defendant directors of the Delaware corporation as they are not necessary parties to this litigation, and no action is required on their part to enforce a potential judgment against the corporation.

The counterclaims must also be dismissed because the counterclaimants have failed to state a claim upon which relief can be granted against either the third-party defendant director or against the original plaintiffs. The well-pleaded counterclaims and the inferences that counterclaimants seek to draw therefrom fail to show any breach of duty on the part of the third-party defendant, because all material information that was allegedly not disclosed was already known by the Delaware corporation. Further, the counterclaim against the plaintiffs must be dismissed because any defect in notice could only serve as a defense to the current breach of contract claim. There is no basis for finding the defective

notice could possibly give rise to a separate claim for breach of contract because the notice was a condition of the agreement, and not a covenant thereto.

II.

Summit Investors II, L.P. and Summit Ventures II, L.P. (together "Summit" or "Plaintiffs") are both California limited partnerships. Before December 29, 1999, Summit had majority control of Sechrist Industries, Inc. ("Sechrist Industries" or the "Company"), a Delaware corporation having its principal offices in California. On December 29, 1999, Summit, Sechrist Industries, the James Ronald Sechrist Trust (the "Sechrist Trust") and James Ronald Sechrist ("Ron Sechrist") entered into a series of transactions whereby Ron Sechrist, through the Sechrist Trust, obtained majority control over Sechrist Industries. Sechrist Industries, Ron Sechrist and the Sechrist Trust are all located in California. [1]

At issue in this case is the Put and Call Agreement between Summit, Sechrist Industries, Ron Sechrist and the Sechrist Trust. This Agreement granted Summit the right (but not the obligation) to put all of its Sechrist Industries shares

[1] The facts in this opinion are taken from Summit's well-pleaded complaint as well as from Sechrist Industries' well-pleaded counterclaim. Also certain facts relevant to jurisdictional analysis are taken from the uncontradicted record on the motions to dismiss.

(the “Put Shares”) to Sechrist Industries by providing 20 days notice prior to June 1, 2001 for the greater of $2 million or 25 % of the fair market value of Sechrist Industries on June 1, 2001 (the “Put Price”). The Put and Call Agreement further stated that if Sechrist Industries was prohibited by Delaware Corporation Law or other applicable law from paying some or all of the Put Price on the designated payment date, Ron Sechrist or the Sechrist Trust would purchase all of the shares at the Put Price, Section 16(c) of the Put and Call Agreement provides that Delaware law governs the Agreement. Section 16(g) of the Agreement contains a clause granting Summit the right to obtain specific performance and injunctive relief to enforce the Agreement. The Put and Call Agreement was negotiated and executed in California There were no acts performed in Delaware in connection with the Put and Call Agreement

In February 2001 the Sechrist Industries board of directors (including Summit’s General Partner, third-party defendant Gregory Avis) unanimously approved a credit agreement (the “Credit Agreement”) with Wells Fargo Bank, N .A. (“Wells Fargo”), containing certain financial restrictions and covenants. This approval was given approximately two months before Summit gave notice of its intention to demand its $2 million payment from Sechrist on June , 2001

On April 20, 2001, Summit timely exercised its put right in a letter to Sechrist Industries, Ron Sechrist and the Sechrist Trust. It sent another notice on May 30, 2001. Sechrist Industries, Ron Sechrist and the Sechrist Trust have failed to acquire the Put Shares or to pay Summit the Put Price.

III.

Summit filed its complaint against Sechrist Industries, Ron Sechrist, the Sechrist Trust, Edwin Weninger, and Clifford Sechrist on February 7, 2002. Count I of the complaint seeks specific performance directing the defendants to comply with the terms of the Put and Call Agreement. Count II seeks an injunction ordering Ron Sechrist, Edwin Weninger and Clifford Sechrist, as directors of Sechrist Industries, to cause Sechrist Industries to comply with the terms of the Put and Call Agreement. Count II also seeks an injunction ordering Ron Sechrist and the Sechrist Trust, as controlling stockholder of Sechrist Industries, to cause Sechrist Industries to comply with the terms of the Put and Call Agreement. The complaint also seeks damages and other relief.

On April 4, 2002, Sechrist Industries filed a counterclaim against Summit and Gregory Avis, a general partner of Summit who served as Summit's representative on the Sechrist Industries board of directors. Count I in the counterclaim alleges a breach of the fiduciary duties of loyalty and care on the

part of Gregory Avi: for failure to discl se material information to echrist Industrie Count II of the counter :laim alleges Summi breached th Put and Call Agreemen by failing to gi proper noti to Ron Sechrist and y proceedi concurrently against Sechrist Industri Ron echrist and th Sechrist Trust without providing the proper n tice.

Defendants ha filed m tion to dismiss Summit :laim gainst Ron hrist and the Sechrist Trust based on lack personal jurisd ct on D fendants ha also iled motion to dismi ummit laim ga nst Clifford Sechri and Edwin Weninger for failur to state :laim upon hich reli f can be granted and for lac f personal jurisdiction. Summit has filed motion to dismis unterclaims serted by Sechrist Industries against Summit and Gr gory A

IV

A. Personal Jurisdiction Standard Of Review

When personal jurisdiction is challenged y motion to dismi: the plaintiff bears th burden of sh win basis for the court exerci of jurisdicti o er the nonr sident efendant Where here, the motion is

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Plummer & Co Realt *Crisafi* A.2d 42 244 (Del Super 987)

submitted to the court for decision on affidavits, a plaintiff can meet its burden by making a *prima **facie*** showing that exercise of jurisdiction over the moving party is appropriate .[3] Generally, the court will engage in a two-step analysis: first determining whether service of process of the nonresident is authorized by statute; and, second, considering whether the exercise of jurisdiction is, in the circumstances presented, consistent with due process.[4]

B. Rule 12(b)(6) Standard Of Review

When considering a motion to dismiss a complaint or a counterclaim under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court is to assume the truthfulness of all well-pleaded allegations of fact in the complaint or the counterclaim? Although "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts are accepted as true. "[6] That is, " [a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in Plaintiffs' favor unless

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[3] ***Hart Holding Co., Inc. v.** Drexel Burnham Lambert, **Inc., 593*** A.2d 535, 539 (Del Ch. 1991).

[4] *LaNuova **D & B, S.P.A** v. **Bowe Co.,*** ***5*** A.2d 764, 768-69 (Del. 1986).

[5] *Grobow v. **Perot,*** A.2d 180, 187 & n.6 (Del. 1988).

[6] ***Id.***

they are reasonable inferences."[7] Additionally, the court may consider, for certain limited purposes, the content of documents that are intregal to or are incorporated by reference into the complaint or counterclaim.[8] For example, I will take judicial notice of the Put and Call Agreement in assessing the merits of the claims asserted against the parties. Under Rule 12(b)(6), a complaint or counterclaim may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's or counterclaim's allegations.[9]

V.

A. Delaware Courts Lack Personal Jurisdiction Over Ron Sechrist And The Sechrist Trust

Summit argues that this Court possesses jurisdiction over Ronald Sechrist and the Sechrist Trust pursuant to Section 3104(c)(6) of Delaware's long-arm

[7] *Id.*

[8] *See In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

[9] *See In re Wheelabrator Tech's, Inc. S'holders Litig.*, Del. Ch., C.A. No. 11495, Jacobs, V.C., slip op. at 7 (Sep. 1, 1992) ("the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegations that *flow* from it"); *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) ("a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law").

statute,[10] and that Mr. Sechrist and the Sechrist Trust both have the minimum contacts necessary with the State of Delaware so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[11] Defendants argue that Section 3104(c)(6) does not apply and that, in any case, Ron Sechrist and the Trust do not have the minimum contacts with the forum state to meet due process requirements.

Whether or not Section 3104(c)(6) provides a statutory basis for service of process on Ron Sechrist and the Sechrist Trust raises interesting and, perhaps difficult, issues of contract analysis and statutory construction. By contrast, it is clear that neither Ron Sechrist nor the Sechrist Trust have the minimum contacts required by standards of constitutional due process to subject either to personal

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[10] The relevant portion of Delaware's general long-arm statute provides as follows:

> As to a cause of action brought by a person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-resident, or his personal representative, who in person or through an agent: * * * (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

10 ***Del. C.*** § 3104(c) (2001).

[11] ***International Shoe Co. v. Washington, 326*** U.S. 310, 316 (1945) (citations omitted).

jurisdiction in Delaware For this reason, the court rests its decision solely on the second prong of the usual analysis. [12]

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[12] The argument that Section 3104(c)(6) does not subject Ron Sechrist and the Sechrist Trust to personal jurisdiction in Delaware is that Ron Sechrist and the Sechrist Trust are not acting as "surety for" Sechrist industries. A typical surety is obligated to perform a contract if the primary obligor fails to perform. This is not the case here. Ron Sechrist and the Sechrist Trust are only obligated under the terms of the Put and Call Agreement if Sechrist Industries is statutorily ***barred*** from performing. If for some reason, Sechrist Industries was able to perform, but simply chose not to, neither Ron Sechrist nor the Sechrist Trust would be bound to perform in any way. Therefore, the argument goes, Ron Sechrist and the Sechrist Trust are not "sureties" to the Put and Call Agreement, but are co-obligors whose priority of obligation is merely secondary to Sechrist Industries.

Defendants also argue that the language of Section 3104(c)(6) should be interpreted to refer to normal commercial contracts of insurance and suretyship as the legislative history of Section 3104(c)(6) shows that it derives from special service provisions in state insurance law. Section 3104 has its roots in Illinois insurance law and its construction may be by reference to the legislative and decisional law of Illinois. See ***Wilmington Supply Co. v. Worth Plumbing & Heating, Inc.,*** 505 F. Supp. 777 (D. Del. 1980). Under a similar section of the Illinois long-arm statute, courts have held that the legislature has evidenced some intent to treat suits against insurance companies differently than suits against other companies or individuals; the obvious intent is to protect the consumers of insurance products by making it easier for them to enforce their rights against insurance companies. ***See Golden Rule Ins. Co. v. Manasherov, 558*** N.E.2d 543 (Ill. App. Ct. 1990).

However, Delaware courts have held that Section 3104(c) confers jurisdiction to the maximum extent permitted by law. See *Afros S. P.A. v. Krauss-Maffei Corp., 624* F. Supp. 464 (D. Del. 1985). Furthermore, the definition of surety is sometimes very broadly construed. See BLACK'S LAW DICTIONARY 1455 (7" ed. 1999) ("'A surety, in the broad sense, is one who is liable for the debtor obligation of another, whether primarily or secondarily, conditionally or unconditionally"') (citations omitted). In addition, Delaware courts have held that Section 3104 (c)(6) applies when somebody guarantees a general debt obligation of a corporation in connection with its creation. The corporation is considered a person located in Delaware and the guarantor is acting as a surety for the corporation (not any particular contract). ***See Republic Envtl. Sys. v. RESI Acquisition*** Corp., 1999 Del. Super. LEXIS 219, *7-8 (Del. Super. May 28, 1999).

Due process requires that the parties have fair warning that an activity may subject them to jurisdiction in Delaware.[13] Fair warning can be satisfied where a defendant purposely directs activities into the forum state.[14] Ron Sechrist and the Sechrist Trust have done nothing to purposely direct their activities into Delaware. Ron Sechrist is a California resident. He works full-time in California. He is the sole trustee for the Sechrist Trust, which is located in California. Sechrist Industries' principal place of business is in California. Also, the Put and Call Agreement was negotiated and to be performed in California.

Although the Put and Call Agreement provides a Delaware choice of law provision, this is not enough to satisfy the minimum contacts requirement? It is certainly true that Ron Sechrist and the Sechrist Trust own part of a Delaware corporation and they acted as co-obligors for that corporation in conjunction with a contract formed in California. However, ownership or control of a Delaware corporation is not enough to establish substantial activities in the forum?

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[13] *Outokumpo Eng'g Enters. v. Kvaerner Enviropower,* 685 A.2d 724,731 (Del. Super. 1996) (citing *Shaffer v. Heitner,* 433 U.S. 186, 218 (1977)).

[14] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

[15] "Although relevant to a determination of jurisdiction, a forum selection clause is not by itself dispositive." *Outokumpu,* 685 A.2d at 733. Since a forum selection clause is not dispositive, a choice of law clause has less impact on contact with a jurisdiction.

[16] *Shaffer,* 433 U.S. at 213.

Furthermore, guaranteeing a contract of a Delaware corporation is also not enough to meet the minimum contacts standard." Therefore, Summit has failed to make a *prima facie* showing that Ron Sechrist and the Sechrist Trust have the requisite contacts with Delaware to satisfy "traditional notions of fair play and substantial justice" required by due process?

In the appropriate case, factors such as the burden on the parties in litigating the matter in the chosen forum may reduce the showing of minimum contacts necessary to establish the reasonableness of jurisdiction.[19] This is not such a case. The burden on Ronald Sechrist and the Sechrist Trust of litigating these claims in Delaware is substantial, considering that Mr. Sechrist is a California resident who works there, and that he is the sole trustee of the Sechrist Trust. Plaintiffs are also both California Limited Partnerships. The object of the action is a contract formed in California. In the circumstances, it does not appear to be mutually convenient for parties located in California to litigate this claim in Delaware.

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[17] *Outokumpu*, 685 A.2d at 731-32.

[18] *International Shoe Co.*, 326 U.S. at 316.

[19] *Id.* at 732.

The two cases relied upon by Plaintiffs are easily distinguished In the first case *Republic Envtl. Sys* [20] the Superior Court held that the exercise of personal jurisdiction did not offend due process requirements when the defendant created a Delaware corporation as wholly owned subsidiary and in connection therewith, guaranteed its debts The Court' rationale was that the defendant availed itself of Delaware law in creating Delaware corporation and deri ed substantial and direct benefit from these transactions of its Delaware subsidiary [21] *Republic* is unlike the current case because Ronal Sechrist and the Sechrist Trust do not wholly own the corporation, and did not sign the Put and Call Agreement as part of its formation On the contrary Sechrist Industries was formed years before the Put and Call Agreement was signed

The second case Plaintiffs cite is *Gunton Corp. v KNZ Constr* here the Superior Court held that personal jurisdiction was proper because the defendants were principals of the defendant corporation, the contract was signed and the construction work under it was performed in Delaware and defendants guaranteed an obligation relating to the deliverv of materials in Delaware

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[20] 1999 Del Super LEXIS *7

Id

1999 Del Super LEXIS 41

Furthermore. the burdens of requiring the defendants, who resided in nearby Pennsylvania to litigate the issue in Delaware were minimal The case at bar is unlike *Gunton*—the contract was formed and to be executed in California, and both parties reside thousands of miles from Delaw

For all these reasons Plaintiffs have failed to meet their burden of showing that this Court may properly exercise personal jurisdiction over Ron Sechrist or the Sechrist Trust.

B Plaintiffs Have Failed To State A Claim Against Clifford Sechrist And Edwin Weninger

Count II of the complaint seeks an injunction ordering the directors of Sechrist Industries to cause Sechrist Industries to comply with the terms of the Put and Call Agreement. Summit argues the complaint states claim against Clifford Sechrist and Edwin Weninger as directors because they are necessary parties to such an injunction Plaintiffs are correct in noting that Delaware courts have generally held that directors are properly joined as defendants in claims seeking various forms of injunctive relief [23] However the facts in this case do not necessitate that the directors be joined as parties There are three reasons for this

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Brianti TeleSTAR, Inc 985 Del Ch. LEXIS 515 (Del Ch. Sept. 3, 985)

First, defendants Clifford Sechrist and Edwin Weninger were not parties to the Put and Call Agreement and cannot be sued for its breach. Second, and more importantly, even if plaintiffs prevail on their breach of contract claim against the Company, there is no basis alleged upon which Summit could be entitled to obtain an injunction against the Sechrist Industries board of directors. [24] Plaintiffs cite ***Brianti***[25] for the proposition that corporate directors are proper parties in actions seeking injunctions. However, *Brianti* does not support the claim for an injunction made here. In *Brianti,* the plaintiffs' rights under the agreement at issue required that the board of directors adopt a resolution recommending dissolution and that the directors call a shareholders' meeting to vote on the resolution pursuant to 8 *Del. C.* § 275. Thus, there was a basis to allege that injunctive relief against the director defendants might be needed to provide complete relief for a breach of contract. Here, no action is required by the directors to enforce Plaintiffs' rights under the Put and Call Agreement. As

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[24] "Officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually." *Wallace v. Wood, 752* A.2d 1175, 1180 (Del. Ch. 1999).

[25] *Brianti, 1985* Del. Ch. LEXIS 515.

plaintiffs themselves state in footnote 4 of their memorandum opposing Defendants' motion to dismiss,[26] if this Court rules that Sechrist must specifically perform its obligations under the Put and Call Agreement there is no need to further order the directors to comply with the Agreement. Thus, the claim alleged against the additional director defendants is not sufficiently ripe to confer subject matter jurisdiction.[27]

Defendants also argue that even if Plaintiffs stated a claim against Clifford Sechrist and Edwin Weninger, the court lacks personal jurisdiction to adjudicate the claim. Because the complaint fails to state a claim on which relief can be granted, the Court need not reach this issue. Therefore the action against Defendants Clifford Sechrist and Edwin Weninger will be dismissed pursuant to Rule 12(b)(6).

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[26] "To de extent that this Court rules that Sechrist Industries can be compelled to specifically perform its obligations . . . Summit will consent to dismissal against all defendants."

[27] "[T]he prospective possibility that injunctive relief may be required is not a basis for equity jurisdiction in this action for a declaration of rights under a contract." *City of Wilmington v. Delaware Coach Co.,* 230 A.2d 762, 767 (Del. Ch. 1967).

C. Sechrist Industries Has Not Stated A Breach Of Fiduciary Duty Claim Against Avis

Sechrist Industries argues that Avis breached his duty of disclosure to it by not disclosing that Summit was going to exercise its rights to put the Sechrist Industries shares to Sechrist Industries, and by not disclosing that Sechrist Industries failed to list the Put and Call Agreement as a contingent liability in the Credit Agreement with Wells Fargo. These arguments have several flaws. First, Sechrist Industries was fully aware of Summit's put rights. Case law clearly establishes that a director owes no fiduciary duty to disclose matters that are already known to the company.** Sechrist Industries clearly was on notice of the very strong potential that Summit would exercise its valuable put rights. Sechrist Industries makes a distinction between knowledge of a contract right and knowledge of whether a party will exercise its contract rights. However, there is no fiduciary duty to disclose an intention to exercise contract rights when the corporation knows those rights exist.[29]

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[28] *See Fisher v. United Technology Corp., 6* Del. J. Corp. L. 380, 385 (Del. Ch. 1981)

[29] *See Randall Craft Realty Co. v. Unijax, Inc., 653* F.2d 1066, 1069 (5" Cir. 1981) ("Unijax could read the contract as well as Craft, and it requires no remarkable powers of prediction to anticipate that one contracting party will exercise its rights against the other. ")

Second, even if Avis definitively knew that Summit intended to exercise its rights, Summit could have chosen not to do so at any time, up to the moment notice was actually given. Therefore, any "knowledge" that Avis had, must be considered speculation. Delaware law clearly has established the principle that a director's fiduciary duties do not extend to speculation concerning future events.[30]

The only case that Sechrist Industries cites to support its argument that Avis had a duty to disclose Summit's intent to exercise its put is ***Hoover Industries v. Chase.***[31] ***Hoover*** is easily distinguishable. The discussion of a director's duty to disclose in ***Hoover*** was limited to a situation where a director has knowledge of a plan to defraud the corporation, and the director was involved in the fraud and failed to disclose the fraud to avoid detection.[32] Nothing remotely similar is alleged here.

During oral arguments, the defendants' attorney made an argument similar to the facts in ***Hoover.*** He argued that it would be a breach of Avis's fiduciary duty of disclosure if Avis knew Summit was going to interpret the Put and Call

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[30] ***See Siebert v. Harper & Row,*** 10 Del. J. Corp. L. 645, 655 (Del. Ch. 1985); ***Warner Communications, Inc. v. Murdoch,*** 581 F. Supp 1482, 1491 (D. Del. 1984).

[31] 1988 Del. Ch. LEXIS 98 (Del. Ch. July 13, 1988).

[32] ***Id.*** at *7

Agreement differently than Sechrist Industries would interpret it. In his hypothetical, the defendants' attorney implied that Avis was engaged in fraudulent deception of Ron Sechrist.[33] However, in the defendants' counterclaim, there are no facts pleaded from which one can infer a fraud was taking place. Thus, the hypothetical defendants' attorney posited is not, itself, grounded in the well pleaded allegations of the counterclaim. Therefore, Sechrist Industries has failed to state a breach of fiduciary duty claim upon which relief can be granted.

D. Sechrist Industries Fails To State A Breach Of Contract Counterclaim

Sechrist Industries alleges Summit has breached the Put and Call Agreement by failing to give proper notice to Ron Sechrist, and by proceeding concurrently against Sechrist Industries, Ron Sechrist, and the Sechrist Trust without providing the proper notice. To recover for breach of contract, Sechrist Industries must allege that some contractual promise or covenant was breached,

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[33] Defendants' attorney recited the following hypothetical:

> What if Ron Sechrist told Greg Avis, "Hey, good thing we're approving this line of credit because we don't need to worry about paying you the $2 million in full in two or three months because we set up the Put and Call Agreement in the right way so that even though the company is nowhere near having $2 million were going to be okay on the line of credit?"
>
> What if Greg Avis looked back at him and shook his head, "Yeah, your right, Ron. That's good that it's set up this way."?

and that it suffered damage as a result. Although damages have generally been averred, Sechrist Industries has still failed to state a claim.

The notice provisions in the Put and Call Agreement are conditions to the obligations of Sechrist Industries, not covenants. Conditions are events that must occur before a party becomes obligated to perform? Non-occurrence of a condition is not considered a breach by a party unless he is under a *duty* for that condition to occur.[35] Summit was under no such duty. This is evident from the fact that Summit was under no obligation to exercise its put rights, and therefore under no obligation to provide any notice whatsoever.

There are several cases that recognize the distinction between covenants and conditions. These cases all hold that, although failure of a condition may excuse a party's performance, it does not give rise to money damages.[36] And, while Sechrist Industries argues the notice provision at issue here is a covenant and not a condition, both the case law and common sense are to the contrary.[37]

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[34] RESTATEMENT (SECOND) OF CONTRACTS § 2.1 (1981); CORBIN ON CONTRACTS § 30.12 (2001).

[35] RESTATEMENT (SECOND) OF CONTRACTS § 225(3) (1981).

[36] *See Weiss v. Northwest Broadcasting, Inc.,* 140 F. Supp. 2d 336, 345 (D. Del. 2001); *In re Columbia Gas Systems, Inc., 50* F.3d 233,241 (3d Cir. 1995); *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard.,* 463 N.Y.S. 2d 960, 962 (N.Y. App. Div. 1983).

[37] *See Falcon Steel Co. v. Weber Eng'g. Co.,* 517 A.2d 281, 287 (Del. Ch. 1986) (lack of notice constitutes a defense to damages claim). Sechrist Industries does not cite any cases that hold a notice provision is a covenant. Instead, Sechrist Industries cites cases that say

Sechrist Industries did not bargain to receive notice as an end in itself. It bargained for notice before its obligations were triggered.

Finally, Sechrist Industries argues that Summit was required to provide additional notices to Sechrist Industries pursuant to paragraphs 2(a) and 2(b) of the Put and Call Agreement, and that it failed to do so. However, there is no provision in paragraph 2(a) or 2(b) requiring Summit to provide Sechrist Industries with additional notices. [38] To the extent Sechrist Industries is alleging a breach of contract for failure to provide notice to Ronald Sechrist or to the Sechrist Trust, it lacks standing to do so. Sechrist Industries does not deny this fact. Therefore, Sechrist Industries' breach of contract claim must be dismissed for failure to state a claim upon which relief can be granted.

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ambiguous provisions should be interpreted as covenants and not conditions. *See Wilmington Trust Co. v. Clark,* 325 A.2d *383, 386* (Del. Ch. *1974); Mellon Bank, N.A. v. Aetna Business Credit, Inc.,* 619 F.2d 1001, 1016 (3d *Cir.* 1980); ***Harmon Cable*** *Communication of Nebraska, L. P. v. Scope Cable Television, Inc., 468* N.W.2d 350, 359 (Neb. 1991). This case does not involve an ambiguous provision. The notice provision at issue here can only be viewed as a condition.

[38] One provision arguably requires additional notices, but this provision is only implicated if Sechrist is insolvent on the put date. Sechrist would not be insolvent on the put date. It would only be in violation of certain debt covenants imposed by Wells Fargo, which could lead to insolvency at some future date.

VI

For the foregoing reasons, the complaint is dismissed as to Ron Sechrist, the Sechrist Trust, Edwin Weninger and Clifford Sechrist. The counterclaim is dismissed in its entirety. The parties shall consult and present a conforming order.