

No. 81896-7

SUPREME COURT OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
similarly situated,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

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STATE OF WASHINGTON
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RESPONDENT'S ANSWER TO BRIEF OF *AMICUS CURIAE*
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I. INTRODUCTION

Chevy Chase Bank, F.S.B. (“Chevy Chase”) respectfully submits this Answer to the brief filed by the Washington Defense Trial Lawyers (“WDTL”) as *amicus curiae* (the “WDTL Brief”).

In 2007, the United States Supreme Court clarified the standard to be applied on a motion under Fed. R. Civ. P. 12(b)(6) to determine whether a complaint has properly pleaded a claim. Such motions test the legal sufficiency of the allegations contained in the complaint. To survive a motion to dismiss, a complaint must allege facts showing that the plaintiff’s claim is “plausible on its face,” not merely “conceivable.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

WDTL urges this Court to adopt the *Twombly* standard for motions to dismiss under Washington’s CR 8 and CR 12(b)(6). WDTL Brief at 1. Chevy Chase agrees with WDTL and submits this Answer to clarify several points introduced by the WDTL Brief.

Recent decisions by the United States Supreme Court and state appellate courts establish three key points:

First, *Twombly*’s standard applies to all motions to dismiss for failure to state a claim, regardless of the subject matter of the lawsuit.

Second, *Twombly* requires that, to survive a motion to dismiss for failure to state a claim, a complaint must allege facts that would, if proved, plausibly entitle the plaintiff to relief.

Third, states in which the civil procedural rules are based on the Federal Rules of Civil Procedure, like Washington's, are overwhelmingly adopting the standard announced in *Twombly*.¹

Washington courts cannot apply *Twombly*'s standard until it is adopted by this Court.² Chevy Chase joins WDTL in urging this Court to adopt the new national standard for Rule 12(b)(6) motions, reject Petitioners' reliance on the former "hypothetical facts" standard, and affirm the decisions below.

II. OVERVIEW OF FACTS AND PROCEDURE

The McCurrys allege that Chevy Chase charged them a fee for delivering their loan payoff statement by fax and that they were charged a notary fee when they paid off their home loan.³ They assert the legal

¹ Washington courts have long recognized that federal court interpretations of the federal rules are highly persuasive in determining the effect of Washington's rules. *Sanderson v. University Village, L.P.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999).

² *McCurry v. Chevy Chase Bank*, 144 Wn. App. 900, 904, 193 P.3d 155 (2008); *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 715 n.24, 197 P.3d 686 (2008); and see *Save Columbia Credit Union v. Columbia Credit Union*, 150 Wn. App. 176, 186 n.10, 206 P.3d 1272 (May 19, 2009) (unpub. portion).

³ CP 4-5.

conclusion that their Deed of Trust did not secure or allow Chevy Chase to charge such fees.⁴ Based on these allegations and legal contentions, they claim that Chevy Chase, by charging the fees and including them on the payoff statement, breached the contract or used a deceptive trade practice.⁵

The Superior Court of King County granted Chevy Chase's motion under CR 12(b)(6) to dismiss the McCurrys' claims as preempted, because federal law exclusively governs what fees a federal thrift may charge and how it must disclose them. The Court of Appeals affirmed the dismissal.⁶

When they opposed the motion to dismiss, and on appeal, the McCurrys argued that the courts could speculate that Chevy Chase might not have actually incurred notary expenses.⁷ The Complaint makes no such allegations. The McCurrys did not seek to amend their complaint to include them. Instead, they argued that the motion to dismiss should have been denied because the "hypothetical facts" might exist.⁸

⁴ CP 4-5, 7-8.

⁵ CP 6-9.

⁶ *McCurry*, 144 Wn. App. at 913.

⁷ SRP 33:5-11; Appellant's Opening Brief at 27-28. Chevy Chase shows in its principal appellate briefs that a claim based on such facts would still be properly dismissed. Brief of Respondent, 35-50.

⁸ Appellant's Opening Brief at 27-28.

III. POINTS OF CLARIFICATION

A. **The *Twombly* Formulation Applies To Rule 12(b)(6) Motions In All Civil Actions.**

WDTL correctly cites the May 2009 holding of the United States Supreme Court in *Ashcroft v. Iqbal*, --U.S.--, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) to show that the pleading standard stated in *Twombly* applies far beyond the context of the antitrust claims presented in that case. WDTL Brief at 10. The United States Supreme Court expressly rejected the view that “*Twombly* should be limited to pleadings made in the context of an antitrust dispute.” *Iqbal*, 129 S. Ct. at 1953. *Twombly* “was based on our interpretation and application of Rule 8,” which governs the federal pleading standard in “all civil actions and proceedings.” *Id.* (quoting Fed. R. Civ. P. 1). Thus, the unambiguous holding of *Iqbal* is that *Twombly* “expounded the pleading standard for **all civil actions.**” *Id.* (emphasis added).

B. ***Twombly* And Civil Rule 8 Require That A Complaint Must Set Forth Facts “Showing” A Plausible Claim For Relief.**

As the WDTL explains, the *Twombly* Court corrected a common misreading of *Conley v. Gibson*, 355 U.S. 41, 45-46, 278 S. Ct. 99, 2 L. Ed. 2d 80 (1957). See WDTL Brief at 5. Many courts, including this one, have read *Conley* to mean that a complaint can be dismissed for failure to state a claim only if the plaintiff could prove “no set of facts,

consistent with the complaint, which would entitle the plaintiff to relief.” *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978). *Twombly* squarely rejects this gloss on the civil rules. *Twombly*, 550 U.S. at 563 (“The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”).

In *Iqbal* the Court clarified further that a court should apply a two step test. *Iqbal*, 129 S. Ct. at 1950. First, the complaint must support its conclusions with allegations of fact – events, happenings, transactions – not a mere “the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1949. This requirement is founded on the requirement of Rule 8(a)(2) that the complaint contain a “short and plain statement of the claim *showing* that the pleader is *entitled* to relief.” *Id.* (emphasis added) (quoting Fed. R. Civ. P. 8). The civil rules do not “unlock the door of discovery for a plaintiff armed with nothing but conclusions.” *Id.* at 1950.

Second, and just as important, the Complaint must allege facts that “plausibly” give rise to an entitlement to relief. *Iqbal*, 129 S. Ct. at 1950. To be clear: *Twombly* and *Iqbal* do not require that the **allegations** be plausible – the court does not ask at this stage whether the alleged events really happened or whether they would be easy to prove. The test is

whether the alleged facts, if proved, would make it plausible that the defendant did some wrong for which the plaintiff could recover. *Id.* The alleged facts must be more than logically consistent with recovery. *Id.*

For example, in *Twombly*, an antitrust complaint failed because it merely alleged parallel conduct, which even if proved would be more consistent with lawful competition than with conspiracy in restraint of trade. *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 567).

The Complaint here fails even more starkly. The facts alleged in the Complaint are (1) that Chevy Chase charged, and plaintiffs paid, the notary and fax delivery fees and (2) the contents of the Deed of Trust. CP 4-5, ¶¶ 11-13. These allegations must be treated as true. The legal conclusions set forth in the complaint – that the provisions of the Deed of Trust “do not permit” these charges and that Chevy Chase “breached its contracts” by charging them or engaged in an unfair practice in disclosing them – are legal conclusions that are not entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1941. The trial court and the Court of Appeals held that the Complaint, based on the facts actually alleged, failed to state a claim because those claims were preempted by federal law.

Plaintiffs conceded at the motion hearing that they did not know whether Chevy Chase passed on to Plaintiffs a notary fee it did not incur, and the Complaint contains no allegations that Chevy Chase charged them

for services it did not provide. See Complaint; and see SRP 33:3-9. Rather, they seek to survive the motion to dismiss by having the Court rely on these hypothetical facts. Appellants' Opening Brief at 27-28. Under CR 8 and CR 12, as *Twombly* and *Iqbal* make clear, neither the Superior Court nor this court should entertain such flights of fancy: Rule 8 requires that the facts alleged in the complaint must "show[] that the pleader is entitled to relief." CR 8.

C. State Courts Are Overwhelmingly Adopting *Twombly* For Good Policy Reasons.

The WDTL correctly observes that federal courts, anticipating *Iqbal*, have applied the *Twombly* standard in many contexts. WDTL Brief at 12. Similarly, most states to have decided the issue have adopted the new standard, and have likewise applied it without regard to the subject matter of the lawsuit.⁹

By way of example, the Massachusetts Supreme Court expressly adopted *Twombly* in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888

⁹ Several other states, like Washington, await a case that squarely raises the issue at their highest level. See *Crum v. Johns-Manville, Inc.*, --So.2d--, -- & n.2, 2009 WL 637260 (Ala. Ct. Civ. App. March 13, 2009); *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344, 348 & n.3 (Ariz. 2008); *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. Ct. App. 2008), cert. denied 2009 WL 1486480 (Colo. May 26, 2009); *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509, 513 n.4 (W.Va. 2007); but see *Colby v. Umbrella, Inc.*, 2008 Vt. 20, 955 A.2d 1082, 1086 n.1 (Vt. 2008) (declining to follow *Twombly*).

N.E.2d 879, 890 (Mass. 2008). More recently that court applied *Twombly* and affirmed the dismissal of a proposed consumer-protection class action based on allegedly improper sales charges. *Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753, 771 (Mass. 2009) (“Where, as here, the plaintiffs made no such allegation in their complaint, dismissal is warranted.”)

Examples from other states include:¹⁰

- Minnesota. *Bahr. v. Capella Univ.*, 765 N.W.2d 428, 436-37 (Minn. Ct. App. 2009) (employment discrimination complaint must state “enough factual matter” and “heft” to show entitlement to relief) (quoting *Twombly*, 550 U.S. at 556-57).
- Ohio. *Gallo v. Westfield Nat. Ins. Co.*, 2009 WL 625522, *2 (Ohio Ct. App. March 12, 2009) (“Factual allegations must be enough to raise a right to relief above the speculative level,” as per *Twombly*, in insurance coverage complaint);
- Tennessee. *Hermosa Holdings, Inc. v. Mid-Tenn. Bone And Joint Clinic, P.C.*, 2009 WL 711125, *3 & n.5, *10 (Tenn. Ct. App. March 16, 2009) (consumer protection act claim dismissal affirmed under *Twombly* because allegations were “no more than

¹⁰ The unpublished opinions in the following list are citable under GR 14.1 because they may be cited in their originating jurisdictions. *See* Ohio Rep. R. 2; Tenn. Ct. App. R. 12; Ky. CR 76.28; Del. Ch. Ct. R. 171. Copies of these opinions are appended to this brief as those rules require.

conclusions and a formulaic recitation of the elements of the cause of action.”);

- Kentucky. *Espinosa v. Jefferson/Louisville Metro Gov't*, 2009 WL 277488, *1 (Ky. Ct. App. Feb. 6, 2009) (consumer protection act claim, dismissal affirmed under *Twombly*);
- South Dakota. *Sisney v. Best, Inc.*, 2008 SD 70, 754 N.W.2d 804, 811 (S.D. 2008): (false advertising claim, dismissal affirmed under *Twombly* because allegations show plaintiff did not buy product himself);
- Delaware. *BASF Corp. v. POSM II Prop. P'ship, L.P.*, 2009 WL 522721, *6-7 & n.43 (Del. Ch. March 3, 2009) (Delaware's approach to pleading “similar” to *Twombly*, dismissing contract claim where facts do not plausibly suggest condition precedent was satisfied).

The United States Supreme Court based its decision in *Twombly* on both the language of Rule 8(a) and on the practical reality that litigation costs – as here – can create undue burdens and threats. There must be a “reasonably founded hope that the [discovery] process will reveal relevant evidence,” lest “a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Twombly*,

550 U.S. at 558-59 (internal quotation marks and citations omitted). The Minnesota Court of Appeals agreed that courts “need to balance caution before dismissal with cognizance of the immense expense of discovery in some litigation and the accompanying motivation to settle ‘even anemic cases.’” *Bahr*, 765 N.W.2d at 437 n.5 (quoting *Twombly*, 550 U.S. at 559). Similarly, the Supreme Court of Maine held in a pre-*Iqbal* opinion that *Twombly* applies at least to actions that “raise a high risk of abusive litigation.” *Bean v. Cummings*, 2008 ME 18, 939 A.2d 676, 680-81 (Me. 2008) (quoting *Twombly*, 550 U.S. at 569 n.14) (affirming dismissal of civil perjury action for lack of factual allegations). This concern is present here. Plaintiffs seek to bring a nationwide class action. Having failed to state a claim based on the facts they alleged, Plaintiffs want to continue the litigation based on hypothetical facts even though they did not seek leave to amend the Complaint to allege them.

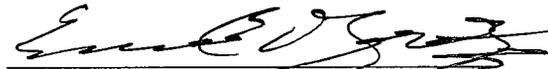
Twombly makes clear that CR 8 requires courts to assess the adequacy of a pleading based on the facts actually alleged, not on speculation of what might have happened. This standard is consistent with the long-standing requirement that a complaint must give the defendant fair notice of the claim that is being asserted. *Twombly* provides one more reason for this Court to affirm the lower court’s rejection of Plaintiffs’ efforts to assert claims based on hypothetical facts.

IV. CONCLUSION

Because the Petitioners' failure to state a claim is even more obvious under the recently clarified national pleading standard, Chevy Chase respectfully renews its request that this Court affirm the Court of Appeals and the Superior Court's dismissal of this action.

RESPECTFULLY SUBMITTED this 27th day of July, 2009.

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APPENDIX PURSUANT TO GR 14.1(b)

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
 HERMOSA HOLDINGS, INC. f/k/a/ The Monroe
 Page Group
 v.
 MID-TENNESSEE BONE AND JOINT CLINIC,
 P.C., Amsurg, The Surgery Center of Middle Tennes-
 see, et al.
 No. M2008-00597-COA-R3-CV.

Dec. 11, 2008 Session.
 March 16, 2009.

Appeal from the Chancery Court for Davidson
 County, No. 07-1476-III; Honorable Ellen Hobbs
 Lyle, Chancellor.

James A. Crumlin, Jr., Lane Moorman, Nashville,
 Tennessee, for the Appellant, Hermosa Holdings,
 Inc., f/k/a/ The Monroe Page Group.

Michael L. Dagley, Kelly A. Cunningham, Nashville,
 Tennessee, for the Appellee, AmSurg Corporation &
 The Surgery Center of Middle Tennessee.

L. Webb Campbell, II and Phillip F. Cramer, Nash-
 ville, TN, Dalton M. Mounger, Columbia, TN for
 Appellees, Mid-Tennessee Bone and Joint Clinic,
 P.C., James Campbell Boulevard Properties, LLC,
 Charles D. Atnip, M.D., Timothy Gordon, M.D. and
 Ralph F. Hamilton, M.D.

THOMAS R. FRIERSON, II, Sp. J., delivered the
 opinion of the court, in which HERSCHEL P.
 FRANKS, P.J., and D. MICHAEL SWINEY, joined.

OPINION

THOMAS R. FRIERSON, II, Sp. J.

*1 The Plaintiff, Hermosa Holdings, Inc., instituted
 the case at bar against several Defendants by assert-

ing various causes of action with reference to a pro-
 posed medical office building development. All De-
 fendants responded to the original complaint by filing
 motions to dismiss pursuant to Tenn.R.Civ.P.
 12.02(6) and for improper venue. The Plaintiff sub-
 sequently filed an amended complaint. The Defen-
 dants responded by filing additional motions to dis-
 miss. By Order entered February 14, 2008, the Chan-
 cery Court of Davidson County granted the Defen-
 dants' motions and dismissed the amended complaint
 with prejudice. We affirm in part, vacate in part and
 remand for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

For purposes of this appellate review of the trial
 court's rulings on the Tenn.R.Civ.P. 12 motions, we
 presume all factual allegations contained in the
 amended complaint to be true, giving the Plaintiff the
 benefit of all reasonable inferences. The Plaintiff,
 Hermosa Holdings, Inc., LLC, (Hermosa) is a Tennes-
 see limited liability company engaged in the busi-
 ness of land development and site construction.^{FN1} Its
 principal business office is in Nashville, Davidson
 County, Tennessee. Hermosa was contacted on or
 about August 22, 2005 by Mr. Daniel A. Buehler,
 Vice President of Center Development for Defendant
 Amsurg Corporation (Amsurg) with reference to a
 proposed project called "The Columbia Tennessee
 Ambulatory Services Pavilion."

^{FN1} For ease of reference, we have abbrevi-
 ated the names of the parties as identified
 in the amended complaint.

Amsurg, the majority owner of Defendant The Surgi-
 cal Center of Middle Tennessee (SCMT), led the ini-
 tial negotiations. Both Amsurg and SCMT maintain
 principal places of business in Nashville, Davidson
 County, Tennessee.

Hermosa further alleges that in October 2005, Mr.
 Buehler directed Hermosa to representatives of
 SCMT and Mid-Tennessee Bone & Joint Clinic, PC
 (Clinic) for the purpose of selecting a developer for

the construction of a new medical office building in Maury County. After considering several potential construction sites, Hermosa transmitted to Mr. Buehler and Mr. Randy Wilmore on behalf of the Clinic, separate memorandums of understanding with reference to the contemplated medical office building construction. On or about January 23, 2006, the Clinic and Hermosa executed a feasibility study agreement and proposal for professional services regarding real property identified as the "Pace Property."

In February 2006, the Clinic's legal counsel requested of Hermosa additional details with regard to Hermosa's memorandum of understanding. On or about February 11, 2006, Hermosa attended the Clinic's yearly retreat for the purpose of presenting the Clinic with additional development options. According to the amended complaint, upon conclusion of Hermosa's presentation, the "medical office defendants" indicated that they wished to construct a 45,000 square foot building, to include a 10,000 square foot surgery center.^{FN2} On March 9, 2006, legal counsel for Hermosa and counsel for the Clinic, met to select a development option best suiting the needs of the medical office defendants.

FN2. By Paragraph 21 of the amended complaint, Hermosa identifies the "Medical Office Defendants" as a combination of the Clinic and SCMT principals.

*2 Meanwhile, the medical office defendants decided to include in the project another medical group, including defendants Charles D. Atnip, M.D., Timothy Gordon, M.D. and Ralph F. Hamilton, M.D. (Eye Doctors).^{FN3} On March 24, 2006, Hermosa met with Dr. Gordon to discuss plans and options for the eye doctors to be included in the proposed property development. At the request of the medical office defendants and eye doctors, Hermosa continued to explore all options with various financial institutions. On June 13, 2006, Plaintiff learned that the medical office defendants were not comfortable paying Plaintiff the fee associated with a "turn-key build." Hermosa later learned that the Clinic had decided to forego partnering on the land purchase and instead decided to purchase the entire property and sell back to Plaintiff a portion thereof. On or about June 22,

2006, several doctors formed Defendant James Campbell Boulevard Properties, L.L.C. (JCBP).

FN3. In Paragraph 10 of the amended complaint, Hermosa identifies Defendants Atnip, Gordon and Hamilton as 3 the "Eye Doctors."

On June 27, 2006, Plaintiff submitted its final due diligence study to Mr. Wilmore. In late June, 2006, Mr. Wilmore contacted Blue Ridge Survey and obtained a copy of a real property survey, giving it to the Ritzen Group.^{FN4} On June 30, 2006, Mr. Wilmore, by letter, notified Hermosa that the Clinic had decided to "go in another direction" and was therefore "terminating its relationship" with Plaintiff. Plaintiff asserts that the Defendants thereafter entered into a development agreement with the Ritzen Group for the construction project anticipated by Hermosa.

FN4. All causes of action asserted against the Ritzen Group, originally named as a Defendant, were dismissed by 4 Order of Voluntary Nonsuit entered March 24, 2008.

Following a hearing on February 1, 2008, the trial court entered an Order of Dismissal granting the Defendants' motions to dismiss. In its Order, the court stated as follows:

After considering Defendants' motions, Plaintiff's response in opposition to those motions, Defendants' replies, arguments of counsel, the entire record and the relevant law, it is hereby ORDERED that the motions are granted and the Amended Complaint is dismissed, with prejudice. As the basis for its decision, the Court expressly adopts the reasoning set forth in the memoranda and reply briefs filed in support of these motions.

It is, therefore, ORDERED that Defendants' motions to dismiss are granted and all claims of Plaintiff against AmSurg Holdings, Inc., The Surgery Center of Middle Tennessee, LLC, Mid-Tennessee Bone and Joint Clinic, P.C., James Campbell Boulevard Properties, LLC, Charles D. Atnip, M.D., Timothy Gordon, M.D. and Ralph F. Hamilton, M.D. are hereby dismissed with prejudice.

The appeal followed.

STANDARD OF REVIEW

The trial court dismissed the amended complaint upon the independent bases of failure to state a claim upon which relief can be granted and improper venue. The issue of venue shall be addressed separately. The determination of whether a trial court has erred in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a question of law, Doe v. Catholic Bishop for Diocese of Memphis, 2008 Tenn.App. LEXIS 527, 2008 WL 4253628 (Tenn.Ct.App.2008). The Tennessee Supreme Court in Trau-Med of America, Inc. v. Allstate Insurance, 71 S.W.3d 691, 696-697 (Tenn.2002) explained the proper standard of review for a Rule 12.02(6) motion to dismiss as follows:

*3 A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof, and, therefore, matters outside the pleadings should not be considered in deciding whether to grant the motion. See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., 986 S.W.2d 550, 554 (Tenn.1999). In reviewing a motion to dismiss, the appellate court must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. See Pursell v. First Am. Nat'l Bank, 937 S.W.2d 838, 840 (Tenn.1996). It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. See Doe v. Sundquist, 2 S.W.3d 919, 922 (Tenn.1999); Fuerst v. Methodist Hosp. S., 566 S.W.2d 847, 848 (Tenn.1978). Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 718 (Tenn.2000) (citing Tenn. R. Civ. P. 8.01). We review the trial court's legal conclusions de novo without giving any presump-

tion of correctness to those conclusions. *Id.*

By its recent decision in Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court elucidated the appropriate standard of pleading for a complaint attacked by a federal Rule 12(b)(6) motion to dismiss. Although the Tennessee Supreme Court has not adopted the standard announced in Twombly, we find it consistent with Tennessee law and therefore recognize its applicability.^{FN5} As reasoned in Twombly:

FN5. Because of the similarities between Tennessee Rule of Civil Procedure 12 and Federal Rule of Civil Procedure 12, the decisions of the federal courts construing Federal Rule of Civil Procedure 12 provide us with helpful guidance in our interpretation and application of Tennessee Rule of Civil Procedure 12. Decisions of the federal courts construing analogous federal rules of procedure can provide helpful guidance in interpreting our rules, Nagarajan v. Terry, 151 S.W.3d 166 (Tenn.Ct.App.2003); Frazier v. East Tennessee Baptist Hosp., 55 S.W.3d 925 (Tenn.2001).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations; ... a plaintiff's obligation to provide the "grounds"

of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level. (Citations omitted.)

Within the amended complaint, Hermosa sets forth numerous factual allegations with respect to its claims of (i) breach of implied contract/quantum meruit; (ii) promissory estoppel; (iii) civil conspiracy; (iv) breach of the duty of good faith and fair dealing; (v) violation of the Tennessee Consumer Protection Act; and (vi) fraud and intentional misrepresentation. Against this procedural backdrop and by incorporating the appropriate standard of review, we shall consider separately Plaintiff's claims asserted against the

Defendants.

BREACH OF IMPLIED CONTRACT/QUANTUM MERUIT

*4 Hermosa asserts by Count I of its amended complaint a cause of action for breach of implied contract/quantum meruit against all Defendants. In support of its claims, Hermosa makes the following factual averments:

...

17. Upon information and belief, Plaintiff asserts that each defendant named in this complaint, as well as the individuals listed above on behalf of the respective defendant for which each works, is in some manner responsible for the wrongs and damages as alleged below, and in so acting was functioning, at least at all times relevant to the allegations of this Complaint, as the agent, servant, partner, alter ego and/or employee of the other defendants, and in doing and/or not doing the actions mentioned below was acting within the course and scope of his or its authority as such agent, servant, partner, and/or employee with the permission and consent of the other defendants. Further, all acts were approved of and ratified by each and every other defendant.

...

38. On or around January 18, 2006, Plaintiff sent Mr. Buehler and Mr. Wilmore separate Memorandums of Understanding in which Plaintiff stated that it would construct a medical office building on land acquired from Medical Office Defendants and that upon completion of the construction, Medical Office Defendants would assume partial ownership of the building.

39. On or around January 23, 2006, Mr. Wilmore and Plaintiff executed a Feasibility Study Agreement and a proposal for professional services with respect to the Pace Property. On or around January 23, 2006, Plaintiff contracted with AMEC Environmental to begin evaluating the Pace Property site and projected anticipated completion of the environmental evaluation on or around February 27, 2006.

40. On or around January 25, 2006, Plaintiff prepared for Medical Office Defendants a summary of options regarding development on the Pace Property. The Medical Office Defendants expressed total confidence in Plaintiff and Plaintiff's ability to develop the Pace Property and repeatedly stated that Plaintiff was to be the developer of the Pace Property.

...

57. Meanwhile, Medical Office Defendants were engaging in negotiations to add another physician group, Eye Doctors, to be included in the development of the Pace Property.

...

59. On March 24, 2006, Plaintiff met with Dr. Gordon to discuss plans and options for Eye Doctors to be included in the development of the property. Dr. Hunter and Dr. Daniel attended that meeting as well. Dr. Gordon stated that he represented the Eye Doctors and that this group needed approximately 10,000 square feet of space.

60. On approximately, April 18, 2006, Plaintiff sent Mr. Wilmore an e-mail requesting that Plaintiff and the Clinic memorialize their intent to enter into a development agreement with Plaintiff, as Plaintiff had already expended vast resources and time on behalf of the Clinic.

...

71. Based on this new decision by Medical Office Defendants and Eye Doctors and at their request, Plaintiff began to revise all architectural plans and designs.

*5 72. On or around June 6, 2006, Mr. Fleming contacted Plaintiff and stated that he had contacted The Ritzen Group to obtain comparable lease rates and gave those rates to the doctors who indicated their discomfort with the fees associated with the project.

...

76. Mr. Wilmore went on to state that The Clinic had decided to forego partnering on the land purchase and instead the Clinic intended to purchase the entire tract of land and sell back to Plaintiff the portion that would be needed to develop the remaining buildings.

...

80. On approximately June 27, 2006, Plaintiff submitted hard and electronic copies of its final Due Diligence Study to Mr. Wilmore.

81. The Due Diligence Study included the updated boundary survey for the tract of land, a breakdown on the usable land area, the architectural conceptual layout, the development pro forma, including rent rolls, and the information regarding the city of Columbia's development requirements in an executive summary.

...

84. On June 30, 2006, Plaintiff received a letter from Mr. Wilmore stating that the Clinic had decided to "go in another direction" and was terminating its relationship with Plaintiff.

...

94. Over the course of eight (8) months, to Plaintiff's financial detriment, Defendants encouraged Plaintiff to negotiate with third party vendors, and requested that Plaintiff on numerous occasions analyze various development and cost options for development of the proposed land sites.

95. Two weeks prior to the closing date of Plaintiff's purchase of the land sites that Defendants selected for their medical and surgical buildings, the Clinic terminated its business relationship with Plaintiff.

96. By way of a press release on January 26, 2007, Defendants announced its new medical building and surgical center would open on (sic) Fall of 2007.

97. As evidenced herein, Plaintiff provided valuable goods and services to Defendants.

98. As evidenced herein, Defendants received the valuable goods and services.

99. A substantial benefit was conferred on Defendants in that Defendants used the information and feasibility study that Plaintiff generated for the Clinic in reliance on a development agreement to build on and develop the land sites.

100. Defendants clearly appreciated and accepted the benefits bestowed upon it by Plaintiff's substantial economic expenditures in reliance on a development agreement with Defendants, as Defendants developed the land and built the medical and surgical buildings—from the ground up—in just approximately five months using the voluminous information that Plaintiff imparted to Defendant.

101. As evidenced herein, the circumstances show Defendants should have reasonably understood that Plaintiff should have been compensated for providing the goods and/or services.

102. As evidenced herein, the circumstances demonstrate that it would be unjust for Defendants to retain the goods or services without payment.

*6 ...

Tennessee courts recognize that contracts may be either express, implied in fact or implied in law. River Park Hosp. v. Bluecross Blueshield TN., 173 S.W.3d 43, 57 (Tenn.Ct.App.2002). Contracts implied in fact arise under circumstances which show a mutual intent or assent to contract while contracts implied in law are created by law "without the assent of the party bound, on the basis that they are dictated by reason and justice." Angus v. City of Jackson, 968 S.W.2d 804, 808 (Tenn.Ct.App.1997).

As Hermosa has not pursued causes of action against the Defendants based upon any claim of breach of the written feasibility agreement and as the facts do not evince circumstances which show a mutual intent or assent to contract beyond the feasibility agreement, its cause of action necessarily claims a breach of a contract implied in law. As the court in *River Park*

Hosp., *supra*, explained, in order to establish a claim based upon a contract implied in law, the Plaintiff must show that "(1) a benefit has been conferred upon the defendant; (2) the defendant appreciated the benefit; and (3) acceptance of the benefit under the circumstances would make it inequitable for the defendant to retain the benefit without paying the value of the benefit." *Id.* at 58.

With reference to Hermosa's companion claim against all Defendants seeking recovery under a theory of quantum meruit, the Court in *Swafford v. Harris*, 967 S.W.2d 319, 324 (Tenn.1998) identified the elements of such a claim as follows:

A quantum meruit action is an equitable substitute for a contract claim pursuant to which a party may recover the reasonable value of goods and services provided to another if the following circumstances are shown:

1. There is no existing, enforceable contract between the parties covering the same subject matter;
2. The party seeking recovery proves that it provided valuable goods or services;
3. The party to be charged received the goods or services;
4. The circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and
5. The circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment.

Having reviewed the factual allegations of the amended complaint and by incorporating the appropriate standard of review with reference to the Tenn.R.Civ.P. 12.02(6) motions, we conclude that Hermosa's amended complaint alleges sufficient facts to state a claim for breach of an implied contract in law and/or claim under quantum meruit. We therefore hold that the trial court erred in granting the Defendants' Rule 12 motions to dismiss these claims.

PROMISSORY ESTOPPEL

Hermosa asserts a cause of action by Count II for promissory estoppel against the Medical Office Defendants and Eye Doctors. For a factual basis of its claims against these Defendants, Hermosa, through the amended complaint, makes the following additional averments:

*7 ...

106. Medical Office Defendants and Eye Doctors stated to Plaintiff that Plaintiff would be the developer and/or later, the project manager for the proposed land sites.

107. Throughout the course of their dealings, the Medical Office Defendants' and Eye Doctors' statements and actions led Plaintiff to believe that it would be the developer and/or, later, the project manager for the proposed land sites.

108. Relying to their detriment on Medical Office Defendants' and Eye Doctors' unambiguous promise of a development agreement and/or later a third party services agreement to serve as project manager, as well as additional statements and actions, as described in this complaint, Medical Office Defendants and Columbia Eye Associates induced Plaintiff to incur substantial expenses and expend extraordinary efforts on their behalf with the purpose of securing a development agreement and/or third party services agreement.

109. That Plaintiff would incur substantial expenses and expend extraordinary efforts for the purpose of securing a development agreement and/or later a third party services agreement to serve as project manager was reasonably foreseeable to Medical Office Defendants and Eye Doctors.

110. Thus, Plaintiff acted reasonably in justifiable reliance based on Medical Office Defendants' and Eye Doctors' unambiguous promise of a development agreement to serve as the developer and/or later a third party services agreement to serve as project manager, as well as Medical Office Defendants and

Eye Doctors additional actions and statements over the course of approximately eight (8) months.

...

In Tennessee, promissory estoppel is sometimes referred to as equitable estoppel or detrimental reliance. As with a claim of an implied contract, a claim of promissory estoppel does not depend upon the existence of an express agreement between the parties. Engenius Entertainment, Inc. v. Herenton, 971 S.W.2d 12, 14 (Tenn.Ct.App.1997). The cause of action has been generally explained by the court in Shedd v. Gaylord Entertainment Co., 118 S.W.3d 695, 699 (Tenn.Ct.App.2003) (quoting Alden v. Presley, 637 S.W.2d 862, 864 (Tenn.1982)) as:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Our courts do not liberally apply the doctrine of promissory estoppel and generally limit its application to exceptional cases. Barnes & Robinson Co. v. Onesource Facility Services, Inc., 195 S.W.3d 637, 645 (Tenn.Ct.App.2006). In Rice v. NN, Inc. Ball & Roller Div., 210 S.W.3d 536, 544 (Tenn.Ct.App.2006), this court explained the limited application of promissory estoppel thusly:

Promissory estoppel is said to be limited to situations where (1) the detriment suffered in reliance is substantial in an economic sense; (2) the substantial loss to the promisee is foreseeable by the promisor; and (3) the promisee acted reasonable in justifiable reliance on the promise as made. Alden v. Presley, 637 S.W.2d at 864 (citing L. Simpson, Law of Contracts § 61 (2d ed.1965)).

*8 To successfully state a claim for promissory estoppel, the asserting party must first show that a promise was made and that it reasonably relied upon the promise to its detriment. Calabro v. Calabro, 15 S.W.3d 873, 879 (Tenn.Ct.App.1999) (citations omitted). The promise upon which the

party relies "must be unambiguous and not unenforceably vague." Id., (citing Amacher v. Brown-Forman Corp., 826 S.W.2d 480, 482 (Tenn.Ct.App.1991)).

We again have carefully examined the factual allegations contained in the amended complaint by incorporating the applicable standard of review under Tenn.R.Civ.P. 12. We conclude that Hermosa's amended complaint alleges sufficient facts to state a claim for relief under a cause of action for promissory estoppel against Defendants, Clinic, SCMT and Eye Doctors. We therefore hold that the trial court erred in granting the respective Defendants' Rule 12 motions to dismiss this cause of action.

CIVIL CONSPIRACY

By Count III of the amended complaint, Hermosa asserts a cause of action for civil conspiracy against all Defendants. The elements of a cause of action for civil conspiracy have been set forth by the court in Kincaid v. Southtrust Bank, 221 S.W.3d 32, 38 (Tenn.Ct.App.2006) as:

- (1) [A] common design between two or more persons,
- (2) [T]o accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means,
- (3) [A]n overt act in furtherance of the conspiracy, and
- (4) [R]esulting injury.

Civil conspiracy claims must be pled with some degree of specificity, McGee v. Best, 106 S.W.3d 48, 64 (Tenn.Ct.App.2002) while conclusory allegations unsupported by material facts will not be sufficient to state such a claim, Kincaid, *supra*. Having reviewed the factual allegations of the amended complaint, we conclude that they are conclusory and merely a formulaic recitation of the elements of the cause of action for civil conspiracy. We hold that the trial court properly granted the motions to dismiss this cause of action.

GOOD FAITH AND FAIR DEALING

Hermosa, by Count V of its amended complaint, asserts a separate cause of action for breach of the duty of good faith and fair dealing against the Medical Office Defendants and Eye Doctors. Paragraphs 128 and 129 of the pleadings contain the following additional factual allegations:

128. Medical Office Defendants' and Eye Doctors' promises of a development agreement and Plaintiff's reasonable and justifiable reliance to Plaintiff's detriment on said promise constituted formation of an implied contract and thus, imposed upon Medical Office Defendants and Eye Doctors a duty of good faith and fair dealing in relation to its performance thereunder. Defendants failed to adhere to this duty of good faith and fair dealing.

129. Medical Office Defendants and Eye Doctors breached their duty of good faith and fair dealing which has resulted in substantial economic damages to the Plaintiffs in an amount to be determined at trial.

*9 In Tennessee, the common law imposes a duty of good faith in the performance of contracts. Wallace v. National Bank of Commerce, 938 S.W.2d 684, 686 (Tenn.1996). "Parties to a contract owe each other a duty of good faith and fair dealing as it pertains to the performance of a contract. Barnes & Robinson Co., supra, 642. "The extent of the duty to perform a contract in good faith depends upon the individual contract in each case," 643. Our courts have not recognized a duty to negotiate in good faith absent an express contractual agreement to do so. Barnes & Robinson Co., Id. Although lack of good faith may be an element or circumstance in an action for breach of contract, Tennessee courts do not recognize lack of good faith, standing alone, as an actionable tort. Solomon v. First American National Bank, 774 S.W.2d 935, 945 (Tenn.Ct.App.1989).

The court in TSC Industries, Inc. v. Tomlin, 743 S.W.2d 169, 173 (Tenn.Ct.App.1987) further explained the parameters of such duty thusly:

It is true that there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement, and a person is presumed to know the law.... What this duty consists of, however, depends upon the individual contract in each case. In construing contracts, courts look to the language of the instrument and to the intention of the parties, and impose a construction which is fair and reasonable. (Citations omitted.)

The gravamen of Hermosa's Count V cause of action for breach of the duty of good faith and fair dealing is aimed toward the alleged, implied contract among the parties. We hold that no such independent cause of action is recognized by our courts and therefore, the trial court's granting of the motions to dismiss this claim is upheld.

TENNESSEE CONSUMER PROTECTION ACT

Hermosa alleges through Count IV of its amended complaint that all Defendants have participated in actions with respect to their business dealings constituting unfair and deceptive acts in violation of the Tennessee Consumer Protection Act. The Act is codified at Tenn.Code Ann. § 47-18-101, et seq. One of the Act's stated purposes is "[t]o protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." Tenn.Code Ann. § 47-18-102(2); see ATS Southeast, Inc. v. Carrier Corp., 18 S.W.3d 626 (Tenn.2000).

Generally, the Act is afforded a liberal construction so as to afford protection to consumers and others from those engaging in deceptive acts or practices. Morris v. Mack's Used Cars, 824 S.W.2d 538, 540 (Tenn.1992). However, our courts have construed the Act so as not to apply "to isolated, casual transactions between individuals not engaged in the conduct of a trade or business." Colquette v. Zaloum, 2004 LEXIS 566 at *12, 2004 WL 1924022 (Tenn.App.2004) 2004 WL 1924022 (2004); see also Ganzevoort v. Russell, 949 S.W.2d 293 (Tenn.1997).

*10 Upon full review of the factual assertions contained in Hermosa's amended complaint, we determine that they appear to be no more than conclusions

and a formulaic recitation of the elements of the cause of action. Inasmuch, no factual allegations exist that the Defendants regularly solicited or engaged in the type of consumer transaction or business establishing the genesis for the instant dispute. This Court therefore holds that the trial court properly granted the Defendants' motions to dismiss Plaintiff's claim of a violation under the Tennessee Consumer Protection Act.

FRAUD AND INTENTIONAL MISREPRESENTATION

Plaintiff through Count VII of its amended complaint asserts causes of action for fraud and intentional misrepresentation against the Medical Office Defendants and Eye Doctors. In Tennessee, the elements of fraud are "(1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, ... (3) an injury caused by reasonable reliance on the representation [and (4) the requirement] that the misrepresentation involve a past or existing fact ...". Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn.Ct.App.1992). With reference to review of factual allegations of fraud, the court in Kincaid v. Southtrust Bank, 221 S.W.3d 32, 41 (Tenn.Ct.App.2006) explained as follows:

Allegations of fraud must be plead with particularity. Tenn. R. Civ. P. 9.02; Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC, 102 S.W.3d 603, 611 (Tenn.Ct.App.2002). A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact. See Dobbs, 846 S.W.2d at 274.... To pass the particularity test, the actors should be identified and the substance of each allegation should be pled. Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC, 102 S.W.3d 603, 611 (Tenn.Ct.App.2002).

Plaintiff's factual allegations asserting causes of action for fraud and intentional misrepresentation generally claim that the Medical Office Defendants and Eye Doctors made intentional misrepresentations upon which Hermosa relied. We conclude that such broad and general allegations of fraud have not been pled with particularity. No particular defendant is identified as the one making the respective false and

misleading statements. Further, the substance of each allegation has not been specifically pled. We hold that the trial court properly granted the Defendants' motions to dismiss regarding these causes of action.

VENUE

The trial court granted the Defendants' motions to dismiss for improper venue pursuant to Tenn.R.Civ.P. 12.02(3). The issue presented is a question of law. Consequently, the scope of review is *de novo* with no presumption of correctness, Taylor v. Fezell, 158 S.W.3d 352, 357 (Tenn.2005); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87 (Tenn.1993). Venue is a concept based on privilege of and convenience to the parties. Meighan v. U.S. Sprint Communications, 924 S.W.2d 632 (Tenn.1996). Venue relates to the appropriateness of the location of the action. *Id.*

*11 Tennessee venue rules are largely statutory. Venue is either local or transitory, depending on the subject matter of the cause of action. Hawkins v. Tennessee Dept. of Correction, 127 S.W.3d 749 (Tenn.Ct.App.2002). A local action focuses upon an injury to an immovable object such as real estate, while a transitory action is one in which the injury has occurred to a subject not having an immovable location such as an action sounding in tort or contract. Five Star Exp., Inc. v. Davis, 866 S.W.2d 944 (Tenn.1993). Our review must begin with Tenn.Code Ann. § 20-4-101 which provides in pertinent part as follows:

- (a) In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the defendant resides or is found.
- (b) If, however, the plaintiff and defendant both reside in the same county in this state, then such action shall be brought either in the county where the cause of action arose or in the county of their residence.

On its face, the statute does not specifically address a circumstance involving multiple defendants residing in different counties. Hermosa argues that venue is proper in Davidson County since it and Defendants AmSurg and SCMT maintain principal places of business there.^{FN6} Where multiple defendants with different residences are involved, Tennessee courts have recognized that proper venue is maintained where the plaintiff and material defendants reside in the same county, that county being the county where the cause of action accrued. Tims v. Carter, 192 Tenn. 386, 241 S.W.2d 501, 503 (Tenn.1951). This rule provides little guidance however where the plaintiff and cause of action are located in different counties.

FN6. For purposes of venue, “the county of the residence of the corporation is that county where it maintains its principal office or place of business.” Skaggs v. Tennessee Cent. Ry. Co., 193 Tenn. 384, 246 S.W.2d 55 (Tenn.1952).

Upon careful inspection of the amended complaint, we find that no allegations exist that venue was expressly provided for by the parties in the event of a dispute. As Hermosa argues that it maintains a common residence with some of the defendants, Tenn.Code Ann. § 20-4-101(a) is inapplicable. Under paragraph (b) our inquiry is directed first toward whether Davidson County is “where the cause of action arose.” Tennessee courts follow the rule that a prerequisite to determining where a cause of action arose for purposes of venue is the identification of the cause of action itself. Mid-South Milling Co. v. Loret Farms, Inc., 521 S.W.2d 586 (Tenn.1975). As determined above, Hermosa's surviving causes of action are in the nature of a contract implied in law/quantum meruit and promissory estoppel.

Hermosa argues that these causes of action arose in Davidson County by reason of it having been initially engaged to provide services by Defendant AmSurg which acted as a representative of the Defendants. Hermosa further argues that it prepared certain models, cost analysis and other information from its Davidson County location. These considerations are not fully determinative, however.

*12 According to the factual assertions contained in the amended complaint, Hermosa prepared and presented various development scenarios and options to certain Defendants in Maury County. Much of the work performed, including preparation of the survey, was conducted in Maury County as well. Clearly the focal point of the dispute is upon the real property which had been proposed to be developed in Maury County. We conclude that the cause of action arose in Maury County, see TPC Facility Delivery Group v. Lindsey, 2004 LEXIS 76 (Tenn.App.2004), 2004 WL 193051 (Tenn.App.2004).

“The language of Tenn.Code Ann. § 20-4-101(b) is mandatory and has been consistently recognized as such.” Mills v. Wong, 39 S.W.3d 188, 190 (Tenn.Ct.App.2000). As Tenn.Code Ann. § 20-4-101(b) permits an action to be brought alternatively in the county where “plaintiff and defendant both reside”, our focus returns to the thorny question of venue for multiple defendants with different residences. Plaintiff asserts that Defendants AmSurg and SCMT are “material” Defendants whose principal places of business are common to that of Hermosa. As the applicable statute does not contain any reference to “material” defendants, we must consider applicable common law since Tennessee courts have adopted several ancillary rules. Mills, at 190. The Mills court, quoting from Lawrence A. Pivnick, Tennessee Circuit Court Practice § 6-2 (1999), explained that:

First, if venue is proper as to one of several defendants who is a material party, venue is proper as to all properly joined defendants, even if venue would not be proper as to the other defendants if sued individually. *An exception, however, applies as to a defendant having common county residence with the plaintiff.* (Emphasis original.)

The concept of a “material” defendant for purposes of venue does not appear to be fully developed by our courts. The Tennessee Court of Appeals in Ward v. Nat'l Healthcare Corp., 2007 LEXIS 695 (Tenn.App.2007), 2007 WL 3446340 concluded that a material defendant need not be a “principal” or “significant” defendant. In Deaton v. Evans, 192 Tenn. 348, 241 S.W.2d 423 (Tenn.1951), the Tennessee Supreme Court addressed a circumstance where

plaintiff had filed suit in Shelby County against a state highway patrolman whose residence was in Shelby County and the Tennessee Commissioner of Finance and Taxation who maintained a residence in Davidson County. The relief sought included an order restraining the Department from cancelling plaintiff's vehicle registration. The Court concluded that where the only relief sought against the Shelby County defendant was "incidental to and dependent upon obtaining against non-resident defendants the main relief sought", the resident defendant was not a material defendant so as to provide a sufficient basis for venue. *Id.* 426.

A close reading of the factual allegations contained in Hermosa's pleadings lead us to the conclusion that although AmSurg is not a material Defendant, SCMT is. Notwithstanding the fact that the Plaintiff asserts numerous factual allegations generally against all Defendants, the most specific allegations are directed toward the Medical Office Defendants, of which SCMT is a part. The relief sought against SCMT includes the main relief requested in this case. We conclude Defendant SCMT is a material Defendant for purposes of establishing a common residence with Plaintiff for venue purposes. Davidson County is a county providing proper venue. Accordingly, we hold that the trial court incorrectly dismissed Plaintiff's amended complaint for improper venue.

CONCLUSION

*13 The judgment of the trial court is affirmed in part and vacated in part. This cause is remanded to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed equally between the Appellant and Appellees and their sureties, for which execution may issue, if necessary.

Tenn.Ct.App.,2009.
Hermosa Holdings, Inc. v. Mid Tennessee Bone and Joint Clinic, P.C.
Slip Copy, 2009 WL 711125 (Tenn.Ct.App.)

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 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County.
 Claire M. GALLO, Plaintiff-Appellant

v.

WESTFIELD NATIONAL INS. CO., et al., Defen-
 dants-Appellees.
 No. 91893.

Decided March 12, 2009.

Civil Appeal from the Cuyahoga County Court of
 Common Pleas, Case No. CV-652376.

Paul W. Flowers, Paul W. Flowers Co., LPA, W. Craig Bashein, Bashein & Bashein, John P. Hurst,
 Cleveland, OH, attorneys for appellant.

John Haggerty, John M. Alten, Brad A. Sobolewski,
 Ulmer & Berne LLP, Cleveland, OH, attorneys for
 appellees.

Before: KILBANE, J., ROCCO, P.J., and
CELEBREZZE, J.

*1 N.B. This entry is an announcement of the court's
 decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become
 the judgment and order of the court pursuant to
App.R. 22(C) unless a motion for reconsideration
 with supporting brief, per App.R. 26(A), is filed
 within ten (10) days of the announcement of the
 court's decision. The time period for review by the
 Supreme Court of Ohio shall begin to run upon the
 journalization of this court's announcement of deci-
 sion by the clerk per App.R. 22(C). See, also, S.Ct.
 Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.

{¶ 1} Claire M. Gallo (Gallo) appeals from the deci-

sion of the trial court that granted the motion to dis-
 miss her class action complaint under Civ.R. 12(B)(6),
 filed by Defendants-Appellees, Westfield
 National Insurance Company, Westfield Insurance
 Company, American Select Insurance Company, and
 Ohio Farmers Insurance Company's (collectively
 referred to as "the companies"). For the following
 reasons, we affirm in part, reverse in part, and re-
 mand.

{¶ 2} Gallo asserts that under Section IV (Auto Li-
 ability), Coverage G (Supplementary Payments), the
 companies agreed to reimburse certain of the litiga-
 tion-related expenses she and other purported class
 members incurred. Based upon these allegations,
 Gallo attempts to set forth four causes of action. The
 companies argue that Gallo failed to promptly give
 notice of her alleged expenses to the companies or
 their agent, thereby failing to trigger the reimburse-
 ment clauses in the policy. The companies further
 argue that this failure renders her complaint without
 cognizable claims under Civ.R. 12(B)(6).

{¶ 3} On February 28, 2008, Gallo filed a four-count
 complaint alleging breach of contract, bad faith and
 breach of the covenant of good faith and fair dealing,
 unjust enrichment/quantum meruit, and seeking de-
 claratory relief.

{¶ 4} On June 16, 2008, after several leaves to plead,
 the companies filed their motion to dismiss.

{¶ 5} On July 10, 2008, Gallo filed her memorandum
 in opposition to defendants' motion to dismiss, or in
 the alternative motion for leave to amend complaint.

{¶ 6} On July 25, 2008, the trial court, without ruling
 on the plaintiff's motion for leave, granted the com-
 panies' motion to dismiss. This appeal followed.

{¶ 7} Gallo's first assignment of error states:

**"The trial judge erred, as a matter of law, in dis-
 missing the class action complaint for failure to
 allege a potentially valid claim for relief."**

{¶ 8} An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 81, 2004-Ohio-4362. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. When granting a motion to dismiss under Civ.R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts entitling her to relief. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187.

*2 {¶ 9} While Gallo cannot survive a motion to dismiss through the mere incantation of an abstract legal standard, she can defeat such a motion if there is some set of facts consistent with her complaint, which would allow her to recover. See *Byrd v. Faber* (1991), 57 Ohio St.3d 56; *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143. However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955. While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, Gallo's obligation to provide the grounds of her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Id.* Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*

Count I: Breach of Contract

{¶ 10} In Count I of her class action complaint, Gallo alleges that she and other purported class members entered into a standard form motor vehicle insurance policy with the companies, which required them to reimburse them for loss of earnings and travel-related expenses because of attendance at conferences, depositions, arbitrations, mediations, hearings or trial at the companies' request, among other things. (Complaint at ¶ 36.) Gallo and the purported class members alleged that the companies breached the terms of the standard policy contracts by failing in their alleged promise to reimburse them. (Complaint at ¶ 39-40.)

{¶ 11} The companies argue that Gallo fails to state a cognizable claim for relief because she failed to notify the companies of her alleged expenses. As a result, the companies argue that their duty to perform has not been triggered. They do not dispute that they owe Gallo the incurred expenses; they assert that they have not been notified of the expenses because Gallo has not made a proper demand for payment. On this basis, they urge this court to uphold the dismissal of Gallo's complaint.

{¶ 12} Gallo asserts, both in her complaint and her brief, that all duties imposed by the policy text have been fully satisfied and because of this, she urges reversal of the motion ruling.

{¶ 13} In order to state a claim for breach of contract under Ohio law, Gallo must establish: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *DPLJR, Ltd. v. Hanna Cuyahoga App. No. 90883, 2008-Ohio-5872*. In this case, Gallo alleges that the companies entered into insurance contracts with her and members of her putative class, which obligated the companies to pay her and others purported to be similarly situated for lost wages, salary, travel-related expenses and other sundry expenses such as postage. In her complaint at ¶ 35-40, Gallo alleges to have satisfied all conditions precedent to such payment, including notice, and maintains that the companies have breached these contracts by failing to pay for the above-mentioned losses.

*3 {¶ 14} Because Gallo has provided the companies with fair notice of this claim and the grounds upon which it rests, she has satisfied the liberal notice pleading requirements set forth in Civ.R. 8, both for herself and on behalf of those purporting to be similarly situated. See, e.g., *Kavouras v. Allstate Ins. Co.* (N.D. Ohio 2008), No. 1:08 CV 571, at 7. (Citations omitted.) As such, the trial court erred in dismissing the breach of contract claim on this basis.

Count II: Bad Faith and Breach of the Covenant of Good Faith and Fair Dealing

{¶ 15} Under Ohio law, because a fiduciary relationship exists in the context of insurance contracts, the insurer has a duty to act in good faith in handling the

claims of the insured. *Id.*, citing *Hoskins v. Aetna Lins Ins. Co.* (1983), 6 Ohio St.3d 272, 275. Therefore, insureds may pursue a bad faith tort claim against their insurers. *Id.*

{¶ 16} The companies argue that Gallo's claim fails because she did not allege that the companies ever received a request for reimbursement from Gallo or the putative class members. Such a request, according to the companies, is "a necessary prerequisite for [the companies] being guilty of a bad faith 'refusal to reimburse.'" "

{¶ 17} However, a review of the complaint indicates at ¶ 35-40 that Gallo generally avers and at ¶ 38 specifically avers that she and other putative class members have satisfied all conditions precedent to the insurance contracts. Such an averment is sufficient at this stage of the litigation. *Kavouras* at 7. Accordingly, the trial court erred in dismissing Gallo's complaint on this basis; the companies' motion to dismiss this count is without merit.

Count III: Unjust Enrichment/Quantum Meruit

{¶ 18} In Ohio, unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another." *Id.* at 8, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 286, 2005-Ohio-4985. Restitution is available as a remedy for unjust enrichment when the following factors are established: (1) a benefit is conferred by a plaintiff on a defendant; (2) the defendant knows about the benefit; and (3) the defendant retains the benefit under circumstances where it is unjust to do so without payment. *Hambleton v. R.G. Berry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶ 19} Unjust enrichment operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. *F & L Ctr. Co. v. H. Goodman, Inc.*, Cuyahoga App. No. 83503, 2004-Ohio-5856, at ¶ 15, fn. 2, citing *University Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002-Ohio-3748. Unjust enrichment cannot exist where there is a valid and enforceable written contract. *Id.*

{¶ 20} No party disputes the existence of an underlying insurance contract governing the issues in this case. Indeed, the enforceability of the provisions of the standard form contract, rather than the existence of the contract, are at issue. Because there is no question that an express written contract between Gallo and the putative class members and the companies exists covering the disputed reimbursement provision, Ohio law precludes a claim for unjust enrichment. Appellee's motion to dismiss this claim has merit. The trial court's decision to dismiss this count is therefore upheld.

Count IV: Declaratory Relief

*4 {¶ 21} Because this count is in reality a claim for relief and not a cause of action, a court may only consider the request for relief if Gallo prevails on her substantive claims. See *Kavouras* at 8 (stating the court would consider a request for equitable relief in the event plaintiff prevailed on his claims).

{¶ 22} Aside from the exceptions noted below, it is error to dismiss a request for declaratory relief in the complaint at the pleadings stage, especially when it is unclear whether the plaintiff would prevail on her claims.

{¶ 23} In Ohio, courts are required to issue a judgment declaring the rights or legal relations, or both, of the parties, and it is error to dismiss the complaint for failure to state a claim under Civ.R. 12(B)(6) unless there is no real controversy or justiciable issue between the parties, or where the declaratory judgment will not terminate the uncertainty or controversy, under R.C. 2721.07. *Fioresi v. State Farm Mut. Auto. Ins. Co.* (1985), 26 Ohio App.3d 203.

{¶ 24} As the court's analysis with respect to Counts I through I II indicates, there is clearly a justiciable controversy between the parties. Given the existence of this controversy, and since a ruling under R.C. 2721.07^{FN1} would "not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought," the trial court erred in dismissing Count IV of Gallo's complaint. R.C. 2721.07.

FN1.R.C. 2721.07 states: "Courts of record may refuse to render or enter a declaratory judgment or decree under this chapter if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought."

{¶ 25} Accordingly, we conclude that with the exception of Count III, Gallo's pleadings were sufficient to defeat a motion to dismiss under Civ.R. 12(B)(6). The trial court erred in dismissing counts I, II and IV of the Complaint. We sustain Gallo's first assignment of error in part.

{¶ 26} In her second assignment of error, Gallo argues as follows:

"The trial judge abused her discretion in denying Plaintiff an opportunity to amend her complaint to correct the pleading deficiencies identified by the court."

{¶ 27} The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. Turner v. Central Local School Dist., 85 Ohio St.3d 95, 99, 1999-Ohio-207, citing Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co. (1991), 60 Ohio St.3d 120, 121-122, 573 N.E.2d 622, 624. We will not overturn a trial court's ruling on a motion for leave to amend a pleading without first determining that the court abused its discretion. *Id.* An abuse of discretion requires more than an error of law or judgment, it implies that the court's attitude was arbitrary, unreasonable or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217.

{¶ 28} However, Civ.R. 15(A) provides in part that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *." Under Ohio law, this right is absolute; no leave of court is required. See, e.g., Cashelmara Villas Ltd. Partnership v. Dibenedetto (1993), 87 Ohio App.3d 809, State ex rel. B & C Machine Co. v. Indus. Comm., 65 Ohio St.3d 538, 1992-Ohio-3200.

*5 {¶ 29} A motion to dismiss under Civ.R. 12(B)(6) is not a "responsive pleading" for purposes of Civ.R. 15(A), nor is it a pleading pursuant to Civ.R. 7(A). See Steiner v. Steiner (1993), 85 Ohio App.3d 513. When, as here, a motion to dismiss is filed before any responsive pleading, the absolute right to amend is not abated. *Id.* at 519.

{¶ 30} Under the facts presented, the civil rules provide Gallo an absolute right to amend her complaint before a responsive pleading is filed. Having already determined that the trial court erred in dismissing the complaint, we also find that the trial court abused its discretion by concomitantly denying Gallo the opportunity to amend her complaint through the underlying dismissal of the action, given the nature of this right under the rules.

{¶ 31} Because of the existence of this absolute right, we find the companies' reliance on McSweeney v. Jackson (1996), 117 Ohio App.3d 623 and Schweizer v. Riverside Methodist Hosp. (1996), 108 Ohio App.3d 539, are misplaced. These cases are premised on fact patterns wholly distinguishable from the case sub judice: In McSweeney, the appellants did not move to amend the pleadings until appellee's case was closed at trial. Here, the motion for leave was placed before the court at the pleadings stage, indeed before a responsive pleading had even been filed. In Schweizer, the court of appeals found no abuse of discretion when the trial court denied plaintiffs' motion to amend the complaint where the plaintiffs did not specify what amendments they sought to make. In this case, although a motion for leave to amend was pending when the action was dismissed, the trial court never ruled on that motion; its dismissal of the underlying action made such an exercise moot. As such, McSweeney and Schweizer are inapplicable.

{¶ 32} Appellant's second assignment of error is well taken.

{¶ 33} Judgment is affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

It is ordered that appellant recover from appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J., and FRANK D. CELEBREZZE, JR., J., concur.

Ohio App. 8 Dist., 2009.
Gallo v. Westfield Natl. Ins. Co.
Slip Copy, 2009 WL 625522 (Ohio App. 8 Dist.),
2009 -Ohio- 1094

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4)
 before citing.

NOT TO BE PUBLISHED

Court of Appeals of Kentucky.

Manuel E. ESPINOSA, doing business as Welsh
 Capital Thoroughbreds

v.

JEFFERSON/LOUISVILLE METRO GOVERN-
 MENT and its Elected or Appointed Officers; Geof-
 frey Morris, Jefferson Circuit Judge; Dr. Meloche,
 Director of Animal Control; Anne Camp, Lieutenant,
 Metro Animal Control Officer; and Captain Zelinski,
 Metro Animal Control Officer.

No. 2008-CA-000944-MR.

Feb. 6, 2009.

West KeySummary

Counties 104  222

104 Counties

104XII Actions

104k222 k. Pleading. Most Cited Cases

Pro se plaintiff's complaint did not state a cause of action against a county. The plaintiff sought \$13.5 million in damages, alleging failure to return collateral and surety after final legal action, failure to prosecute, judicial negligence, unfair business practices in thoroughbred industry in county, and pain and suffering. None of the listed grievances was a proper cause of action supported by any factual allegations. 8.01; CR 8.01.

Appeal from Jefferson Circuit Court, Action No. 08-CI-000123; F. Kenneth Conliffe, Judge.

Manuel E. Espinosa, Louisville, KY, pro se appellant.

Kungo Njuguna, Louisville, KY, for appellees.

Before COMBS, Chief Judge; CAPERTON and CLAYTON, Judges.

OPINION

COMBS, Chief Judge.

*1 Manuel Espinosa appeals a dismissal by the Jefferson Circuit Court of his lawsuit against Jefferson County, Kentucky ^{FN1}. Finding that he failed to state a claim against the appellee, we affirm.

FN1. We note that as of January 2003, Jefferson County was dissolved and became part of the Louisville-Jefferson County Metro Government.

Espinosa is a *pro se* litigant. He filed a document titled "Lawsuit" that named Jefferson County, Kentucky, as the defendant. He sought damages of 13.5 million dollars. The allegations were:

1. failure to return collateral and surety after final legal action;
2. failure to prosecute;
3. judicial negligence;
4. unfair business practices in the Thoroughbred industry in Jefferson County, Kentucky; and
5. pain and suffering.

The only other information in the pleading was that: "The Plaintiffs [sic] claims are based on financial losses incurred during litigation in Jefferson County Ky. These allegations occurred during the time frame of 2005-2007." The trial court dismissed Espinosa's complaint for failure to state a cause of action. After the court denied his motion to vacate the dismissal, Espinosa filed this appeal.

Kentucky Rule(s) of Civil Procedure (CR) 8.01 pro-

vides that a complaint “shall contain a short and plain statement of the claim showing that the pleader is entitled to relief [.]” Kentucky follows a “liberal construction rule,” meaning that pleadings are “judged according to [their] substance rather than [their] label or form.” McCollum v. Garrett, 880 S.W.2d 530, 533 (Ky.1994). CR 8.06 emphasizes that: “All pleadings shall be so construed as to do substantial justice.”

The complaint is meant to “give a defendant fair notice and identify the claim.” Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 844 (Ky.2005). It identifies the disputed issues as to which a defendant must file an answer. Perry v. Livingston, 296 S.W.2d 217, 219 (Ky.1956). The Supreme Court of the United States has recently discussed the threshold requirements of notice pleading, observing that even though the facts do not have to be detailed, they must be fundamentally adequate to provide at least a modicum of notice as to the cause of action:

a plaintiff's obligation to provide the “grounds of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007). (citations omitted).

Espinosa argues that the negligence he alleges is a cause of action. However, we have unearthed only one example of “judicial negligence” in Kentucky—a case that is more than one hundred years of age. It refers to the actions of a judge rather than those of a municipality. Cosby v. Commonwealth, 7 Ky. L. Rptr. 143 (Ky.Super.1885). Espinosa has not set forth enough facts for us upon which a cause of action can be ascertained. Additionally, none of the other listed grievances is a proper cause of action supported by any factual allegations. The trial court did not err in dismissing his lawsuit.

*2 Louisville-Jefferson Metro Government argues that Espinosa's brief fails to meet the requirements of CR 76.12 and requests that a penalty of striking the

brief or dismissing the appeal be imposed on Espinosa. We agree that Espinosa's brief is non-compliant. But because he is proceeding *pro se*, we decline to strike the brief or to dismiss the appeal. We have sifted through the record—such as it is—to try to reach the merits. Having found no merit in the case, we decline to impose the sanctions sought by the appellee.

Because Espinosa's complaint did not state a cause of action or recite facts sufficient to construe a cause of action, Jefferson Circuit Court did not err in dismissing this case. Accordingly, we affirm.

ALL CONCUR.

Ky.App.,2009.

Espinosa v. Jefferson/Louisville Metro Government
Not Reported in S.W.3d, 2009 WL 277488
(Ky.App.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Chancery of Delaware.
 BASF CORPORATION, Plaintiff,

v.

POSM II PROPERTIES PARTNERSHIP, L.P., and
 Posm II Limited Partnership, L.P., Defendants.
 C.A. No. 3608-VCS.

Submitted: Dec. 9, 2008.
 Decided: March 3, 2009.

West KeySummary

Partnership 289  225

289 Partnership

289V Retirement and Admission of Partners

289k225 k. Provisions of Partnership Agree-
 ments. Most Cited Cases

A partnership agreement did not contain a change of control provision allowing a partner to withdraw from the agreement when the corporation became a wholly owned subsidiary of another company. The agreement provided the partners an opportunity to withdraw from the partnership if the corporation underwent a change in operation but did not contain a change of control provision. Because the partner failed to allege specific facts that would support the inference the plant at issue was being operated by its new purchasers in the place of its operating subsidiary, the withdrawal provision of the agreement was not triggered.

William M. Lafferty, Esquire, Jay N. Moffitt, Esquire, Justin B. Shane, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; Thomas A. Clare, P.C., Christopher C. Posteraro, Esquire, Beth A. Williams, Esquire, Robert B. Gilmore, Esquire, Kirkland & Ellis LLP, Washington, District of Columbia, Attorneys for Plaintiff and Counterclaim Defendant.

Anthony W. Clark, Esquire, Mark S. Chehi, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware; Charles W. Schwartz, Esquire, Wallis M. Hampton, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, Texas, Attorneys for Defendants and Counterclaim Plaintiffs.

MEMORANDUM OPINION

STRINE, Vice Chancellor.

I. Introduction

*1 The plaintiff, BASF Corporation, a Delaware corporation, seeks to withdraw from defendant POSM II Limited Partnership, L.P. (the "Partnership"), a Delaware limited partnership, and have its interest in the Partnership bought out. BASF has a contractual right to withdraw if Lyondell Chemical Company or one of Lyondell's affiliates no longer operates the Partnership's petrochemical facility in Channelview, Texas (the "Plant"). Historically, Lyondell both leased the Plant from the Partnership and served as the general partner of defendant POSM II Properties Partnership, L.P. ("POSM II Properties") which is, in turn, the general partner of the partnership. BASF argues that the December 2007 purchase of Lyondell, which was then a public company, by Basell AF S.C.A. changed this situation and triggered BASF's contractual right to have its interest in the Partnership bought out by the general partner, POSM II Properties.

In its First Amended and Supplemental Verified Complaint (the "Amended Complaint"), BASF argues that its right to be bought out was triggered either because: (1) the fact that Lyondell has experienced a change in control means that Lyondell is no longer operating the Plant; or (2) as a factual matter, LyondellBasell Industries AF S.C.A., Lyondell's new parent company, is operating the Plant rather than Lyondell. POSM II Properties and the Partnership have moved to dismiss this action, arguing that BASF has no rights upon a change in control of Lyondell and that BASF has not adequately pled that Lyondell

no longer operates the Plant.

In this opinion, I grant the defendants' motion to dismiss. First, I address BASF's contention that because Lyondell went from a publicly traded company to a wholly owned subsidiary of another company, Lyondell ceased to operate the Plant. I conclude that the plain language of the withdrawal provision does not entitle BASF to have its interest bought out simply because Lyondell has experienced a change of control. Rather, BASF only has the right to withdraw if Lyondell or one of its affiliates is no longer operating the Plant. Although Lyondell may now have a single owner of its shares, rather than a large group of public stockholders, as long as Lyondell continues to operate the Plant, POSM II Properties is not obligated to purchase BASF's interest in the Partnership.

Next, I turn to BASF's conclusory allegation that LyondellBasell-Lyondell's parent company-now operates the Plant, rather than Lyondell itself. This is a conclusory allegation because it is not supported by any pled facts. BASF does not plead that the Plant is no longer managed and operated by managers and employees of Lyondell. Rather, BASF distorts a management report and a set of financial statements of Lyondell's parent corporation that plainly are designed to portray the overall financial and operational situation of LyondellBasell, and excerpts quotes that supposedly suggest that LyondellBasell is directly operating the plant. But, the very documents BASF cites make clear that LyondellBasell is a holding vehicle with no employees or operations of its own. Instead, LyondellBasell's subsidiaries, of which Lyondell is one, conduct LyondellBasell's operations. Of equal importance is the fact that BASF pleads no facts suggesting that Lyondell's separate corporate form should be disregarded. That is, BASF pleads no facts suggesting that Lyondell is not continuing to operate the plant, much less that its parent corporation has so disrespected Lyondell's separate existence that Lyondell's veil should be pierced. All that BASF has pled is that Lyondell now has a single owner of its equity rather than many, and that this single owner is in a position to influence Lyondell. Every solvent corporation is subject to influence by its stockholders, when those stockholders use the correct means. The fact that Lyondell now has a single stockholder does not rationally support an inference that Lyondell

does not operate anything itself, including the Plant. Accordingly, I grant the defendants' motion to dismiss.

II. Factual Background^{FN1}

^{FN1}. All facts are drawn from the First Amended and Supplemental Verified Complaint ("Am.Compl."), the exhibits thereto, or BASF's Verified Complaint. See Ct. Ch. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *AT & T Corp. v. Lillis*, 953 A.2d 241, 257 (Del.2008) ("Under some circumstances, a party may offer earlier versions of its opponent's pleadings as evidence of the facts therein." (quoting *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir.2002))); *Ishimaru v. Fung*, 2005 WL 2899680, at ---- 9-10 (Del.Ch. Oct.26, 2005) (considering amendments to a complaint on a motion to dismiss). All reasonable inferences have been drawn in BASF's favor. Conclusory allegations not supported by pled facts, however, have not been accepted as true.

*2 At the center of this litigation is the Partnership, which was formed on July 27, 1990 by the Agreement of Limited Partnership between POSM II Properties, Alberta Gas Chemicals, Inc., and Mobil Chemical Company. The Partnership was created for the sole purpose of "own[ing] a propylene oxide/styrene monomer coproduction plant ... at a site in Channelview, Texas" and leasing that Plant and the land it was built on to ARCO Chemical Company.^{FN2}

^{FN2}. Am. Compl. Ex. 1 (Agreement of Limited Partnership (July 27, 1990)) ("Partnership Agreement") § 2.2.

When the Partnership was formed, Alberta and Mobil were limited partners and POSM II Properties was the general partner.^{FN3} Aside from being the intended tenant of the Plant, ARCO was also POSM II Properties' initial general partner.^{FN4} Thus, from its inception, the Partnership was indirectly controlled by the operator of the Plant.

FN3. Partnership Agreement at 70, 71.

FN4. Partnership Agreement at 70.

The Partnership Agreement did not set out what the limited partners would contribute to the Plant's construction. Instead, POSM II Properties entered into separate agreements with each of the limited partners of the Partnership addressing that subject.^{FN5} In June 1991, POSM II Properties entered into a Supplementary Agreement with Mobil. In that Agreement, Mobil promised to contribute an initial \$5 million as well as up to an additional \$85 million. The Supplementary Agreement also granted Mobil certain rights. Most importantly for this action, § 14(b) provides that:

FN5. Partnership Agreement § 7.1(a).

If [POSM II Properties] becomes aware that the Plant no longer is to be operated by [ARCO] or its Affiliates (as defined in the Partnership Agreement) it shall so notify [Mobil], such notification to be given at any time up to thirty days after the date of such change in operation. Upon receipt of such notice, [Mobil] shall have ninety days to notify [POSM II Properties] that it wishes to withdraw from the partnership.^{FN6}

FN6. Am. Compl. Ex. 2 (POSM II Supplementary Agreement (June 10, 1991)) ("Supplementary Agreement") § 14(b).

Section 14(c) then provides a mechanism by which Mobil's interest would be bought out if § 14(b) is triggered. By stark contrast, the Supplementary Agreement does not contain a change of control provision expressly obligating POSM II Properties to purchase Mobil's stake if ARCO is purchased by another company, has its board or management changed as the result of a proxy contest, or has a change in its capital structure.

And, Mobil was not just a passive investor in the Plant; it also intended to be a major consumer of the Plant's output. On the same day Mobil signed the Supplementary Agreement, Mobil signed a separate

processing contract to have ARCO produce styrene monomer for Mobil's use.^{FN7} According to BASF, the processing agreement required ARCO to produce styrene monomer for Mobil at cost.^{FN8}

FN7. Am. Compl. Ex. 4 (Styrene Monomer Processing Contract (June 10, 1991)).

FN8. Am. Compl. ¶ 16.

Although the Partnership still exists, the parties in interest have changed. In July 1992, only a little over a year after the Supplementary Agreement was signed, BASF took over Mobil's stake in the Partnership.^{FN9} In the process, BASF was assigned Mobil's rights under both the Partnership Agreement and the Supplementary Agreement.^{FN10} BASF also obtained Mobil's rights under the styrene monomer processing contract.^{FN11}

FN9. Am. Compl. Ex. 1 (Agreement Assigning of Mobil's Interest in the Partnership (July 1, 1992)) at 2.

FN10. *Id.*

FN11. Am. Compl. Ex. 4 (Agreement Assigning Mobil's Interest under the Styrene Monomer Processing Contract (July 1, 1992)) at 1.

*3 In 1998, Lyondell acquired ARCO and, according to BASF, succeeded to ARCO's interest.^{FN12} Lyondell also took over the lease for the Plant that ARCO had entered into with the Partnership. Thus, by mid-2007, Lyondell was both operating the Plant and controlling the Partnership through POSM II Properties, and BASF was a limited partner who also had the right to buy styrene monomer from Lyondell at cost.

FN12. Am. Compl. ¶¶ 8, 15.

According to BASF, this state of affairs was interrupted in late December 2007 when Basell, a privately held Dutch chemical group, acquired Lyondell by purchasing all of Lyondell's stock for cash.^{FN13} In the process, Lyondell transformed from a publicly held company with a diverse stockholder base into

the wholly owned subsidiary of a privately held company. As part of the acquisition, Basell also changed its capital structure. A new, privately held Dutch company, LyondellBasell Industries AF S.C.A., is now the parent of both Basell and Lyondell, which remain separate subsidiaries.^{FN14}

FN13. Am. Compl. ¶ 18.

FN14. Am. Compl. Ex. 6. It is not entirely clear from the Amended Complaint whether LyondellBasell is a new company or simply a renamed version of Basell. For purposes of this motion, I have assumed that it is a new company as that is how the Complaint describes it, but whether that is the case is immaterial. *See* Am. Compl. ¶ 19.

The day Basell's acquisition of Lyondell was completed, BASF wrote to POSM II Properties asserting that POSM II Properties had to give BASF the option of having its interest in the Partnership bought out.^{FN15} In ensuing correspondence, BASF argued that because LyondellBasell now owns Lyondell, LyondellBasell "exercises complete operational control of the Plant," and, as a result, § 14(b) of the Supplementary Agreement was triggered.^{FN16} POSM II Properties, however, responded that Lyondell remains the operator of the Plant and that there was no change in operation within the meaning of § 14(b).^{FN17}

FN15. Am. Compl. Ex. 10 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Dec. 20, 2007)).

FN16. Am. Compl. Ex. 11 (letter from Thomas A. Clare, Kirkland & Ellis LLP to George T. Shipley, Shipley Snell Montgomery LLP (Jan. 21, 2007)).

FN17. Am. Compl. Ex. 14 (letter from George T. Shipley, Shipley Snell Montgomery LLP to Thomas Clare, Kirkland & Ellis LLP (Feb. 15, 2008)).

BASF then brought this action against the Partnership and POSM II Properties seeking a declaration that

there has been a change in operation within the meaning of § 14(b). Despite the fact that § 14(b) is concerned with the operations of the Plant, BASF has not pled a single fact about those operations. BASF does not allege that the Plant is being run differently than it was before Basell acquired Lyondell. Nor does it allege that Lyondell employees and officers are not directly managing, overseeing, and operating the Plant. In short, the allegations in the Amended Complaint are totally bereft of any fact indicating that operations at the Plant were affected at all by the fact that Lyondell's equity is now owned by a single owner. Because BASF has pled no facts suggesting how the change in Lyondell's equity ownership has affected the Plant in any way at all, much less an adverse way, it appears that BASF has independent business reasons of its own for seeking to withdraw, reasons that are not substantively related to the change in Lyondell's equity ownership. Rather, that change is simply the hook on which to hang a claim that BASF's § 14(b) right to withdraw has been triggered.^{FN18}

FN18. Tr. at 29. Since oral argument on this motion, LyondellBasell has announced that it is suffering from serious financial problems. *See* Chemical Unit Files For Bankruptcy, N.Y. Times, Jan. 7, 2009, at B4 ("The United States operations of Lyondell-Basell, a petrochemical company, filed for bankruptcy protection in New York on Tuesday, facing a huge debt load and slumping demand for its products."). BASF has not moved to amend based on this event.

Interestingly, in its Verified Complaint (the "Original Complaint"), BASF asserted that it had the right to withdraw solely on the basis that if LyondellBasell was the controlling stockholder of Lyondell, LyondellBasell was also controlling the Plant, a situation that supposedly triggered § 14(b).^{FN19} In making its original argument, BASF conceded that Lyondell was still in fact operating the Plant. Rather, BASF argued that § 14(b) was triggered because LyondellBasell, as the owner of Lyondell, can now direct Lyondell's operation of the Plant.

FN19. *See* Verified Complaint ¶ 28.

*4 But, in its Amended Complaint, BASF pivoted away from its statement that Lyondell operates the Plant. After its 180 degree spin, BASF now asserts that LyondellBasell, rather than Lyondell, is operating the Plant.^{FN20} BASF says that because Lyondell is no longer operating the Plant, § 14(b)'s plain language gives BASF a right to withdraw.

FN20. In line with the plaintiff-friendly Rule 12(b)(6) standard, I have not given any weight to the allegation in the Original Complaint that Lyondell operates the Plant. I merely present the fact that BASF changed its theory for completeness.

After having changed its tack, BASF therefore settled for asserting two theories for relief: (1) that a change in control of the operator of the Plant means that there was a change in operator for purposes of § 14(b); and (2) that LyondellBasell now operates the Plant, rather than Lyondell.

The defendants have moved to dismiss the Amended Complaint. They argue that the Supplementary Agreement gives BASF no rights upon a change in control of Lyondell and that BASF has not alleged actual facts that support BASF's conclusory allegation that Lyondell no longer operates the Plant.

III. Legal Analysis

Because this is a motion to dismiss, I must evaluate BASF's claim under the familiar Rule 12(b)(6) standard. This means that I must accept the well-pled allegations in the Amended Complaint as true and give BASF the benefit of all reasonable inferences that flow from the face of the Amended Complaint.^{FN21} But, even at this stage of the litigation, "neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true."^{FN22} As a result, I only accept conclusory statements as true where they are supported by pled facts.^{FN23} Finally, in conducting this inquiry I am allowed to consider the documents that BASF has attached to its Amended Complaint.^{FN24}

FN21. *Malpiede v. Townson*, 780 A.2d

1075, 1083 (Del.2001) (holding that on a motion to dismiss under Rule 12(b)(6), "the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint").

FN22. *Grobow v. Perot*, 539 A.2d 180, 187 n. 6 (Del.1988); see also *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del.2006) (holding that in deciding a motion to dismiss, "a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff'" (quoting *Malpiede*, 780 A.2d at 1083)); *In re Lukens Inc. S'holder Litig.*, 757 A.2d 720, 727 (Del.Ch.1999) (holding that on a motion to dismiss, a court need only accept allegations supported by pled facts).

FN23. See *Grobow*, 539 A.2d at 187 n. 6.

FN24. See Ct. Ch. R. 10(c).

A. A Change In Operation Is Not Triggered By A Change In Control Of Lyondell

BASF's first argument is that the withdrawal right provided in § 14(b) is triggered by a purchase of Lyondell. This argument presents a straightforward question of contract interpretation. "Under Delaware law, the proper interpretation of language in a contract is a question of law."^{FN25} Accordingly, the meaning of a contract is properly determined on a motion to dismiss.^{FN26} This is done by effectuating, "to the extent possible, the reasonable shared expectations of the parties at the time they contracted."^{FN27} In determining this intent, I am limited to considering the words of the contract unless their meaning is ambiguous.^{FN28}

FN25. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del.Ch.2006).

FN26. *Id.*

FN27. *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del.Ch. Sept.4, 2003) (quoting *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *9 (Del.Ch. June 6, 1996)).

FN28. See *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del.1997) (“If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.”).

Here, the provision at issue is a relatively simple one. Section 14(b) is only triggered if POSM II Properties “becomes aware that the Plant no longer is to be operated by [Lyondell] or its Affiliates.”^{FN29} On its face, this asks a simple question: is Lyondell or one of its affiliates operating the Plant?^{FN30}

FN29. Supplementary Agreement § 14(b). Because the Supplementary Agreement was between ARCO and Mobil, § 14(b) actually discusses whether ARCO is no longer operating the Plant. But, in their briefing both parties have assumed that this language applies to Lyondell in the same manner it applied to ARCO. See Op. Br. at 7; Ans. Br. at 8. Thus, I have assumed for purposes of this opinion that the language applies if neither Lyondell nor one of its affiliates is operating the Plant.

FN30. As the defendants have pointed out, there remains a question as to whether LyondellBasell is an affiliate within the meaning of § 14(b). Neither side, however, spent a great deal of time briefing this issue, and, in any event, it is not necessary to reach this question as I find that even if LyondellBasell is not an affiliate within the meaning of § 14(b), BASF’s Complaint still does not state a claim.

Notwithstanding this obvious interpretation, BASF advances a strained reading of § 14(b) to argue that a

change in control of the operator of the Plant means that there was a change in the operator itself. The first step in its approach is to simplify and distort § 14(b)’s focus on whether or not Lyondell is still operating the plant by referring to this question as whether there has been a “change in operation.”^{FN31} BASF then notes that “operate” has been defined to mean “to control [or direct] the functioning of.”^{FN32} BASF argues that because LyondellBasell is now the sole stockholder in Lyondell, it controls Lyondell. And, because LyondellBasell now controls Lyondell, BASF argues that LyondellBasell is now indirectly operating the Plant through Lyondell.

FN31. See, e.g., Ans. Br. at 8. As noted later, the phrase “change in operation” is used in § 14(b), but only as a short hand for the specific commitment Mobil received which turned on whether “the Plant no longer is to be operated by [ARCO] or its Affiliates.” Supplementary Agreement § 14(b).

FN32. Ans. Br. at 12 (citing *The American Heritage Dictionary of the English Language*, available at <http://dictionary.reference.com/browse/operate> (last visited Oct. 8, 2008); *Webster’s II New College Dictionary* (3d ed.2005)).

*5 Boiled down to its essence, BASF is asserting that if any party besides Lyondell is capable of exerting influence on Lyondell, and therefore influencing Lyondell’s operation of the Plant, then in some sense that third-party is the actual party operating the Plant. This is an extraordinary argument that reads § 14(b) very loosely, so loosely that its text has almost no relevance to the meaning advanced. As BASF admitted at oral argument, this broad construction of § 14(b) would give it a withdrawal right in a myriad of situations, including ones that could have occurred if Lyondell remained a public company without a single controlling stockholder. Thus, as BASF confessed, BASF interprets § 14(b) as providing it with a withdrawal right if: (1) a successful proxy contest was conducted at Lyondell that resulted in a change of the Lyondell board and a decision to replace Lyondell’s CEO, and the new CEO changes operations at the Plant;^{FN33} or (2) stockholders successfully exerted pressure on Lyondell management to change its ap-

proach to operating the Plant.^{FN34}

FN33. Tr. at 37-38.

FN34. Tr. at 55-56.

Admittedly, these sorts of events do not occur every year. But, given the ever-increasing level of stockholder activism over recent decades, these events are far from uncommon. Over the life of the Partnership, one would expect a public company with a diverse stockholder base, as Lyondell was before it was acquired by Basell, to be subjected to a variety of cross-cutting pressures that might change how it would approach its operations, including those at the Plant. According to BASF, § 14(b) gave BASF a withdrawal right whenever Lyondell's stockholder base changed in some important way (would it be enough if someone bought a controlling stake but did not take the company private?) or where Lyondell's stockholders somehow influenced (or simply had the capability of influencing?) the corporation in its operation of the Plant.

Burdening stockholders' ability to alienate or vote their shares with a financial penalty at the corporate level, such as a requirement for the corporation to pay off a contractual partner like BASF, is not a small thing. But, it commonly happens. The method by which it is done, however, involves something far more straightforward than § 14(b); it involves the use of a change of control provision that vests certain rights in one contractual party if the other experiences a change of control as defined in the contract. Such provisions are used in many contexts, including in the joint venture context analogous to the limited partnership here.^{FN35} Given the important rights of Lyondell stockholders that would be burdened by BASF's reading of § 14(b) and the prevalence of common contractual models that directly state what BASF claims is implied by § 14(b), a court should be chary about reading a provision like § 14(b) that, on its face, has nothing to do with a change of corporate control as one that embodies hidden meanings burdening stockholders. If the parties to the Supplementary Agreement had reached a bargain to give Mobil a right to walk away and be bought out upon a change of control of ARCO, one would have expected them to use the common technique and do that

explicitly. In this regard, it is notable that change of control provisions often detail the precise scenarios that qualify,^{FN36} whereas, under BASF's approach, the parties would either have to reach an after-the-fact accord on what corporate events qualified as an implied change in the operator or have a court do so.

FN35. See, e.g., MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (2006) (defining "a Change in Control of the Member or Person directly or indirectly controlling the Member" as a Default Event and specifically defining what constitutes a "Change in Control"). Change of control provisions have also become a common fixture in a variety of corporate contracts. See Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Stockholder Choice*, 152 U. PA. L. REV. 577, 614 (2003) ("Change of control provisions can be and currently are incorporated into a variety of contracts, including intellectual property licenses, leases, joint ventures, debt and equity financing, union contracts, and employee stock option plans."); see also *In re Lorai Space and Commc'ns Corp. Inc.*, 2008 WL 4293781, at ----12-13 (Del.Ch. Sept.19, 2008) (describing a change in control provision in a securities purchase agreement); *Sutton Holding Corp. v. DeSoto, Inc.*, 1991 WL 80223 (Del.Ch. May 14, 1991) (addressing whether there was a change in control under a pension plan); Kenneth C. Johnson, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L.J. 909 (1985) (addressing concerns about change of control provisions in employment contracts).

FN36. See MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY § 8.2(g) (specifying in detail the situations that would constitute a change in control).

*6 Delaware law does not invest judicial officers with the power to creatively rewrite unambiguous contracts in this manner. By its plain terms, § 14(b) is not a change of control provision. Although § 14(b)

contains the phrase “change in operation,” § 14(b) is not concerned with any and all changes in operation, but only a specific, albeit important, change. Section 14(b) is only triggered in the event that “the Plant no longer is to be operated by [Lyondell] or its Affiliates.”^{FN37} Putting to the side the question of whether LyondellBasell is an affiliate of Lyondell,^{FN38} the mere fact that Lyondell now has a single stockholder-LyondellBasell-rather than a disaggregated group of public stockholders, does not mean that Lyondell has stopped operating the Plant within the meaning of § 14(b).

FN37. Supplementary Agreement § 14(b).

FN38. Without answering the question, it seems plausible that LyondellBasell is an affiliate of Lyondell under the Partnership Agreement's definition of the term, which defines two companies as affiliates when one is wholly owned by the other. *See* Partnership Agreement at 5. Indeed, one could imagine rational parties not caring whether the affiliate was a parent or a subsidiary of Lyondell so long as it shared a commonality of interest with Lyondell in the success of the Plant.

As will be discussed in more detail in addressing BASF's other argument, BASF does not allege that Lyondell has not continued its existence as a separate corporation, does not have assets, does not have large number of managers and employees, and is not using its assets, managers, and employees to operate the Plant. For purposes of § 14(b), the mere fact that Lyondell is now controlled by a private company does not make it, as BASF argues, a different company than the one referred to in the Supplementary Agreement.^{FN39} The fact that Lyondell's equity is owned by LyondellBasell does not change the fact that Lyondell Chemical Company still exists and operates the Plant.^{FN40} BASF has not pointed to any language in the Supplementary Agreement or any other agreement that makes promises about how Lyondell would be capitalized or on whose behalf the Plant would be operating.

FN39. *See* Op. Br. at 15-16 (“[E]ven if ‘Lyondell Chemical Company’ continues to

exist on paper ... it is not the same ‘Lyondell Chemical Company’ that actually existed in reality and actually operated the Plant.”).

FN40. The fact that § 14(b) is only directed at the operator as a legal entity is also reflected in the Supplementary Agreement's use of the term “ACC” to refer to ARCO. The definition of ACC in the Partnership Agreement is simple, ACC means ARCO Chemical Company. Partnership Agreement at 5. This captures ARCO as a legal entity, not as a transient collection of owners and business policies.

The original parties to the Supplementary Agreement could, of course, have negotiated specific promises from POSM II Properties about the capital structure of the operator of the Plant or about the other common occurrences that, under BASF's interpretation, would mean that the contractually defined operator was no longer operating the Plant, such as the replacement of the operator's management or the purchase of a certain percentage of stock by a single investor or a group of affiliated investors. And, BASF could have negotiated to add such promises after it acquired Mobil's interest. But, the arrangement between BASF and POSM II Properties, as the deal now stands, does not contain promises about Lyondell's capital structure. And, having failed to secure those promises through negotiations, BASF is not well placed to argue that this court should create those terms because they might serve BASF's business interests.^{FN41}

FN41. *See Delucca v. KKAT Mgmt.*, 2006 WL 224058, at *2 (Del.Ch. Jan.23, 2006) (“[I]t is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts.”).

Section 14(b) is only triggered if Lyondell no longer operates the Plant, which Lyondell may continue to do even if it experiences a change in control of its equity.

B. *BASF Has Not Adequately Pled that Lyondell-*

Basell Operates The Plant

Having determined that § 14(b) is only triggered if Lyondell no longer operates the Plant, I now turn to whether BASF adequately pleads its alternative theory that LyondellBasell is now operating the Plant in Lyondell's stead. As explained above, even at this stage of the proceedings, I need "not concede pleaded conclusions of law or fact where there are no allegations of specific facts which would support such conclusions."^{FN42} Thus, in order to state a claim, BASF must plead facts that rationally support the inference that LyondellBasell, rather than Lyondell, now operates the Plant.^{FN43}

FN42. *Shintom Co., Ltd. v. Audiovox Corp.*, 2005 WL 1138740, at *2 (Del.Ch. May 4, 2005) (quoting *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1264 (Del.Ch.1979), *aff'd*, 888 A.2d 225 (Del.2005); see also *Grobow*, 539 A.2d at 187 n. 6 ("Even under the less stringent standard of a Chancery Court Rule 12(b)(6) motion to dismiss, all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true, but neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true.").

FN43. See *Desimone v. Barrows*, 924 A.2d 908, 928 (Del.Ch.2007) (requiring that a complaint "plead facts supporting an inference of breach, not simply a conclusion to that effect" to survive a motion to dismiss); *Feldman v. Cutaja*, 956 A.2d 644, 653-54 (Del.Ch.2007) ("While specific allegations of fact, along with reasonable conclusions buttressed by specific allegations of fact, will sustain a complaint, mere conclusions of law or fact are insufficient under this standard of review." (citations omitted)), *aff'd*, 951 A.2d 727 (Del.2008). Recognizing the costs of modern litigation, the U.S. Supreme Court has adopted a similar standard. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1959, 167 L.Ed.2d 929 (2007) (holding that a claim for relief "requires more than labels and conclusions"

and that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true").

*7 But, as we have seen, aside from the conclusory allegation that, following Basell's purchase of Lyondell, "LyondellBasell Industries became the operator of the Plant,"^{FN44} the Amended Complaint does not plead any facts about the Plant's operations. The Amended Complaint also does not allege that the Lyondell managers and employees who were operating the Plant have been replaced by managers and employees working directly for LyondellBasell. In fact, the Amended Complaint does not allege any change in the operational direction of the Plant.

FN44. Am. Compl. ¶ 25.

Instead, in flipping from its original statement that Lyondell operates that Plant to its current allegation that LyondellBasell operates the Plant, BASF has relied entirely on two quotes from LyondellBasell's public disclosures.

Specifically, BASF quotes LyondellBasell's Management Report for the Year Ended December 31, 2007 (the "Management Report") as stating that "LyondellBasell Industries' PO/SM II plant at the Channelview, Texas complex was created through a joint venture among Lyondell and unrelated equity investors. LyondellBasell Industries retains a majority interest in [the Plant] and is the operator of the [Plant]."^{FN45} Similarly, BASF's Amended Complaint excerpts the statement "LyondellBasell Industries operates the U.S. PO Joint Venture's ... plants" from LyondellBasell's Consolidated Financial Statements Years ended December 31, 2007 and 2006 (the "Financial Statements").^{FN46}

FN45. Am. Compl. ¶ 25 (quoting Am. Compl. Ex.8 (Lyondell Basell AF S.C.A Management Report for the Year Ended December 31, 2007) ("Management Report") at 16.

FN46. Am. Compl. ¶ 2 (quoting Am.

Compl. Ex. 9 (LyondellBasell Industries AF S.C.A. Consolidated Financial Statements Years ended December 31, 2007 and 2006 With Independent Auditors' Report) ("Financial Statements") at 19).

But, although these documents provide good quotes for BASF, they do not substitute for fact pleading that rationally supports the inference that Lyondell no longer operates the Plant. Indeed, when read completely and in context, these documents refute rather than support the inference that BASF seeks the court to draw.^{FN47} As so read, both documents are clearly meant to provide a picture of LyondellBasell as a corporate holding company, and thus they refer to LyondellBasell and its various subsidiaries as a single entity instead of as a collection of subsidiaries and affiliated companies. The documents cannot sensibly be read to suggest that LyondellBasell as a holding corporation operates the Plant, instead of Lyondell, the operating subsidiary that presumably continues to hold all the assets it possessed before the change in its equity owner.

^{FN47} See *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del.1995) (noting that even in cases where the relevant document is not part of the complaint, it is important that a court be able to consider the whole document because "[w]ithout the ability to consider the document at issue, 'complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure.' " (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.1991))).

The first document, the Management Report, makes its scope explicit and defines "LyondellBasell Industries" as LyondellBasell and its consolidated subsidiaries.^{FN48} Thus, when it says that LyondellBasell Industries operates the Plant, the Management Report is simply offering the unremarkable proposition that LyondellBasell or one of its subsidiaries operates the Plant. That is, the entire basis for BASF's claim is that because Basell bought Lyondell, Lyondell is now a subsidiary of LyondellBasell, and-voilà-Lyondell is now included and subsumed in the Management Re-

port's term "LyondellBasell Industries." Rather than having to do something it apparently cannot (such as pleading that Lyondell's corporate veil should be pierced because it in fact has no separate dignity from its parent), BASF has, by the magic of simplifying definitions in documents describing the consolidated operations of holding corporations, won its case. Because Lyondell's parent produces documents that include its subsidiaries within the scope of the term LyondellBasell Industries, the subsidiary Lyondell must not be operating the Plant. Rather, all operations must now be occurring at the mother ship, regardless of the continued existence of the various subsidiaries.

^{FN48} Management Report at 8 (" 'LyondellBasell Industries' or the 'Company' refers to LyondellBasell Industries AF S.C.A and its consolidated subsidiaries.'").

*8 This line of reasoning is not, well, really reasoning. A holding corporation like LyondellBasell must present reports of their affairs on a consolidated basis.^{FN49} The fact that holdings corporations do so does not render all their subsidiaries inutile, deprived of all their separate legal dignity. If that were the case, one wonders why large public holding corporations would continue their common practice of running business lines and holding assets through multiple subsidiaries.^{FN50} After all, simply by making SEC filings, the holding corporation would eliminate its subsidiaries' separate legal existences!

^{FN49} E.g., *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN NO. 51, ¶ 3 (1959) ("All majority-owned subsidiaries ... shall be consolidated except [for subsidiaries that the majority-owner does not control].").

^{FN50} Delaware public policy does not lightly disregard the separate legal existence of corporations. *Gasden v. Home Pres. Co., Inc.*, 2004 WL 485468, at *4 (Del.Ch. Feb.20, 2008) ("A Delaware court will not lightly disregard a corporation's jural identity."). The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment

of capital in new enterprises. See, e.g., *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *8 (Del.Ch. Mar.4, 2004) (holding that a parent company was not liable for its subsidiary's breach of contract where there was no basis for piercing the corporate veil); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *8-9 (holding that a parent company cannot be liable for its subsidiaries actions absent veil piercing or agency liability). To pierce a corporate veil, a plaintiff must show that the interests of justice require it because matters like fraud, public wrong, or contravention of law are involved. *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (Del.1968) (holding that veil-piercing "may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved"). BASF has not even tried to meet that standard. Moreover, it is precisely because sophisticated parties like BASF understand that changes in control can affect the behavior of a corporate contractual partner that they bargain expressly for change of control provisions.

There is nothing in the Management Report that supports a rational inference that LyondellBasell is actually operating the Plant in place of its operating subsidiary, Lyondell. In fact, the Report directly contradicts BASF's conclusory assertion that LyondellBasell operates the Plant. *The Report unambiguously states that LyondellBasell by itself "does not manufacture any products, does not have any employees or business operations, operates exclusively through its subsidiary companies, and has no source of operating income or assets of its own other than its interests in its subsidiary companies."* ^{FN51} That description is impossible to reconcile with BASF's allegation that LyondellBasell actually operates a large petrochemical plant. ^{FN52}

^{FN51}. Management Report at 8 (emphasis added).

^{FN52}. BASF points out that the Management Report defines Lyondell separately from LyondellBasell, and that when the Management Report refers to Lyondell-Basell operating the Plant, the authors had the choice of using the precise, defined term for Lyondell, but did not do so. When read as a whole and in concert, the Management Report does not support a rational inference that LyondellBasell itself, rather than Lyondell, is operating the Plant. In complex documents, inconsistencies arise. That is why it is important to read them as a whole and contextually. Indeed, the only fair inference is that LyondellBasell does not directly operate anything because, among other things, it has no employees or business operations of its own. Management Report at 8. Rather, operations are done at the subsidiary level by companies like Lyondell. *Id.*

This leaves the Financial Statements to bear the full weight of BASF's assertion. Unlike the Management Report, the Financial Statements do not contain a single definition of LyondellBasell Industries that shows that the Statements are explicitly referring to LyondellBasell and its consolidated subsidiaries as operating the Plant. On their face, the Consolidated Financials therefore read literally as stating that LyondellBasell operates the Plant.

But, the purpose that Lyondell offers the Financial Statements for-to show that LyondellBasell operates the Plant in place of LyondellBasell's wholly owned subsidiary Lyondell-distorts the nature of consolidated financial statements. Under Generally Accepted Accounting Principles, "[t]he purpose of consolidated statements is to present, primarily for the benefit of the stockholders and creditors of the parent company, the results of operations and financial position of a parent company and its subsidiaries essentially as if the group were a single company with one or more branches or divisions."^{FN53} Thus, although the Financial Statements may not be felicitously drafted, there is no rational basis for believing that when LyondellBasell's accountants drafted the Financial Statements they were addressing the legal question of who operates each LyondellBasell facility around the world instead of following accounting rules and craft-

ing a picture of the total health of LyondellBasell and its various holdings, which include Lyondell.^{FN54}In this context, a single statement about LyondellBasell operating the Plant does not create a rational inference that the parent holding company, LyondellBasell, is actually operating the Plant. Instead, although the sentence that refers to the Plant might have been more carefully worded, its plain meaning in line with the rest of the Financial Statements is that the Plant is operated, as are all of LyondellBasell's operations, through one of its subsidiaries. The short hand of the Financial Statements is to describe LyondellBasell as being accountable for all of the operations and results of its wholly-owned subsidiaries, so that the Financial Statements can provide a complete picture of the health of LyondellBasell as a holding company that possesses subsidiaries with diverse operations and substantial assets.

FN53. *Consolidated Financial Statements*, ACCOUNTING REVIEW BULLETIN NO. 51, ¶ 1 (1959).

FN54. *E.g.*, CONSOLIDATED FINANCIAL STATEMENTS, Accounting Review Bulletin No. 51, ¶ 3 (1959) (“All majority-owned subsidiaries ... shall be consolidated except [for subsidiaries that the majority-owner does not control].”); Financial Statements at 9 (“The consolidated financial statements, prepared under accounting principles generally accepted in the United States, include the accounts of LyondellBasell Industries and its consolidated subsidiaries.”); 17 C.F.R. § 210.3-01(a) (2009) (requiring consolidated balance sheets by SEC registrants); 17 C.F.R. § 210.3-02(a) (2009) (requiring consolidated statements of cash flow and income by SEC registrants).

*9 In sum, BASF has certain rights in the event that Lyondell no longer operates the Plant. To try to invoke those rights, BASF changed its description of the relationship between LyondellBasell and the Plant in its Amended Complaint, switching from alleging that Lyondell operates the Plant to alleging that LyondellBasell operates the Plant. But, BASF has not pled any facts about conditions on the Plant floor at all. NONE. Instead it makes a conclusory

allegation that is only supported by “gotcha” quotes from LyondellBasell filings. When actually examined, the only reasonable inference that flows from the documents is that Lyondell continues to operate the Plant. As long as Lyondell is still operating the Plant, § 14(b) of the Supplementary Agreement is not triggered.

IV. Conclusion

For the foregoing reasons, BASF's First Amended and Supplemental Verified Complaint is dismissed.
IT IS SO ORDERED.

Del.Ch., 2009.
BASF Corp. v. POSM II Properties Partnership, L.P.
Not Reported in A.2d, 2009 WL 522721 (Del.Ch.)

END OF DOCUMENT

DECLARATION OF SERVICE

I, Emanuel F. Jacobowitz, declare as follows:

I am one of the Attorneys for Chevy Chase Bank, F.S.B. and am a resident of the State of Washington, residing and employed in Seattle, Washington.

I am over the age of eighteen years old and am not a party to the above-titled action. My business address is 1111 Third Avenue, Suite 3400, Seattle, Washington 98101.

On July 27, 2009, I caused to be served on the parties in the manner noted: (1) Respondent's Answer to Brief of Amicus Curiae Washington Trial Defense Lawyers and (2) this Declaration of Service:

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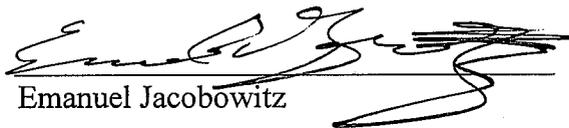
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 27th day of July 2009, in Seattle, Washington.

FOSTER PEPPER PLLC


Emanuel Jacobowitz