IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PHILLIP STEWART, VINCENT PRIEST, TIMOTHY MCCORKLE, and T&K MCCORKLE IRREVOCABLE TRUST,	)	
Plaintiffs,	)	
v.	)	C.A. No. 8119-VCP
BF BOLTHOUSE HOLDCO, LLC, ROBIN P. SELATI, GEORGE A. PEINADO, and BENJAMIN D. CHERESKIN,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: April 22, 2013
Decided: August 30, 2013

Matthew E. Fischer, Esq., Janine M. Salomone, Esq., Ryan W. Browning, Esq., POTTER ANDERSON & CARROON LLP, Wilmington, Delaware; Michael J. Zdeb, Esq., Richard R. Winter, Esq., Maureen E. Browne, Esq., Michael A. Grill, Esq., HOLLAND & KNIGHT, LLP, Chicago, Illinois; *Attorneys for Plaintiffs Phillip Stewart, Vincent Priest, Timothy McCorkle, and T&K McCorkle Irrevocable Trust.*

William M. Lafferty, Esq., Leslie A. Polizoti, Esq., Bradley D. Sorrels, Esq., MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Robert B. Ellis, Esq., Benjamin T. Kurtz, Esq., KIRKLAND & ELLIS LLP, Chicago, Illinois; *Attorneys for Defendants BF Bolthouse Holdco, LLC, Robin P. Selati, George A. Peinado, and Benjamin D. Chereskin.*

PARSONS, Vice Chancellor.

This action involves a dispute between, on one side, a Delaware limited liability company and its board of managers, and on the other, former employees of the company, arising from the company's July 2010 repurchase of the former employees' membership units. The defendant company and its managers allegedly breached both the contract that governed the terms of the repurchase transaction and the terms of the company's limited liability company agreement by valuing the former employees' units at $0.00 in bad faith. The plaintiff former employees further allege that, in coming to the $0.00 valuation decision, the manager defendants breached their fiduciary duties and that the defendants also breached the implied covenant of good faith and fair dealing associated with the contract governing the repurchase. The plaintiffs seek, among other relief, a declaratory judgment invalidating the repurchase transaction and an order restoring their ownership of membership units in the company.

The company and its directors have moved to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted.

Having considered the parties' briefs and heard argument on the motion, I conclude that the plaintiffs have stated a claim for breach of contract in parts, but not all, of Count I of their complaint. Therefore, I deny in part, and grant in part, the defendants' motion to dismiss Count I. I also conclude that the plaintiffs have failed to state a claim for breach of fiduciary duty or for breach of the implied covenant of good faith and fair dealing in Counts II and III because both claims are foreclosed by, and duplicative of, the plaintiffs' breach of contract claims. Accordingly, I grant the defendants' motion to dismiss Counts II and III.

I. BACKGROUND

A. The Parties

Plaintiffs Phillip Stewart, Vincent Priest, and Timothy McCorkle are former employees of Wm. Bolthouse Farms, Inc. ("Bolthouse Farms"), a wholly owned subsidiary of BF Bolthouse Holdco, LLC (the "Company" or "Bolthouse"). Plaintiff T&K McCorkle Irrevocable Trust ("T&K Trust," and together with Stewart, Priest, and McCorkle, "Plaintiffs") is a trust created by McCorkle and his wife.

Defendant Bolthouse is a Delaware limited liability company in the business of producing foods and premium beverages. Defendants Robin Selati, George Peinado, and Benjamin Chereskin (the "Individual Defendants," and together with Bolthouse, "Defendants") were members of Bolthouse's board of managers appointed by Bolthouse's controlling shareholder, Madison Dearborn Partners, LLC ("Madison Dearborn").

B. Facts[1]

In December 2005, Madison Dearborn acquired a controlling interest in Bolthouse, a previously family-owned food and beverage producer. At the time Madison Dearborn acquired Bolthouse, the structure and management of the Company was set forth in a Unitholders' Agreement and a limited liability company agreement (the "LLC Agreement"). The Unitholders' Agreement established a five-person board to oversee Bolthouse. Madison Dearborn had the right to designate three of the five board members,

[1] The facts, unless otherwise noted, are derived from the allegations in Plaintiffs' Complaint.

and elected to fill those positions with the Individual Defendants. The remaining two seats were allocated to Bolthouse Farm's CEO Andre Radandt, so long as he remained in that position, and a designee of Radandt's choice. The scope of the board's fiduciary duties was defined in Section 6.4 of the LLC Agreement. Under that clause, the board members owed the Company and the other members of the Company the same fiduciary duties that a director of a Delaware corporation would owe a corporation and its stockholders.

Upon Madison Dearborn's acquisition of Bolthouse, certain employees of Bolthouse and its subsidiaries, including Plaintiffs, were offered the opportunity to obtain an ownership interest in Bolthouse by purchasing Class B Common Units (the "Class B Units" or "Units"). From 2005 through 2008, Plaintiffs collectively acquired 7,611[2] Units for approximately $25 each. Plaintiffs purchased all of their Units pursuant to an Executive Unit Purchase Agreement (the "Purchase Agreement") that outlined the rights associated with Units ownership.

Under the terms of the Purchase Agreement,[3] Plaintiffs acquired Units that vested on a daily basis over a five-year period so long as Plaintiffs continuously were employed

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[2] Stewart acquired 2,003 Units, Priest acquired 2,003 Units, McCorkle acquired 3,366 Units, and T&K Trust acquired 239 Units. Compl. ¶ 18.

[3] The parties in their briefing and at oral argument presented the Court with competing versions of the Purchase Agreement. Because Plaintiffs appear to rely on a "draft" of the Purchase Agreement, the Court is skeptical of at least some of their allegations. Nevertheless, to the extent a relevant provision of the Purchase Agreement relied upon by Defendants differs from what is alleged in the Complaint, for purposes of deciding the pending motion to dismiss, I adopt

by Bolthouse Farms. In the event that a Plaintiff's employment at Bolthouse Farms was terminated for any reason, voluntarily or involuntarily, the Purchase Agreement entitled the Company to repurchase, within 210 days of the date of termination, all or part of that Plaintiff's Class B Units (the "Repurchase Option"). The Company could exercise the Repurchase Option for vested Units at their "Fair Market Value," and could repurchase non-vested Units at the lesser of their Fair Market Value and the price paid for the Units.

According to the terms of the Purchase Agreement, the Fair Market Value of the Units is: (1) decided as of the date a Plaintiff's employment terminated[4] and (2) to be "determined in good faith by the Board in its sole discretion after taking into account all factors determinative of value including, but not limited to, the lack of a readily available market to sell such units, but without regard to minority discounts."[5] The Purchase Agreement does not require Bolthouse to provide the owners of repurchased Units with any information pertaining to the repurchase decision or provide those owners with any right to seek an independent appraisal of their repurchased Units.

Plaintiffs' version as presented in the Complaint pursuant to my obligation to view the facts in the light most favorable to Plaintiffs, as the non-moving parties.

4 Defendants dispute this allegation and, instead, contend they were entitled to determine Fair Market Value of the Units as of any date during the 210-day Repurchase Option period, provided it was the date they delivered the repurchase notice to Plaintiffs. Defs.' Op. Br. 6. For the reasons stated in note 3, *supra*, I have assumed the truth of Plaintiff's allegations for purposes of deciding this motion to dismiss.

5 Compl. ¶ 19.

In September 2008, the Campbell Soup Company ("Campbell") expressed an interest in acquiring Bolthouse from Madison Dearborn in an all-cash transaction that valued Bolthouse in the range of \$1.4 to \$1.6 billion. Under the terms of the LLC Agreement, if Bolthouse were sold, the Class B Units would share pro rata in the proceeds of the sale with holders of Class A Units after, generally, repayment of debt and certain unreturned capital contributed by Class A Unit holders. Based on the LLC Agreement, a sale of Bolthouse in the \$1.4 to \$1.6 billion range would have translated to a valuation for the Class B Units of approximately \$1,000 per Unit. Madison Dearborn and Campbell failed to reach an agreement regarding the sale of Bolthouse in 2008 and their negotiations ended without any commitment to resume sale discussions at a later date.

Between September 2008 and February 25, 2010, Plaintiffs attended several Bolthouse management meetings. These meetings often included discussions of Bolthouse's financial position and the value of the Company's Class B Units. In one such meeting on February 1, 2010, Jeffrey Dunn, President and CEO of Bolthouse, discussed the Company's bright future prospects. Two days later, on February 3, 2010, Dunn sent an email to Plaintiffs and Scott LaPorta, Bolthouse's Chief Financial Officer, stating:

> Per our leadership meeting Monday, I have attached a schedule Gareth built which looks at valuation of "B" shares currently and in various future scenarios. The schedule sensitizes various EBITDA levels and net debt levels at an 8.5 times valuation. You will see that currently at our \$135M LTM EBITDA that the value of a "B" share is roughly \$200. If we were to reach our FY 2013 target of \$200M EBITDA at

> same multiple a "B" share would be worth $2340. The future is uncertain, but I remain confident that the best value creation path is for us to recommit ourselves to growth and make the necessary investments to capture that growth.[6]

On February 25, 2010, Plaintiffs voluntarily terminated their employment with Bolthouse. Shortly after Plaintiffs' departure, Radandt and his designee resigned from Bolthouse's board and were not replaced, leaving the three Individual Defendants as Bolthouse's only board members. Plaintiffs' voluntary termination triggered Bolthouse's right under the Purchase Agreement to repurchase Plaintiffs' vested and unvested Units.[7] On July 22, 2010, which was within the 210-day repurchase period,[8] Bolthouse gave notice of its decision to repurchase Plaintiffs' Units. LaPorta sent substantially identical letters to each Plaintiff, stating in relevant part:

> We hereby notify you and the Trust that, pursuant to paragraph 3(b) of the [Purchase] Agreement, we are repurchasing the [Class B Units] at their Fair Market Value. The Fair Market Value as determined by the board of managers of the Company is $0.00 per Unvested Management Unit and $0.00 per Vested Management Units.

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6 Defs.' Op. Br. Ex. L at 1. The Complaint quotes most, but not all of LaPorta's email. The Court is free, however, to consider the complete copy of the letter Defendants attached to their opening brief in evaluating the motion to dismiss. *See In re Gen. Motors S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used").

7 As of their date of termination, Plaintiffs had the following vested/unvested/total Units: Stewart -- 1,241/762/2,003; Priest -- 1,682/312/2,003; McCorkle -- 2,826/540/3,366; and T&K Trust -- 200/39/239.

8 The 210-day period would have expired on September 23, 2010.

> Because your Unvested Management Units and your Vested Management Units have no value, your Unvested Management Units and your Vested Management Units will be cancelled for no consideration as of the date hereof.[9]

The letter did not provide any explanation or analysis regarding the valuation of $0.00 for either the vested or unvested Units. Following receipt of the letter, McCorkle made several phone calls to various Bolthouse executives seeking an explanation of the Bolthouse board's decision, but no explanation was provided. Counsel for Plaintiffs also inquired of Bolthouse as to the board's methodology in valuing the Units. Those efforts, however, were equally fruitless.

In August 2012, after renewed negotiations, Campbell successfully acquired Bolthouse from Madison Dearborn in a cash transaction for approximately $1.55 billion. As a result of that acquisition, Class B Unit Holders received consideration of approximately $1,200 per Unit.

C. Procedural History

On December 18, 2012, Plaintiffs commenced this action. The Complaint seeks, among other relief, a declaration that, due to breaches of contract and fiduciary duties by Bolthouse and the Individual Defendants, the July 22, 2010 repurchase of Units by Bolthouse was null and void. On February 22, 2013, Defendants moved to dismiss the Complaint in its entirety. After full briefing on that motion, I heard argument on April 22, 2013. This Memorandum Opinion constitutes my ruling on the motion to dismiss.

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[9] Compl. ¶ 29; Defs.' Op. Br. Exs. H-K.

D. Parties' Contentions

Plaintiffs have asserted claims for breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. With respect to the breach of contract claim, Plaintiffs allege three sets of breaches. First, they aver that Defendants' determination that Plaintiffs' Units had a Fair Market Value of $0.00 was made in bad faith and thus in breach of both the Purchase Agreement and Section 6.4 of the LLC Agreement. Second, Plaintiffs assert that Defendants failed to deliver Bolthouse's audited financial statements to Plaintiffs within 120 days of March 31, 2010 in violation of Section 11.4(a) of the LLC Agreement. And third, Defendants stand accused of impermissibly "cancelling" the Units repurchased from Plaintiffs in violation of both the Purchase Agreement and the LLC Agreement. In addition, Plaintiffs allege that the Individual Defendants owed them fiduciary duties pursuant to Section 6.4 of the LLC Agreement and the common law and that the Individual Defendants breached those duties because: (1) they had a conflict of interest when they determined the Fair Market Value of Plaintiffs' Units and are unlikely to be able to prove that the value of $0.00 they assigned was entirely fair; and (2) their valuation of $0.00 was made in bad faith. Plaintiffs' final claim is that, by their bad faith conduct, Defendants also breached the implied covenant of good faith and fair dealing in relation to the Fair Market Value provision of the Purchase Agreement.

Defendants counter that Plaintiffs have failed to state a claim for breach of the Purchase Agreement or of the LLC Agreement because the facts alleged are insufficient to support a claim of bad faith. Defendants also argue that, because Plaintiffs were no longer "Members" of Bolthouse when the audited financial information was disseminated, they had no right to receive such disclosures under Section 11.4(a) of the LLC Agreement. As to the final breach of contract allegation, Defendants deny that they acted in breach of either the Purchase Agreement or the LLC Agreement when they "cancelled" Plaintiffs' Units, because they acted pursuant to their express right to repurchase those Units. Regarding the alleged breach of fiduciary duties, Defendants contend that Plaintiffs claims are duplicative of their breach of contract claims and should be dismissed based on the supremacy of contract law over fiduciary law in Delaware. Finally, Defendants assert that the implied covenant of good faith and fair dealing does not apply to the Fair Market Value provision of the Purchase Agreement because it is controlled by an express term agreed to by the parties. To the extent the implied covenant of good faith and fair dealing may have given rise to an additional obligation, Defendants also maintain that it would not apply to the Individual Defendants because none of them were parties to the Purchase Agreement.

II. ANALYSIS

A. Standard

Pursuant to Court of Chancery Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Delaware Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[10] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[11]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[12] If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[13] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[14] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[15]

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10 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted).

11 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

12 *Id.* at 537 & n.13.

13 *Id.* at 536.

14 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

15 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

Generally, a court will consider only the pleadings on a motion to dismiss under Rule 12(b)(6). "A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents."[16]

B. Breach of Contract

1. Breach of the Purchase Agreement

The main issue in this action is whether Bolthouse's board acted in bad faith by determining that Plaintiffs' Units had a Fair Market Value of $0.00 as of February 25, 2010, the date Plaintiffs terminated their employment with the Company's subsidiary, Bolthouse Farms. Defendants' motion presents two primary questions: (1) whether $0.00 conceivably was less than the Fair Market Value of Plaintiffs' Units on February 25, 2010; and (2) whether Defendants conceivably acted in bad faith when they determined that the Fair Market Value of Plaintiffs' Units was $0.00. For the reasons stated below, I find that Plaintiffs' Complaint alleges sufficient facts to make it reasonably conceivable that the Fair Market Value of Plaintiffs' Units was greater than $0.00 and that Defendants acted in bad faith in deciding upon that valuation. Therefore, I deny Defendants' motion to dismiss as to parts of Count I of the Complaint.

a. Plaintiffs' Units Conceivably had a Fair Market Value greater than $0.00

Plaintiffs assert that the Fair Market Vale of their Units at the time they left Bolthouse Farms exceeded $0.00. In support of their contention, Plaintiffs offer three

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16 *Allen v. Encore Energy P'rs*, 2013 WL 3803977, at *1 n.2 (Del. 2013).

data points: Campbell's 2008 "appraisal" of Bolthouse, Dunn's February 2010 email, and Campbell's purchase of Bolthouse in 2012. According to the Complaint, these three events yielded implicit valuations of Class B Units of $1,000, $200, and $1,200, respectively. Plaintiffs argue that even if none of these amounts accurately reflect the Fair Market Value of the Class B Units at the times in question, they still suggest that the Units were not worthless on February 25, 2010 and had *some* value beyond $0.00.

Defendants respond that none of the data points Plaintiffs rely on establish Fair Market Value as defined by the Purchase Agreement, nor are any of those points reliable because they were not made as of February 25, 2010, the date as of which Bolthouse's board was to determine the Fair Market Value of Plaintiffs' Units.

The Purchase Agreement provides that Fair Market Value of the Units was to be "determined in good faith by the Board in its sole discretion after taking into account all factors determinative of value including, but not limited to, the lack of a readily available market to sell such units, but without regard to minority discounts."[17] The data points provided by the 2008 Campbell "appraisal" and the 2012 Campbell acquisition bear little, if any, relationship to Fair Market Value under the Purchase Agreement. The Complaint states that both the $1,000 per Unit valuation derived from Campbell's 2008 proposal and the $1,200 per Unit valuation derived from Campbell's 2012 acquisition of Bolthouse were based on the terms of the LLC Agreement,[18] not the Fair Market Value provision of

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[17] Compl. ¶ 19.

[18] *Id*. ¶ 22.

the Purchase Agreement. But, the Complaint neither explains, nor attempts to explain, how to reconcile the amount Class B Units were to receive in a sale of Bolthouse, as set forth in the LLC Agreement, with the definition of Fair Market Value in the Purchase Agreement. Even if, however, the Campbell's data points actually spoke to the Units' Fair Market Value under the Purchase Agreement, the events that lead to those valuations occurred either too far before or too far after Bolthouse's board had to make its valuation determination to be meaningful in this case. Said differently, I do not believe evidence of a contemplated acquisition in September 2008 or a completed acquisition in August 2012, in isolation or combined, makes it reasonably conceivable that the Units had a Fair Market Value greater than $0.00 in February 2010.

The additional fact of Dunn's February 2010 email valuing Plaintiffs' Units at $200 each, however, does make it reasonably conceivable that Plaintiffs' Units had a Fair Market Value greater than $0.00 when their employment at Bolthouse Farms ended just over three weeks later. Unlike either of the Campbell events, the Dunn email was sent sufficiently close to the February 25, 2010 valuation date that its contents are likely to be probative of the key issue. In addition, the financial analysis in Dunn's email was prepared by Bolthouse itself, under the direction of its CEO. It is true, as Defendants emphasize, that Dunn was not a member of Bolthouse's board and that Plaintiffs have not alleged the board endorsed, or was even aware of, Dunn's representation to Plaintiffs about the value of their Units. Plaintiffs have alleged, however, that over the course of their employment at Bolthouse they "regularly participated in Bolthouse management meetings,"[19] and that "the value of the Class B Units were frequently discussed" at those meetings.[20]

Under these circumstances, one reasonably could infer that Bolthouse's board, even in the absence of a specific allegation, had some knowledge that Bolthouse's management regularly discussed, and at least occasionally prepared detailed financial analyses related to, the value of Class B Units. Another reasonable, but not conclusive, inference is that these discussions and analyses represented Bolthouse's views, as an entity, on the value of Class B Units and largely reflected Bolthouse's board's perspective on the subject, even if the viewpoints were not uniform.[21]

Dunn's email does not establish definitively that the Units had a Fair Market Value greater than $0.00, but it makes it reasonably conceivable that they did. In addition, the absence of any pleading or argument that some material event occurred in the three weeks between February 3, 2010, the date of Dunn's email, and the critical date

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19 *Id*. ¶ 25.

20 *Id.*

21 This inference also is supported by the fact that on March 18, 2010 Bolthouse's CFO LaPorta wrote the following to Plaintiffs in response to inquiries about the Repurchase Option: "*We* have not made a decision as to whether or not *we* will repurchase your Class B units or the Trust's Class B Units. *We* are discussing the matter internally and will notify you once *we* have made a decision." Compl. ¶ 28 (emphasis added). LaPorta's language suggests Bolthouse management was at least aware of the board's thinking about Class B Units, if not actively involved in shaping the board's perspective.

of February 25, 2010, further supports the reasonableness of an inference that Plaintiffs' Units had a Fair Market Value greater than $0.00 when Plaintiffs left Bolthouse.

b. Plaintiffs have sufficiently alleged bad faith

Having determined Plaintiffs satisfied their burden of pleading a conceivable claim that their Units had a Fair Market Value greater than $0.00, I turn to the issue of whether Plaintiffs adequately have alleged that Defendants acted in bad faith. Both Plaintiffs and Defendants argue that the pleading standard for contractual bad faith claims articulated in *Clean Harbors, Inc. v. Safety-Kleen, Inc.*[22] should control here. In *Clean Harbors*, this Court determined that for a contractual bad faith claim to survive a motion to dismiss, the plaintiff must only allege "facts related to the alleged act taken in bad faith, and a plausible motivation for it."[23] The Court in *Clean Harbors* described such a pleading standard as "minimal" and noted its purpose was "to give the defendants notice of the claim being made against it."[24]

Applying the *Clean Harbors* standard, I find that Plaintiffs sufficiently have alleged bad faith here. The Complaint explicitly alleges that Defendants determined the Fair Market Value of Units in bad faith while exercising the Repurchase Option for Plaintiffs' Units.[25] These allegations of bad faith are supported by the facts that: (1) on

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[22] 2011 WL 6793718 (Del. Ch. Dec. 9, 2011).

[23] *Id.* at *7 (quoting *Winston v. Mandor*, 710 A.2d 835, 844 (Del. Ch. 1997)).

[24] *Id.* (citation omitted).

[25] Compl. ¶¶ 7, 43, 44, 59.

several occasions between 2005 and 2008, Plaintiffs purchased Units from Bolthouse for approximately $25 per Unit; (2) there is no indication Bolthouse's financial position was materially worse in 2010 than it was in 2005-2008; (3) in February 2010, the CEO of Bolthouse conveyed to Company managers that Bolthouse had bright future prospects; (4) on February 3, 2010, the CEO of Bolthouse expressed to Plaintiffs his belief that each Unit was worth roughly $200; (5) on February 25, 2010, Plaintiffs quit their respective jobs at Bolthouse; and (6) in July 2010, seven days before Bolthouse's deadline to deliver audited financial information to Plaintiffs, LaPorta informed Plaintiffs, without any explanation,[26] that as of February 25, 2010, their Units had a Fair Market Value of $0.00. None of these allegations viewed individually is demonstrative of bad faith. Taken as a whole, however, they convince me that it is reasonably conceivable Bolthouse failed to act in good faith when it determined Fair Market Value for Plaintiffs' Units. A more complete record might reveal that Defendants' decision to ascribe zero value to shares of a company with an established track record, no financial difficulties, and promising future prospects was made in good faith, even if in doing so, they implicitly disagreed with a near contemporaneous valuation of the Class B Units prepared by Bolthouse's CEO. It is, however, reasonably conceivable based on the limited record before me that those decisions, considered in light of the fact that the repurchase transaction was timed

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[26] Under the terms of the Purchase Agreement, Plaintiffs were not entitled to any disclosure relating to the board's determination of Fair Market Value. As such, I do not consider the lack of disclosure itself to be evidence of bad faith conduct. In this case, however, such disclosure may have prevented the current lawsuit or entitled Defendants to dismiss the Complaint in its entirety.

in such a way that it relieved Defendants of their obligation to provide Plaintiffs with relevant financial information about Bolthouse, were made in bad faith. Accordingly, Plaintiffs have carried their burden as to the first component of the *Clean Harbors* pleading standard.

Plaintiffs also sufficiently have pled a plausible motivation for Defendant's bad faith conduct. First, Plaintiffs have alleged that the Individual Defendants sought to increase Madison Dearborn's majority position in Bolthouse at Plaintiffs' expense by repurchasing their Units for less than their Fair Market Value.[27] Such an allegation, standing alone, may not be sufficient to establish a plausible motivation for bad faith conduct.[28] But, the additional allegations here, including those pertaining to Bolthouse's favorable future prospects and the questionable circumstances surrounding Defendants' determination of Fair Market Value, strengthen Plaintiffs' claim to the point that it exceeds the conceivability threshold of a motion to dismiss. Defendants' argument that neither the Individual Defendants nor Madison Dearborn obtained a unique benefit from

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[27] Compl. ¶¶ 1, 35, 51.

[28] There is case law, however, that supports the argument that it would. *See Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *8 (Del. Ch. Dec. 9, 2011) ("Clean Harbors alleges a sufficient improper motivation, claiming that Safety–Kleen desired to benefit the remaining Safety–Kleen shareholders, which conceivably could include Safety–Kleen's directors, at Plaintiffs expense"); *Gale v. Bershad*, 1998 WL 118022, at *4 (Del. Ch. Mar. 4, 1998) (finding allegation that "the directors had a conflicting self-interested motivation to redeem the Preferred for an inadequately low price" sufficient to show bad faith at the motion to dismiss stage).

the repurchase transaction does not preclude a finding that their conduct was in bad faith. If, for example, the Individual Defendants acted with the purpose of harming Plaintiffs by increasing the value of Madison Dearborn's or their own Class B Units at Plaintiffs' expense, that conduct would be in bad faith.[29]

Plaintiffs also argue that Defendants may have had improper retributive motivations for valuing their Units at $0.00.[30] Although the Complaint does not specifically allege Defendants intended to punish Plaintiffs for leaving Bolthouse, such an improper motivation is reasonably conceivable based on the facts alleged. For example, a reasonable inference that could be drawn from Dunn's February 2010 email, which encouraged Plaintiffs to join the Company in "recommit[ing] ourselves to growth and mak[ing] the necessary investments to capture future growth," is that Bolthouse believed it was at an important juncture and that Plaintiffs were a relevant component to achieving the Company's future growth goals. It is reasonably conceivable that, under those circumstances, Bolthouse viewed Plaintiffs' unexpected departure as a material setback to the achievement of the Company's growth ambitions and elected to penalize Plaintiffs for leaving. On the limited record before me, it is also reasonably conceivable

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29 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009) ("[A]t least three different categories of fiduciary behavior are candidates for the "bad faith" pejorative label. The first category involves so-called "subjective bad faith," that is, fiduciary conduct motivated by an actual intent to do harm.... [S]uch conduct constitutes classic, quintessential bad faith.") (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64 (Del. 2006)).

30 Pls.' Resp. 17 n.5.

that Radandt and his designee's resignation from Bolthouse's board was related to Plaintiffs' quitting, which reinforces the notion that Bolthouse was harmed by Plaintiffs departure and that Bolthouse had a reason deliberately to reduce or eliminate any benefit Plaintiffs hoped to realize from owning Units. Neither party has alleged or argued that any group or individual other than Plaintiffs had their Units reacquired pursuant to the Repurchase Option. In the absence of any indication that Defendants repurchased Plaintiffs' Units in a manner consistent with prior (or subsequent) transactions under the Purchase Agreement, I conclude that it is reasonably conceivable that Defendants were motivated by retribution when they determined the Fair Market Value of Plaintiffs' Units was $0.00. Thus, it is reasonably conceivable Defendants had a plausible motivation for their bad faith conduct.

Defendants correctly argue that unlike the plaintiffs in *Clean Harbors,* Plaintiffs here do not claim any wrongful inducement, trickery, or deception on the part of Bolthouse. While such claims are often sufficient to establish bad faith, they are not necessary under Delaware law.[31] Consequently, I do not find their absence from the Complaint to be fatal to Plaintiffs' allegations of bad faith here. Plaintiffs have alleged

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[31] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993) (finding allegations that general partner excluded plaintiff from participating in investments in bad faith and in retaliation for the plaintiff's prior lawsuit against the general partner sufficient to survive a motion under rule 12(c)); *Winston v. Mandor*, 710 A.2d 835, 844 (Del. Ch. 1997) (finding allegations that defendant made valuation decision in bad faith and hired an interested party to perform the valuation and that controlling shareholders would benefit from undervaluation sufficient to survive motion to dismiss).

sufficient facts to satisfy both elements of the *Clean Harbors* standard. Therefore, Defendants' motion to dismiss Plaintiffs' breach of contract claim, as it relates to Bolthouse's alleged failure to determine in good faith the Fair Market Value of Plaintiffs' Units under the terms of the Purchase Agreement, is denied.

2. Breach of Section 6.4 of the LLC Agreement

Plaintiffs also argue that Defendants' failure to determine the Fair Market Value of their Units in good faith constitutes a breach of the LLC Agreement, but they have failed to specify how. Plaintiffs appear to contend that Defendants violated Section 6.4 of the LLC Agreement, which prescribes the "Duties of the Board." Section 6.4 states: "Each Manager shall owe the same fiduciary duty to the Company and its Members that such individual would owe to a corporation and its stockholders as a member of the Board thereof under the laws of the State of Delaware."[32] Plaintiffs' claim thus raises two questions: (1) whether Section 6.4 of the LLC Agreement applies to the Purchase Agreement; and, if it does, (2) whether Plaintiffs have alleged sufficient facts to state a claim for breach of Section 6.4

a. Section 6.4 applies to the Purchase Agreement

On December 15, 2005, Plaintiffs simultaneously, or nearly simultaneously, executed both the LLC and Purchase Agreements.[33] Section 1(b) of the Purchase Agreement makes it a condition precedent to the receipt of Units that Plaintiffs, "deliver counterpart signature pages to, and [agree] to be bound by the terms of, the Company's

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[32] Compl. ¶ 16.

Limited Liability Company Agreement."[34] The parties, therefore, understood the agreements to be related and presumably intended the agreements to be read in tandem.

The Purchase Agreement's definition of Fair Market Value is not conclusive evidence that the parties intended either the Purchase Agreement generally or the Repurchase Option specifically to be "carved out" from the scope of Defendants' contractual fiduciary duties.[35] The Purchase Agreement states that Fair Market Value is to be "determined in good faith by the Board in its sole discretion." This definition does not plainly express any intent on behalf of the parties to move this element of their relationship outside of the scope of Section 6.4 of the LLC Agreement. In addition, it would not be inconsistent with or contradictory of the definition of Fair Market Value to hold that Bolthouse's board also was obligated to act carefully and loyally in making its good faith valuation determination. Ultimately, the evidence may show that the parties intended the good faith requirement related to determining Fair Market Value under the Purchase Agreement to override the more general fiduciary duties prescribed in Section 6.4 of the LLC Agreement. Based on the relationship between the LLC Agreement, the Purchase Agreement, and the lack of clear contractual language to the contrary, however,

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33 Defs.' Op. Br. Exs. A-E, G.

34 Defs.' Op. Br. Ex. A, §1(b).

35 The Delaware Supreme Court has recognized that breaches of fiduciary duties can be the basis for a breach of contract claim. *See Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1213 (Del. 2012) (finding where LLC had contractually adopted the fiduciary duty standard of entire fairness, appropriate claim for failure to demonstrate entire fairness was breach of contract).

it is reasonably conceivable that Bolthouse's board was bound by Section 6.4 of the LLC Agreement when exercising the Repurchase Option under the Purchase Agreement. Accordingly, I now turn to whether Plaintiffs sufficiently have alleged that Defendants breached their contractual fiduciary duties of care and loyalty.

b. Plaintiffs have not alleged a breach of the duty of care

As Section 6.4 specifies that Bolthouse's board members shall owe the same fiduciary duties to the Company and its member as directors of Delaware corporations would, my analysis of those duties relies upon cases pertaining to corporate directors. Under Delaware law, a director is liable for a breach of the fiduciary duty of care when their actions are grossly negligent.[36] "Delaware's current understanding of gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason."[37] The focus of a duty of care analysis is not the substance of the decision the directors made but rather the process they undertook in making it. "Due care in the decision making context is *process* due care only."[38]

The Complaint in this case is devoid of any allegations pertaining to the process Defendants used when determining Fair Market Value for Plaintiffs' Units. To the extent the Complaint refers to Defendants' process at all, it indicates that Defendants "had

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36 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 53 (Del. 2006).

37 *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008).

38 *Id.* at 1270 (quoting *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000)).

discussions"[39] about the Fair Market Value of Plaintiffs' Units and took approximately five months to reach and convey their valuation decision to Plaintiffs.[40] Neither of these facts, considered separately or together, make it reasonably conceivable that Defendants acted with gross negligence. Plaintiffs also allege the Individual Defendants were self-interested and had improper intentions, but these allegations pertain to the Individual Defendants' duty of loyalty, discussed *infra*, not their duty of care. In the absence of allegations pertaining to the process the Individual Defendants undertook to reach their valuation decision, it is not reasonably conceivable that Plaintiffs could prove from the facts alleged in the Complaint that the challenged actions taken by the Individual Defendants were "without the bounds of reason" or could be considered recklessly indifferent. Accordingly, Plaintiffs have failed to state a claim against Defendants for breach of their contractual fiduciary duty of care, and that aspect of Count I is dismissed.

c. Plaintiffs have alleged a breach of the duty of loyalty

Plaintiffs assert the Individual Defendants violated their duty of loyalty on two bases. First, Plaintiffs argue that the determination of Fair Market Value was an interested transaction in which the Individual Defendants had an impermissible conflict of interest. Second, Plaintiffs argue that the determination of Fair Market Value was made in bad faith. I address each of these contentions in turn.

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[39] Compl. ¶ 28.

[40] *Id*. ¶ 29.

"A transaction is interested where directors appear on both sides of a transaction or expect to derive a financial benefit from it that does not devolve upon the corporation or all stockholders generally."[41] In addition, the unique benefit obtained must be considerable enough that it is "improbable that the director could perform her fiduciary duties . . . without being influenced by her overriding personal interest."[42]

Plaintiffs here have failed to allege a viable breach of loyalty claim based on the premise that Defendants' exercise of the Repurchase Option or their determination of Fair Market Value was an interested transaction. There are no allegations that the Individual Defendants stood on both sides of the repurchase transaction, which is unsurprising given that the Individual Defendants were, in fact, only on one side of the deal. While Plaintiffs have alleged that the Individual Defendants and Madison Dearborn, the controlling shareholder they served, were in a position to benefit from an unfairly low repurchase price for Plaintiffs Units, there are no allegations that such benefit would have been enjoyed only by the Individual Defendants or Madison Dearborn and not shared equally with all owners of Bolthouse's Class B Units. The Individual Defendants undoubtedly had an interest in the repurchase transaction. That does not make their determination of Fair Market Value, however, an "interested transaction"[43] such that it

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41 *Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009).

42 *Id*. (quoting *Hokanson v. Petty*, 2008 WL 5169633, at *7 (Del. Ch. Dec. 10, 2008)).

43 *See In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1035 (Del. Ch. 2012) ("Generally speaking, a fiduciary's financial interest in a transaction as a

would implicate the duty of loyalty under Delaware law, absent allegations that the directors stood on both sides of the transaction or derived a benefit that was not shared *pro rata* among the other shareholders. Plaintiffs have not established that the Individual Defendants' Fair Market Valuation determination or exercise of the Repurchase Option was an interested transaction. Thus, any claim for breach of a contractual duty of loyalty predicated on such conduct is dismissed.

It is now well-established, however, that the duty of loyalty encompasses more than interested transactions and also covers director actions taken in bad faith.[44] For the reasons explained in Section II.B.1.b., *supra*, Plaintiffs sufficiently have alleged that Defendants acted in bad faith in establishing Fair Market Value for their Units at $0.00. As bad faith conduct is a breach of the duty of loyalty, Plaintiffs have asserted a sustainable claim that Defendants' bad faith conduct was also a breach of Defendants' contractual duty of loyalty under the LLC Agreement. Accordingly, Defendants' motion to dismiss this aspect of Count I is denied.

3. Breach of LLC Agreement Financial Disclosure Provision

Plaintiffs further assert that Bolthouse breached Section 11.4(a) of the LLC Agreement on the grounds that they were "Members" of the LLC on March 31, 2010,

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stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally, as does the Merger") (citation omitted).

44 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

Bolthouse's fiscal year end, and Bolthouse failed to deliver the Company's audited financial statements within 120 days of that date. Defendants counter that Section 11.4(a) only applies to individuals who are "Members" on the date the financial information is released, not on the date of Bolthouse's fiscal year end. Thus, Defendants argue, because Plaintiffs' Units were repurchased on July 22, 2010, before the 120 day period expired on July 29, 2010, the LLC Agreement gave Plaintiffs neither an absolute right to the financial disclosures nor a right to receive Bolthouse financial disclosures made after they ceased to be members on July 22, 2010.

Section 11.4(a) of the LLC Agreement states, in relevant part,[45] "[w]ithin one hundred twenty (120) days after the end of each Fiscal Year of the Company, the Company shall deliver to each Member the Company's annual audited financial statements."[46] The term "Member" is defined as, "each Initial Member and each other Person who is hereafter admitted as a Member in accordance with the terms of this Agreement and the Act, in each case so long as such Person is shown on the Company's

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45 I may consider the terms of the LLC Agreement not specifically mentioned in the Complaint as the LLC Agreement is integral to the Complaint. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003) ("the court may consider, for certain limited purposes, the content of documents that are integral to or are incorporated by reference into the complaint. Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations") (citations omitted).

46 Defs.' Op. Br. Ex. G, § 11.4(a).

books and records as the owner of one or more Units."[47] The term "Units" comprises "all Class A Common Units and all Class B Common Units."[48]

There is no dispute that Plaintiffs were "Members" of the LLC on March 31, 2010. The issue then becomes whether membership as of that date entitled Plaintiffs to the benefits of Section 11.4(a). Based on my review of the LLC Agreement, I conclude the plain meaning of Section 11.4(a) indicates that merely because Plaintiffs were "Members" on March 31, 2010, does not mean they had a definite right to receive Bolthouse financial information thereafter. The parties specifically chose to define a "Member" as a person with a *present* ownership interest in the LLC and Section 11.4(a) only applies to "Members." Bolthouse had an obligation under Section 11.4 to deliver the Company's audited annual financial statements to anyone who was a Member on the date of delivery and to make delivery of those financial statements for the year ended March 31, 2010 by July 29, 2010. There is no allegation in the Complaint that Bolthouse delivered its annual financial statements at any time between March 31, 2010 and July 22, 2010. Plaintiffs' interpretation of Section 11.4(a) contradicts the parties' unambiguous agreement that Bolthouse only would distribute financial information to those with an ownership interest in the LLC at the time of distribution. Hence, I need not accept Plaintiffs' allegation in that regard as true. The Complaint thus fails to allege that Plaintiffs were entitled to financial disclosures for the fiscal year ended March 31, 2010

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47 *Id.* at 4.

48 *Id.* at 5.

from Bolthouse before or after their membership interest was terminated by the repurchase transaction. As a result, there are no alleged facts upon which Plaintiffs conceivably could prove that Bolthouse breached any disclosure obligation. Plaintiffs' breach of contract claim based on Section 11.4(a) of the LLC Agreement, therefore, is dismissed.

4. Cancellation of the Units as a Breach

Plaintiffs' final breach of contract allegation is that Bolthouse breached the terms of the Purchase and LLC Agreements by impermissibly "cancelling" Plaintiffs' Units. In response, Bolthouse dismisses Plaintiffs' argument as being predicated on semantics. According to Defendants, there is no functional difference between repurchasing Units, which is explicitly permitted under the Purchase Agreement, for $0.00 and "cancelling" those Units. Bolthouse argues that if it was permitted to repurchase the Units for $0.00, it is immaterial whether the parties characterized their actions as a repurchase, a cancellation, or both. I concur with Bolthouse's position.

Pursuant to the Purchase Agreement, Bolthouse was entitled to repurchase Plaintiffs' vested and unvested Units. The parties agree that Bolthouse exercised that option in a timely manner. Once Bolthouse elected to repurchase Plaintiffs' Units, it was free to do whatever it wished with those Units after tendering the requisite consideration to Plaintiffs. In this case, that consideration was $0.00. Thus, to assume complete control of Plaintiffs' vested and unvested Units, Bolthouse was obligated only to inform Plaintiffs that it was exercising its repurchase rights, which it did via LaPorta's July 22, 2010 letters to each Plaintiff.[49] If Bolthouse properly exercised its repurchase rights, the "cancellation" issue is moot. If Bolthouse improperly exercised its repurchase rights, it was because it failed to use good faith and not a result of calling a "repurchase" a "cancellation." The primary issue here is whether Bolthouse violated the Purchase Agreement, but that issue is duplicative of Plaintiffs' previously discussed allegation that Bolthouse breached the Purchase Agreement through its bad faith conduct. Accordingly, I dismiss the aspect of Plaintiffs' breach of contract claim that specifically challenges the purported cancellation.

C. Breach of Fiduciary Duty

Plaintiffs next allege that the Individual Defendants' actions in determining Fair Market Value for their Units also breached the fiduciary duties the Individual Defendants owed to Plaintiffs as members of Bolthouse. Defendants, in turn, seek dismissal of Plaintiffs' fiduciary duty claims as duplicative of their breach of contract claims. For the reasons set forth below, I conclude that Plaintiffs' breach of fiduciary duty claims are, in fact, duplicative of their breach of contract claims and must be dismissed.

1. Legal standard

Delaware law recognizes the primacy of contract law over fiduciary law.[50] "It is a well-settled principle that where a dispute arises from obligations that are expressly

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49 LaPorta's letter also states that Bolthouse is repurchasing Plaintiffs' shares and not merely unilaterally cancelling them.

50 *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *7 (Del. Ch. Feb. 26, 2010) (citation omitted).

addressed by contract, that dispute will be treated as a breach of contract claim."[51] Furthermore, "[i]n that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."[52] There is a "narrow exception" to this general principle of Delaware law in cases where the breach of the fiduciary duty claims and the breach of contract claims share a "common nucleus of operative facts," but the fiduciary duty claims "depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy."[53] In other words, "a breach of fiduciary duty claim generally only survives where it may be maintained independently of the breach of contract claim."[54]

2. Entire fairness does not apply

In an effort to distinguish their breach of fiduciary duty claim from their breach of contract claim, Plaintiffs contend that the Individual Defendants, due to their affiliation with Madison Dearborn, had a "disabling and material conflict of interest" when determining Fair Market Value for Plaintiffs' Units. It follows, Plaintiffs argue, that due to this conflict of interest, for purposes of assessing the fiduciary duty claim, the Individual Defendants' conduct should be assessed under entire fairness, which is a

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51 *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010).

52 *Id*.

53 *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) (quoting *Schuss v. Pennfield P'rs, L.P.,* 2008 WL 2433842, at *10 (Del. Ch. June 13, 2008)).

54 *Id*. at *6.

different standard than the one that applies to their breach of contract claim. Defendants retort that, in the absence of any allegation that the Individual Defendants stood on "both sides" of the transaction or uniquely benefited from their decision, Plaintiffs have failed to raise a valid basis for asserting that entire fairness should apply.

For the reasons discussed in Section II.B.2.c., *supra*, Plaintiffs have failed to articulate a basis for employing the entire fairness standard here. As a result, I reject as unpersuasive Plaintiffs' argument that, even though their breach of fiduciary duty claim and breach of contract claim generally arise out of the same facts, they are not duplicative because a different standard of review applies to each claim.

3. Plaintiffs' breach of fiduciary duty claims are duplicative of, and foreclosed by, their breach of contract claims

In *Nemec v. Shrader*, the Delaware Supreme Court addressed a factual situation similar to the one presented here. The plaintiffs in *Nemec* obtained stock in their employer, a corporation, throughout the course of their careers at the company pursuant to an Officers Stock Rights Plan (the "Stock Plan").[55] Under the Stock Plan, the plaintiffs had the right to sell or "put" their stock back to the company at "book value" for a period of two years after their date of retirement. After that put right expired, the Stock Plan gave the company the right to redeem, at any time, all or part of the plaintiffs' stock, again at "book value." Four months after the plaintiffs' put right expired, the company was sold to a private equity firm. Immediately before that sale closed, the

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[55] *Nemec*, 991 A.2d at 1123.

company exercised its right under the Stock Plan to redeem the plaintiffs' stock at a pre-sale book value. After the sale closed, the book value of the plaintiffs' shares would have been $60 million more than the book value of their stock when the company redeemed it.[56]

The plaintiffs filed suit against the company, alleging, among other things, that the company's directors redeemed their shares to further the directors' own economic self-interest in violation of their fiduciary duty of loyalty. In affirming the Chancellor's decision to dismiss the plaintiffs' fiduciary duty claim, the Court stated:

> the fiduciary duty claim still arises from a dispute relating to the exercise of a *contractual* right – the Company's right to redeem the shares of retired nonworking stockholders. That right was not one that attached to or devolved upon all the Company's common shares generally, irrespective of a contract. Rather, that right was solely a creature of contract, and attached only to those shares that retired stockholders acquired under the Stock Plan. As a consequence, the nature and scope of the Directors' duties when causing the Company to exercise its right to redeem shares covered by the Stock Plan were intended to be defined solely by reference to that contract. Any separate fiduciary duty claims that might arise out of the Company's exercise of its contract right, therefore, were foreclosed.[57]

Similar to *Nemec*, the fiduciary duty claim here arises from a dispute relating to the exercise of a contractual right – Bolthouse's right to exercise its Repurchase Option under the Purchase Agreement after Plaintiffs terminated their employment with

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[56] *Id.* at 1125.

[57] *Id.* at 1129.

Bolthouse Farms. The Repurchase Option was not a right "that attached to or devolved upon all the Company's common shares generally," and was instead "solely a creature of contract." Under these conditions, the nature and scope of the Individual Defendants' duties when exercising Bolthouse's Repurchase Option were "intended to be defined solely by reference to that contract" and any common law fiduciary claim arising from Bolthouse's exercise of its repurchase right is foreclosed.

Plaintiffs argue, however, that the facts here come within a "narrow exception" to the general principle that a breach of contract and a breach of fiduciary duty claim based on the same facts are duplicative. In support of their position, Plaintiffs cite *Schuss v. Penfield Partners, L.P.*[58] and *In re Mobilactive Media, LLC*,[59] neither of which are apposite.

In *Schuss*, the plaintiffs alleged that the defendants had breached their partnership agreement by failing to make distributions to the plaintiffs in accordance with the terms of the agreement.[60] The plaintiffs further alleged that the defendants breached their fiduciary duties by leaving the partnership in a position where it could not satisfy any damages owed to the plaintiffs because the defendants had engaged in self-dealing conduct that included depleting the partnership funds and improperly shifting losses to the plaintiffs. Based on these allegations, this Court found the fiduciary duty claim was

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[58] 2008 WL 2433842 (Del. Ch. June 13, 2008).

[59] 2013 WL 297950 (Del. Ch. Jan. 25, 2013).

[60] *Schuss*, 2008 WL 2433842, at *4.

not foreclosed by the breach of contract claim because "[a]lthough these fiduciary duty claims share a common nucleus of operative facts with Plaintiffs' breach of contract claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy."[61]

Plaintiffs here have made no such distinct allegations. Regarding the alleged breach of fiduciary duty, Plaintiffs contend, "[t]he Individual Defendants acted contrary to their fiduciary duties to plaintiffs when they purported to declare that plaintiffs' Class B Units held no value and to cancel those Class B Units outright."[62] This is, in substance, identical to Plaintiffs' allegations pertaining to their breach of contract claim, which states: "Pursuant to the terms of the LLC Agreement, as members of Bolthouse, the Board owed plaintiffs the duties of care and loyalty (including good faith)"[63]; "Bolthouse breached the terms of the Purchase Agreement and LLC Agreement when the Board acted in bad faith in determining that the Fair Market Value of plaintiffs' Class B Units was $0.00"[64]; and "Bolthouse further breached the terms of the Purchase Agreement and LLC Agreement when the Board acted in bad faith in unilaterally cancelling plaintiffs'

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61 *Id.* at *10.

62 Compl. ¶ 51.

63 *Id.* ¶ 42.

64 *Id.* ¶ 43.

vested Class B Units."[65] Plaintiffs' breach of fiduciary duty claim, therefore, is based on the same facts as their breach of contract claim.

Nor is Plaintiffs' breach of fiduciary duty claim broader in scope than its breach of contract claim. In relation to their breach of contract claim, Plaintiffs state, "[a]s a result of Bolthouse's breach of the Purchase Agreement and the LLC Agreement, plaintiffs have been and will continue to be harmed in that plaintiffs have been deprived of their rightful ownership of 7,611 Class B Units."[66] The harm Plaintiffs allege as a result of the purported breach of fiduciary duty similarly states, "[a]s a result of the Individual Defendants' breach of their fiduciary duties, plaintiffs have been deprived of their rightful ownership of 7,611 Class B Units."[67] Thus, Plaintiffs' breach of fiduciary duty claim is identical, not broader, in scope to its breach of contract claim and does not fit within the "narrow exception" discussed in *Schuss.*[68]

Finally, Plaintiffs' breach of contract and breach of fiduciary duty claims do not implicate potentially different remedies. Plaintiffs request that this Court declare Bolthouse's repurchase of their Units invalid and declare that Plaintiffs are still the

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65 *Id.* ¶ 44.

66 *Id.* ¶ 47.

67 *Id.* ¶ 54.

68 *See Grunstein v. Silva*, 2009 WL 4698541, at *7 (Del. Ch. Dec. 8, 2009) ("The Plaintiffs' reliance on *Schuss*, however, is unavailing because, there, the court allowed the fiduciary duty claim to go forward because the plaintiff had plead distinct harms caused by the defendants that fell outside the scope of their contractual relationship but within their fiduciary relationship.").

owners of their Class B Units.[69] Neither of these remedies is specific or exclusive to a breach of fiduciary duty claim, and should Plaintiffs prevail on their breach of contract claim, either or both of those remedies would be available to them. This fact distinguishes this case from *Mobilactive*. In *Mobilactive*, this Court permitted a claim for breach of fiduciary duty based on usurpation of corporate opportunity to go forward when the plaintiffs also had alleged a breach of contract based on the same set of facts, because the plaintiffs sought remedies not otherwise provided for by contract, namely, the right to a disgorgement of the profits the defendants obtained through their inequitable conduct.[70] Defendants' alleged breach of fiduciary duty in this case would not entitle Plaintiffs to any remedy beyond those they could obtain under their breach of contract claim. This further demonstrates that Plaintiffs' breach of fiduciary claim does not fall within the "narrow exception" outlined in *Schuss* and is duplicative of their breach of contract claim.

Based on these considerations, I dismiss Count II of the Complaint in its entirety, as duplicative of Count I.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing

The final count of the Complaint alleges that Defendants violated the implied covenant of good faith and fair dealing as to the Fair Market Value provision of the Purchase Agreement by failing to act in good faith in valuing Plaintiffs' Units when

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[69] Compl. at Prayer for Relief ¶¶ C, D.

[70] *In re Mobilactive Media*, 2013 WL 297950, at *20 n.219.

exercising the Repurchase Option.[71] Defendants argue that these allegations fail to state a claim on the grounds that Defendants' conduct was governed by express, rather than implied, contract provisions and that the allegations are therefore duplicative of the claims asserted in Plaintiffs' first count for breach of contract. For the reasons discussed below, I conclude that the implied covenant of good faith and fair dealing does not apply to this dispute regarding the Fair Market Value clause of the Purchase Agreement because the dispute is governed by the express terms of the agreement.

1. Legal standard

The implied covenant of good faith and fair dealing (the "implied covenant") "inheres in every contract" governed by Delaware law and mandates that parties to a contract refrain from arbitrary or unreasonable conduct that prevents the other party from receiving the "fruits of the bargain."[72] When considering an implied covenant claim, a court must ask whether it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter."[73] A valid implied covenant claim requires more than general allegations of bad faith conduct; the plaintiff must allege a specific implied

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[71] Compl. ¶¶ 57, 59.

[72] *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636 (Del. Ch. 2011).

[73] *Gerber v. Enter. Products Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 441 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)).

contractual obligation and a breach of that obligation that precluded the plaintiff from enjoying their reasonable expectations of the bargain.[74]

As noted by the Delaware Supreme Court, "[a]pplying the implied covenant is a cautious enterprise and we will only infer contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."[75] When an issue is addressed by the express terms of the contract, those express terms "always supersede," and cannot be overridden by, the implied covenant.[76] "The doctrine thus operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer."[77]

2. Plaintiffs have failed to state a claim for breach of the implied covenant

The allegations in Plaintiffs' Complaint fail to state a claim for breach of the implied covenant. Plaintiffs have not alleged a specific *implied* contractual obligation that was violated; rather, their Complaint focuses on the express contractual requirement that Bolthouse's board determine Fair Market Value under the Purchase Agreement in good faith. There are only two possibilities here: Bolthouse either acted in good faith or

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[74] *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

[75] *Gerber*, 67 A.3d at 421.

[76] *Id*. at 419 (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member*, *LLC*, 50 A.3d 434, 441 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)).

[77] *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *10 (Del. Ch. Dec. 22, 2010).

it did not. If Bolthouse acted in good faith, Plaintiffs would not have a cause of action grounded in either contract or the implied covenant. If Bolthouse did not act in good faith (*i.e.*, acted in bad faith), it breached the express terms of the Purchase Agreement. The Court cannot conceive of any circumstances where Bolthouse could be deemed to have acted in bad faith but not be in breach of contract; thus, the implied covenant is not applicable. Moreover, even if the implied covenant applied, it would not have provided Plaintiffs with any rights or remedies beyond those available to them under the express terms of the Purchase Agreement. Plaintiffs' implied covenant claim, therefore, adds nothing beyond, and is entirely duplicative of, their breach of contract allegations in Count I of the Complaint.

This conclusion comports with the discussion of the law of the implied covenant in Delaware set forth in the Supreme Court's recent decision in *Gerber v. Enterprise Products Holdings, LLC.*[78] In *Gerber*, a former holder of units in a limited partnership ("LP") brought suit against the LP's general partner and others, alleging that the general partner violated the terms of the LP's limited partnership agreement ("LPA") and the implied covenant by causing the LP to engage in two transactions, an asset sale and a merger. The LPA provided that, in conducting the LP's business, the general partner was to use "good faith" in making its determinations, but it also specified conduct that would not violate the "good faith" requirement because it either fell within a "safe harbor" or

[78] 67 A.3d 400 (Del. 2013).

was "conclusively presumed" to be in good faith.[79] The defendants in *Gerber* moved in this Court to dismiss the complaint. Finding that the defendants' conduct comported with the "safe harbor" and "conclusive presumption" provisions of the LPA, the Vice Chancellor held that there could be no breach of the LPA or the implied covenant and granted the defendants' motion.[80]

On appeal, the Supreme Court reversed the Vice Chancellor's ruling that the claim for a breach of the implied covenant necessarily was foreclosed by the fact that the defendants complied with the LPA's terms. In reaching its conclusion, the Court drew a distinction between the "contractual" and "implied" duties of good faith, noting that the distinction was predicated on temporal factors. Whereas the "contractual" duty of good faith "looks to the parties as situated at the time of the wrong,"[81] the "implied" duty of good faith relates to "what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting."[82] On the facts of that case, the Supreme Court found that compliance with the "contractual" duty of good faith did not eliminate a claim for a breach of the implied covenant because at the time the parties contracted, it was Gerber's reasonable expectation that the actions the defendants engaged in to obtain the protection of either the "safe harbor" or the

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[79] *Id.* at 409-10.

[80] *Id.* at 413.

[81] *Id.* at 419.

[82] *Id.* at 418.

"conclusive presumption" would themselves be performed in good faith.[83] Because Gerber had alleged facts that supported an inference that the defendants did not pursue the "safe harbor" and "conclusive presumption" in good faith, the Court held that he had stated a cause of action for breach of the implied covenant. Accordingly, the dismissal of that claim was reversed.

This case is distinguishable from *Gerber*. The LPA in *Gerber* arguably had a contractual "gap" in that the duty of a party seeking the benefits of the "safe harbor" or "conclusive presumption" to the other party was not specified. In the absence of an express agreement, the implied covenant "filled the gap" and created a duty for a party pursuing a "safe harbor" or "conclusive presumption" to do so in good faith. After *Gerber,* that duty remains even if the agreement states that literal compliance with the terms of the "safe harbor" or "conclusive presumption" provisions constitutes good faith under the contract.

Here, there was never a "gap" that the implied covenant could have filled. Plaintiffs' claim is based on a single clause of the Purchase Agreement that required Bolthouse to act in good faith. Plaintiffs essentially contend that Bolthouse had an implied duty to act in good faith in complying with its contractual duty to act in good faith. That contention is not accurate, as Bolthouse was *expressly* required to act in good faith, and does not provide a basis for a valid claim for breach of the implied covenant. There is also no credible basis for drawing a reasonable inference that the Purchase

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[83] *Id.* at 423-25.

Agreement failed to reflect the parties' expectations at the time of bargaining. When the parties contracted, they clearly foresaw potential issues with allowing Fair Market Value to be determined in Bolthouse's board's sole discretion. The parties chose to address that issue explicitly by requiring that the board exercise its discretion in good faith. The Fair Market Value provision of the Purchase Agreement thus completely encompasses the parties' expectations at the time of bargaining, obviating the relevance of the implied covenant to the circumstances of this case.

The more significant distinction between *Gerber* and this case, however, relates to the "discretionary rights" at issue. In addition to its holding on the temporal distinction between "contractual" and "implied" duties of good faith, the Court noted that the implied covenant applies to discretionary rights and that, "[w]hen exercising a discretionary right, a party to the contract must exercise its discretion reasonably."[84] Parties, however, can decide to prescribe what "reasonably" means in their agreement. In reference to discretionary rights, the Court explained, "[t]he contract may identify factors that the decision-maker can consider, and it may provide a contractual standard for evaluating the decision. *Express contractual provisions always supersede the implied covenant*."[85] In *Gerber*, the "safe harbor" and "conclusive presumptions" were discretionary rights that the defendants could utilize to limit or avoid liability. The

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84 *Id*. at 419 (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 441 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis omitted).

85 *Id.* (emphasis added).

contract at issue, however, did not specify any "contractual standard for evaluating" the defendants' exercise of either of those discretionary rights. Because the parties had not agreed to a contractual standard, the Court determined that the defendants had to use their discretion in conformity with the implied covenant.

Unlike in *Gerber*, the parties in this case agreed on a contractual standard to evaluate Defendants' exercise of discretion. The Purchase Agreement gave Defendants the discretionary right to determine the Fair Market Value of Plaintiffs' Units in connection with the exercise of the Company's Repurchase Option. Under the Purchase Agreement, the parties also expressly agreed to assess the reasonableness of Defendants' discretion under the standard of good faith. The implied covenant only attaches to a discretionary right when it has not been superseded by an express term of the agreement. In this case, the parties' express agreement to evaluate Defendants' use of discretion under the standard of good faith supersedes the implied covenant and precludes its application to that discretionary right.

Although *Gerber* holds that a showing of compliance with a contractual duty of good faith does not automatically extinguish all implied covenant claims relating to that contract, it does not relieve Plaintiffs from the burden of pleading a cognizable implied covenant claim to withstand a motion to dismiss under Rule 12(b)(6). Here, Plaintiffs have not sufficiently alleged a breach of the implied covenant because they have not shown how the express terms of the Purchase Agreement fail to account for their legitimate expectations at the time they contracted with Bolthouse to purchase Units. As such, *Gerber* is inapposite, and Plaintiffs' implied covenant claim must be dismissed.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the part of Count I that claims a breach of the Purchase Agreement based on Defendants' allegedly bad faith actions in determining that the Fair Market Value of Plaintiffs' Units was $0.00 is denied. I also deny Defendants' motion to dismiss the part of Count I that claims a breach of the LLC Agreement based on that same conduct. In all other respects, including Plaintiffs' claims for breach of contract based on Section 11.4(a) of the LLC Agreement, Defendants' allegedly bad faith "cancellation" of Plaintiffs' Units, Defendants' contractual duty of care, and Plaintiffs' claims in Counts II and III, Defendants' motion to dismiss is granted.

IT IS SO ORDERED.