IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GREAT-WEST INVESTORS LP,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5508-VCN**
	:	
THOMAS H. LEE PARTNERS, L.P.,	:	
THOMAS H. LEE ADVISORS, LLC, and	:	
THOMAS H. LEE MANAGEMENT	:	
COMPANY LLC,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: October 18, 2010
Date Decided: January 14, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

In the Chinese version of an old folk tale, the Emperor was so impressed with the game of chess that he offered its inventor a reward of his choice. The inventor said that he was a simple man, and wanted only a few grains of rice, the number of which would be determined by the chessboard itself. All he asked for was a single grain of rice for the first square on the board, double that amount for the second square, and that amount doubled again for each of the board's remaining sixty-two squares. The Emperor accepted the proposal immediately, pleased, and even a little insulted that the inventor had asked for so meager a reward. The inventor came to collect one square's worth of rice per day. It was only a few grains at first, but by the third week he was collecting enough rice to feed his family for a day. By the last day of the first month, however, he was due more rice than his entire village could eat in a year. As the sixty-fourth day approached, when the man would justly be able to demand many times more rice than existed in all of China or, indeed the world,[1] the Emperor realized he was ruined.

[1] The last square would contain 2^{63}, or 9,223,372,036,854,775,808 grains of rice. At more than 29,000 grains per pound (*see* http://www.producersrice.com/rice/facts.html), this figure represents nearly 213 times the amount of rice produced globally in 2009. *See* Food and Agric. Org. of the U.N., *Rice Market Monitor, December 2009*, http://www.fao.org/es/ESC/en/15/70/highlight_71.html.

In this case, the defendants (a limited partnership, its general partner, and its manager) argue that a similar deal, contemplating a fee that would more than double each year, exists between them and the plaintiff (one of the limited partners). The first square of this figurative chessboard, however, is filled not with a single grain of rice, but instead with nearly $48 million.

The plaintiff has brought claims for a declaration that the limited partnership agreement does not require it to pay a fee that more than doubles every year, specific performance of the agreement as it interprets it, breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. In the alternative, the plaintiff seeks reformation of the agreement for mistake or fraud. This memorandum opinion addresses the defendants' motion to dismiss the Complaint.

II. BACKGROUND

A. *Parties*

Defendant Thomas H. Lee Partners, L.P. (the "Partnership") is a Delaware limited partnership that promotes and manages private-equity buyout funds and holds interests in the profits and losses of, and distributions with respect to, the investments of such funds.[2] Defendant Thomas H. Lee Advisors, LLC ("TH Lee") is the general partner of the Partnership, and Defendant Thomas H. Lee

[2] Amended Complaint (the "Complaint" or "Compl.") ¶ 2.

Management Company, LLC (the "Manager") manages the Partnership.[3] The Partnership was formed on June 24, 1999.[4]

Plaintiff Great-West Investors LP ("Great-West")[5] is one of the limited partners in the Partnership.[6] Under the Partnership's limited partnership agreement, Great-West is the "Special Limited Partner," which has rights and obligations that vary from those of the Partnership's other limited partners.[7] Great-West acquired its 24.875% interest in the Partnership and became a Special Limited Partner when it purchased the previous Special Limited Partner, Putnam Investments, Inc. ("Putnam"), on August 3, 2007.[8]

B. *Facts*

Under the LP Agreement, the limited partners, including the Special Limited Partner, receive, in addition to other income derived from the Partnership's funds,

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[3] *Id.* at ¶ 4.
[4] *Id.* at ¶ 24.
[5] Defendants characterize Great-West as a subsidiary of the "financial services conglomerate" Power Corporation of Canada. Defs.' Opening Br. in Supp. of their Mot. to Dismiss ("OB"), at 1.
[6] *Id.* at ¶ 3.
[7] *Id.*; Fourth Amended and Restated Agreement of Limited Partnership of Thomas H. Lee Partners, L.P (the "Fourth LP Agreement," or, when its terms do not differ from those expressed in an earlier version, simply the "LP Agreement") at § 1.8, "Special Limited Partner" (attached as Exhibit A to the Compl.).
[8] Fourth LP Agreement at Schedules A, B, C, R-1, and R-2; Third Amended and Restated Agreement of Limited Partnership of Thomas H. Lee Partners, L.P. (the "Third LP Agreement") § 1.8, "Special Limited Partner" (attached as Exhibit 1 to OB); Tr. of Oct. 18, 2010, Hr'g on Defs.' Mot. to Dismiss ("Tr."). TH Lee and the Limited Partners approved the transfer of Putnam's interest in the partnership to Great-West by the "Global Amendment" to the Third LP Agreement, also executed August 3, 2007. Compl. ¶ 26.

a percentage of the Partnership's Fee Income[9] based on their respective ownership interests in each class of funds generating such income.[10] To compensate the Manager for managing the Partnership's funds, certain limited partners, including the Special Limited Partner, were required to make "Expense Assumption" payments to the Partnership on April 21 and October 21 of each year from 1999 to 2009; the Partnership in turn paid such amounts to the Manager.[11] For the period from the formation of the Partnership through the end of 2009, the LP Agreement specified a formula for determining the amount due under the Expense Assumption provision. For example, if the period covered included any days in 1999, the amount due for those days was the product of the 1999 Expense Assumption—$30,000,000—**multiplied by** the number of days in 1999 included in the expense period, and then divided by 365, the total number of days in 1999.[12] The Expense Assumption for 1999 increased by 2.5% for days in 2000 and then increased by 5% annually until it reached $47,703,343 for days in 2009.[13]

[9] Fee Income is comprised of the management fees, litigation proceeds, and other fees and compensation the Partnership receives from the funds it manages. LP Agreement § 1.8, "Fee Income."
[10] LP Agreement § 3.2(b).
[11] LP Agreement § 12.1(b).
[12] *Id.* at § 1.8, "Expense Assumption."
[13] *Id.*

The payments that would be due from the Special Limited Partner for years after 2009 were not specified in the same way. Instead, § 12.2(c) of the Third LP Agreement provided:

> Following the ninth anniversary of the Closing Date, the General Partner and the Special Limited Partner shall negotiate in good faith toward an agreement upon the allocation of Fee Income and expense payable pursuant to Section 12.2 to assure that, effective as of the tenth anniversary of the Closing Date, the Special Limited Partner receives thereafter, directly and/or indirectly . . . 25% of the Fee Income . . . attributable to each Class in which it holds a Partnership Interest, reduced by 25% of all expenses attributable to such class, and the applicable Sections of this Agreement shall be amended . . . to give effect to such agreement. In connection with such good faith negotiations, the Special Limited Partner shall receive financial statements of the Manager and other information reasonably requested by the Special Limited Partner to enable it to determine the expense attributable to each Class, including the total cash compensation of each investment professional attributable to each Class. In the event that the General Partner and the Special Limited Partner are unable to agree on such allocation, the Expense Assumption then in effect will increase on January 1 of each year, commencing on January 1, 2010, by an amount equal to the product of 1.05 multiplied by the Expense Assumption in effect during the preceding year.[14]

As alleged in the Complaint, Great-West read this provision during the weeks before it acquired Putnam, and it asked Putnam about the way the Expense Assumption would work.[15] Putnam and Putnam's outside counsel, Russell G.

[14] Third LP Agreement § 12.2(c) (underlining in original).
[15] Compl. ¶ 44.

D'Oench, Esquire of Skadden, Arps, Slate, Meagher & Flom LLP, told Great-West that the default escalator described in § 12.2(c) would, if triggered, result in a 5% annual increase in the amount of the Expense Assumption.[16] Great-West alleges that Mr. D'Oench then proposed to Defendants that the language of § 12.2(c) be clarified "to make the intent of the parties as to the 5% increase more explicit."[17] During a July 19, 2007 teleconference between Mr. D'Oench and Defendants' outside counsel, David P. Kreisler, Esquire of Weil, Gotshal & Manges LLP, Mr. Kreisler allegedly acknowledged that the provision was intended "to effect a 5% increase and agreed to clarify the provision to make such intent more explicit."[18] In a teleconference held on July 26, Mr. Kreisler confirmed to Mr. D'Oench that the requested clarification was reasonable, but in an email he sent to Mr. D'Oench on the same day, Mr. Kreisler explained:

> thl partners is not interested in making any changes to the agreement related to the expense assumption amount at this time. Clearly thl partners and powercorp/great west need to have a negotiation about those provisions, but not at this time/in this forum.[19]

Great-West alleges that Defendants never suggested that the Expense Assumption would increase by other than 5% annually in the event the default escalator was

[16] *Id.*
[17] *Id.*
[18] *Id.* at ¶ 45.
[19] *Id.* at ¶ 47 n.5.

triggered.[20] Great-West completed its acquisition of Putnam's interest in the Partnership on August 3, 2007, and later executed the Fourth LP Agreement, which altered some language in § 12.2(c), but left the language regarding the default Expense Assumption escalator unchanged.[21]

Great-West contends that it later tried to negotiate toward an agreement to allocate Fee Income and expenses for years following 2009, but that TH Lee instead proposed to Great-West "scenarios whereby Great-West Investors would have to relinquish all or a material part of its [nearly] 25% stake as the Special Limited Partner on economically unreasonable terms" and advanced the position that the default escalator clause in § 12.2(c) of the LP Agreement provided for an

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[20] *Id.* at ¶ 47.

[21] *Id.* at ¶ 27; the Fourth LP Agreement at § 12.2(c) provides:

> After July 6, 2008, the General Partner and the Special Limited Partner shall negotiate in good faith toward an agreement upon the allocation of Fee Income and expense payable pursuant to Section 12.2 to assure that, effective as of July 6, 2009, the Special Limited Partner receives thereafter, directly and/or indirectly . . . 25% of the Fee Income . . . attributable to each Class in which it holds a Partnership Interest, reduced by 25% of all expenses attributable to such class, and the applicable Sections of this Agreement shall be amended . . . to give effect to such agreement. In connection with such good faith negotiations, the Special Limited Partner shall receive financial statements of the Manager and other information reasonably requested by the Special Limited Partner to enable it to determine the expense attributable to each Class, including the total cash compensation of each investment professional attributable to each Class. In the event that the General Partner and the Special Limited Partner are unable to agree on such allocation, the Expense Assumption then in effect will increase on January 1 of each year, commencing on January 1, 2010, by an amount equal to the product of 1.05 multiplied by the Expense Assumption in effect during the preceding year.

(Underlining in original).

annual 105% increase in the Expense Assumption amount instead of an annual 5% increase.[22] During negotiations, Great-West requested certain financial information from TH Lee and the Manager and received, in response, a three-page spreadsheet summarizing the Manager's expenses from 2000 to 2009.[23] The parties did not reach an agreement to allocate Fee Income and expenses.

TH Lee decided that, because the parties had not reached such an agreement, the default Expense Assumption escalator had been triggered, and it fixed the Expense Assumption for 2010 at $97,791,853, representing an increase of $50,088,510 over the 2009 Expense Assumption.[24] TH Lee used that amount to calculate the Expense Assumption payment due Oct. 21, 2009, which covered a six month period extending to April 2010,[25] and it offset payments of $3,773,796 that were otherwise due from the Partnership to Great-West against that Expense Assumption charge. In April 2010, it offset another $6,278,221 against the Expense Assumption payment due that month.[26]

Section 12.1(a) of the LP Agreement provides that the Manager shall use amounts paid to it under §12.2(b) to cover the expenses of managing the Partnership, and directs that any amounts received in excess of those expenses be

[22] Compl. ¶ 50.
[23] Compl. ¶ 49.
[24] Compl. ¶ 51.
[25] *Id.*
[26] *Id.*

distributed to the owners of the Manager, who include certain of the limited partners of the Partnership, but not Great-West.[27] Thus, to any extent Great-West is charged an Expense Assumption that exceeds the actual costs of managing the Partnership, the owners of the Manager profit.[28]

Great-West alleges that the current expenses of the Manager that would be "properly covered by the Expense Assumption could amount, at most, to approximately $45 million."[29] Therefore, if Great-West's estimate is accurate, charging Great-West the Expense Assumption in effect for 2009 ($47,703,343) would yield the owners of the Manager a profit of just under $2.3 million.

Were the Expense Assumption to increase 105% annually from the 2009 amount for ten years, the Expense Assumption for 2019 would exceed $62.5 billion.[30] Great-West alleges that such growth in the Expense Assumption would wipe out its 25% share of the Partnership's Fee Income almost immediately, and would exceed the total income of the Partnership beginning in 2013.[31]

III. CONTENTIONS

By Count I of the Complaint, Great-West seeks declaratory relief. Subpart (a) seeks a declaration that TH Lee may increase the Expense Assumption from the

[27] Compl. ¶¶ 34-36.
[28] *Id.* at ¶ 36.
[29] *Id.* at ¶ 16.
[30] *Id.* at ¶ 38.
[31] *Id.* at ¶ 16.

amount in effect for 2009 only after it engages with Great-West in good faith negotiations as required by § 12.2(c). Subpart (b) of Count I seeks a declaration that § 12.2(c) of the LP Agreement allows only a 5% annual increase in the Expense Assumption in the event such negotiations fail to reach an agreement. Defendants argue that § 12.2(c) unambiguously provides that the Expense Assumption will grow by 105% annually in the absence of an agreement to allocate expenses differently. Great-West responds that the language of § 12.2(c) is at least ambiguous, and that extrinsic evidence supports its position that the provision provides for only a 5% annual increase.

Counts II and VII are premised on breach of contract. Both counts accuse Defendants of breaching those sections of the LP Agreement requiring Defendants to negotiate in good faith toward an agreement regarding a new method for allocating Fee Income and expenses and to deliver financial information to Great-West in connection with those negotiations. By Count II, Great-West seeks an order that Defendants specifically perform those sections of the LP Agreement; in Count VII, damages are sought not only for the same breaches, but also for breach of those sections of the LP Agreement that specify how the Expense Assumption is calculated and how Expense Assumption payments are collected.

Defendants argue that they are not liable for breach of contract because they have fully performed their obligations under the LP Agreement. Further, they contend that Great-West is not entitled to specific performance because its allegations regarding TH Lee's negotiating positions do not describe "bad faith" conduct under Delaware law and because Delaware courts do not enforce agreements to negotiate in good faith. Further, they argue that Great-West has failed to allege that it was deprived of any information that was material to the mandated negotiations because TH Lee is entitled under § 12.2(c) to negotiate its compensation without regard to its actual expenses.

Great-West responds that Delaware courts do enforce agreements to negotiate in good faith and that, because the purpose of the negotiations mandated under §12.2(c) is to reach an agreement that accounts for the Manager's actual expenses, it was entitled to more financial information than TH Lee and the Manager provided. It contends that, because its interpretation of § 12.2(c) is the correct one, Defendants also breached the LP Agreement by increasing the Expense Assumption in effect for 2010 and by using the improperly inflated figure to justify offsetting payments that would have otherwise been due to Great-West.

Count III of the Complaint accuses TH Lee of breaching its fiduciary duties, as the general partner of the Partnership, to Great-West as a limited partner. Defendants argue that this claim is duplicative of Great-West's contract claims and

thus barred under *Nemec v. Shrader*,[32] while Great-West argues that Defendants misstate the law.

Counts IV and V seek reformation of the LP Agreement for mutual mistake and unilateral mistake, respectively. Defendants argue that Great-West has failed to state a claim for mistake because it has not identified a specific prior agreement between the parties that is not reflected in the written contract. Further, Defendants argue that Great-West waived any claim for mistake based on conduct that occurred before it became the Special Limited Partner by executing the Fourth LP Agreement a year after it had acquired Putnam's interest in the Partnership. Great-West asserts that the parties reached an agreement on the size of the default escalator in the Expense Assumption, and that whether the underlying mistake was unilateral or mutual, Great-West did not waive its claim by executing the Fourth LP Agreement because there was no reason it should have known of the mistake when it signed that agreement in 2008.

Count VI seeks reformation for fraud. Defendants contend that this claim essentially duplicates Great-West's claim for reformation for unilateral mistake and should be dismissed for the same reasons. Great-West responds that it can show that the Defendants intentionally misled it and that its allegations thus support a claim for fraud.

[32] 991 A.2d 1120, 1129 (Del. 2010).

Finally, Count VIII accuses TH Lee of breaching the implied covenant of good faith and fair dealing. Defendants argue that this claim is barred because the implied covenant cannot create rights that contradict an express contractual provision, and because Great-West has failed to plead either an implied contractual term that it asks the Court to read into the LP agreement or the existence of a contractual gap that no party anticipated. Great-West argues that TH Lee acted arbitrarily in a manner that frustrated the overall purpose of the LP Agreement, in violation of the implied covenant.

IV. DISCUSSION

A. *The Standard for a Motion to Dismiss*

The Court may a grant motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) only if the plaintiff would be unable to recover under "any reasonably conceivable set of circumstances susceptible of proof."[33] The Court must accept the truth of all well-pled facts as alleged in the complaint and draw all inferences in a light most favorable to the plaintiff.[34] The Court is not required, however, to accept conclusory allegations unsupported by specific, factual allegations, nor must it accept every strained interpretation of the plaintiff's allegations, but instead must only accept those reasonable inferences that "logically

[33] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167 (Del. 2006) (citation omitted).
[34] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).

flow from the face of the complaint."[35] Still, when considering a claim based upon the interpretation of a contract, "[d]ismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law."[36]

Under Court of Chancery Rule 12(b)(6), "[t]he complaint generally defines the universe of facts that the trial court may consider."[37] Where appropriate, the Court may also consider exhibits attached to the complaint,[38] and the Court may rely upon exhibits attached to a motion to dismiss if the plaintiff's claims are based upon them.[39]

B. *Count I: Declaratory Relief*

Count I of the Complaint seeks declaratory relief. By subpart (a), Great-West seeks a declaration that any increase in the Expense Assumption from the amount in effect for 2009 may take effect only after TH Lee and Great-West engage in good faith negotiations toward an agreement replacing the existing Expense Assumption provision with new terms under which Great-West would receive 25% of Fee Income reduced by 25% of the Manager's actual expenses.

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[35] *Gen. Motors (Hughes*), 897 A.2d at 167.
[36] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (emphasis in original).
[37] *Gen. Motors (Hughes*), 897 A.2d at 168.
[38] *VLIW Tech.,* 840 A.2d at 611.
[39] *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *3 n.12 (Del. Ch. Aug. 13, 1997), *aff'd,* 708 A.2d 989 (Del. 1998).

Through subpart (b), Great-West seeks a declaration that in the event no such agreement is reached, §12.2(c) allows only a 5% annual increase in the Expense Assumption.

In addressing a question of contract interpretation, the Court's role is to "effectuate the parties' intent."[40] The Court determines the parties' intent objectively: "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[41] The Court must give unambiguous language its plain meaning; it must not twist language to create ambiguity where none exists because doing so could "in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[42] To determine the plain meaning of ordinary words that have not been defined in the contract, the Court may consider dictionaries, which are the customary references to which a reasonable person in a party's position would look in order to determine the meaning of ordinary words.[43]

1. Subpart (a): good faith negotiations as a prerequisite for imposing the default escalator in the Expense Assumption

Section 12.2(c) of the LP Agreement provides that the General Partner and the Special Limited Partner "shall" negotiate in good faith, and that the purpose of

[40] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).
[41] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195-6 (Del. 1992).
[42] *Id.*
[43] *Lorillard Tobacco*, 903 A.2d at 738.

the negotiations is to "assure . . . the Special Limited Partner receives thereafter, directly and/or indirectly . . . 25% of the Fee Income . . . attributable to each Class in which it holds a Partnership Interest, reduced by 25% of all expenses attributable to such class." It provides that, if the parties are "unable to" (as contrasted with "do not") reach such an agreement, then the default escalator is triggered. Great-West's interpretation that § 12.2(c) requires good faith negotiations toward a new agreement incorporating the specified terms before the General Partner can trigger the default escalation in the Expense Assumption amount from its 2009 level is at least a reasonable reading of the text. Defendants contend that their attempts to negotiate regarding the compensation of the Manager satisfied their obligations under this provision, but otherwise they have not yet offered a competing interpretation of those particular provisions of § 12.2(c). For the purposes of the pending motion, the important point is simply that Great-West may be able to demonstrate that its interpretation is the correct one and, therefore, may be able to show it is entitled to declaratory relief in this regard.

2. Subpart (b): the amount of the default escalator of the Expense Assumption

Under § 12.2(c), if good faith negotiations fail to result in an agreement regarding the allocation of Fee Income and expenses, the Special Limited Partner must pay an annual Expense Assumption that escalates according to the following formula: "the Expense Assumption then in effect will increase on January 1 of

each year, commencing on January 1, 2010, by an amount equal to the product of 1.05 multiplied by the Expense Assumption in effect during the preceding year."[44]

The meaning of this sentence is plain: if the Expense Assumption escalator was triggered by failure to reach an agreement in 2009, then the Expense Assumption that was in effect for 2009 would increase by 105% of the 2009 Expense Assumption amount. That is, the Expense Assumption would grow from $47,703,343 in 2009 to $47,703,343 + (1.05*$47,703,343), or $97,791,853.15, for 2010. Defendants contend that this is the only reasonable interpretation of the sentence, and that Great-West's claim that it means something else should be rejected.

Great-West argues, however, that Defendants' reading misconstrues the meaning of the word "by," which it says has the definition given to it by the *American Heritage Dictionary*: "to the extent or amount of."[45] Great-West argues that using this definition leads to conclusion that § 12.2 unambiguously provides for a default 5% annual escalator: that the Expense Assumption should have increased on January 1, 2010 to the extent that the 2010 Expense Assumption would equal 105% of the 2009 Expense Assumption. Defendants contend that, even if the Court were to use Great-West's definition of "by," a fair reading of § 12.2 supports Defendants' position.

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[44] *Id.* (underlining in original).
[45] *American Heritage Dictionary*, 4th ed. (2004), 255.

Although the Court understands Great-West's desire to find an interpretation of § 12.2 that would not require the Expense Assumption to more than double annually in the event it cannot negotiate a different allocation agreement with TH Lee, the reading Great-West advances is not supported by the text. The illustration incorporated into the *American Heritage Dictionary*'s definition of "by," is "He's taller than his sister by three inches."[46] Using that definition in place of "by" yields: "He's taller than his sister to the extent or amount of three inches." Paraphrasing that the sentence to build a sentence that uses "by" in the same way Great-West argues it is used in § 12.2(c), however, yields a nonsensical result. "Her brother's height increased by three inches," for example, cannot be read to mean "Her brother's height increased to the extent or amount of three inches, and he is now three inches tall."

Likewise, § 12.2 provides that, in the absence of an agreement otherwise, the Expense Assumption will "increase by" 105% of the previous year's Expense Assumption; that sentence cannot plausibly be read to mean the Expense Assumption will increase such that the 2010 amount is only 105% of the 2009 amount. The words following "increased by" must indicate the amount that will be added to the 2009 Expense Assumption to reach the 2010 amount in the event good faith negotiations do not produce an alternate agreement.

[46] *Id.*

Great-West also attempts to encourage a conclusion that the language of the default Expense Assumption escalator is ambiguous by insisting that the Defendants' interpretation produces an unconscionable and absurd result.[47] That Great-West does not like the result, however, does not render it ambiguous if the result is required by the plain language of the contract.[48] As the Court has observed, "parties are free to make bad bargains."[49] The Court's role is not "to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness."[50]

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[47] Pl.'s Answering Br. to Defs.' Mot. to Dismiss ("AB") at 25.

[48] Despite making a passing reference to an "unconscionable 105%" annual increase in the Expense Assumption (Compl. ¶ 2), Great-West has not squarely alleged that it can avoid the contract as written because it is unconscionable—perhaps because it might be difficult to prevail under that theory. A contract is unconscionable only if it is characterized by both "an absence of meaningful choice and contract terms unreasonably favorable to one of the parties." *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978). Great-West and the Defendants are all sophisticated parties. Great-West was concerned about the language of §12.2(c) before it acquired Putnam and, had it been sufficiently alarmed, could have chosen to walk away from its purchase of Putnam. *See Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *8 (Del. Ch. July 9, 2002) (holding that strict, unilaterally-imposed confidentiality requirements that hampered Progressive's due diligence efforts did not deprive Progressive of a meaningful choice because it always retained the ability to walk away from the transaction).

[49] *Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *5 (Del. Ch. Nov. 26, 1990); *see also W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009) ("A wide gulf exists between construing an ambiguous contract as commanding an absurd result and simply enforcing the language of a revised contract that appears to be a poor bargain based upon a close and careful reading of its terms.").

[50] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2005 WL 5757652, at *8 (Del. Ch. Apr. 1, 2005).

Instead, "[i]t is to give meaning and substance to the words the parties have freely chosen."[51]

Although Great-West may wish it had not agreed to the possibility of annual 105% increases in the Expense Assumption, the only reasonable interpretation of the sentence in question is that it in fact did so in 2007 and again in 2008. Accordingly, the Court grants Defendants' motion to dismiss subpart (b) of Count I. The Court denies the motion to dismiss subpart (a) of Count I, which seeks a declaration that "the Expense Assumption may increase from the amount in effect for 2009 only after TH Lee has negotiated in good faith with Great-West Investors concerning the allocation of Fee Income and related expenses premised on Great-West Investors receiving 25% of Fee Income."[52]

C. *Counts II and VII: Breach of Contract*

The Defendants next contend that the Court should dismiss Great-West's breach of contract claims. Great-West claims that TH Lee has breached § 12.2(c) of the LP Agreement by failing to negotiate in good faith toward an agreement on the allocation of Fee Income and expenses.[53] It further claims that TH Lee and TH Lee Management have breached § 12.2(c) by failing to provide requested

[51] *CorVel Enterprise Comp, Inc. v. Schaffer*, 2010 WL 2091212, at *4 (Del. Ch. May 19, 2010); *see also Osborn ex rel. Osborn v Kemp*, 991 A.2d 1153, 1160-61 (Del. 2010) (rejecting both parties' constructions of a contract as "contrary to both the plain meaning of the document and logic" and as leading to an "absurd, *unfounded* result.") (emphasis added).
[52] Compl. ¶ 56.
[53] Compl. ¶ 103.

information relating to the calculation of the Partnership's expenses.[54] Finally, it accuses TH Lee and the Partnership of breaching §§ 3.2(b), 12.1(b), and 12.2(c) by improperly increasing the Expense Assumption for 2010. Under Count VII, Great-West seeks damages for breach of §§ 3.2(b), 12.1(b), and 12.2(c), and it seeks an order granting specific performance of § 12.2(c) under Count II. The Court first addresses Great-West's claims that Defendants have breached § 12.2(c), upon which its other breach of contract claims depend.

1. Breach of § 12.2(c)'s requirements to negotiate in good faith with, and to deliver financial information to, Great-West.

Although the parties agree that § 12.2(c) requires TH Lee and Great-West to engage in good faith negotiations, they disagree over what, exactly, was required of TH Lee. Great-West contends that TH Lee was required to negotiate with a particular purpose: both parties were required to negotiate in good faith toward an agreement that would replace the current provisions specifying the Expense Assumption with a new agreement regarding the method to allocate Fee Income and expenses. It contends that, to facilitate those negotiations, TH Lee and the Manager were to provide Great-West with reasonably-requested financial information. Great-West alleges that TH Lee and the Manager breached both duties.

[54] Compl. ¶ 104.

Defendants respond that TH Lee fully performed its obligations under § 12.2(c) by negotiating about the future compensation of the Manager[55] and by providing a three page expense analysis for the period from 2000 to 2009.[56] They argue that they are not required to provide additional financial information to Great-West because § 12.2(c) allows them to negotiate the Manager's compensation (through Expense Assumption payments) without regard to the Manager's actual expenses. They also contend that Great-West cannot prove a breach of the requirement to negotiate in good faith because Great-West has not adequately alleged that Defendants engaged in conduct that would be considered bad faith under Delaware law.[57]

The question of whether TH Lee and the Manager satisfied the requirements of § 12.2(c) presents a matter of contract interpretation. The Court has already accepted that it may be possible for Great-West to demonstrate that § 12.2(c) affirmatively requires TH Lee to engage in good faith negotiations toward an agreement to replace the Expense Assumption provision with new terms allocating Fee Income and expenses in a particular manner. If it can do so, then Great-West

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[55] OB at 7 (citing Compl. ¶ 14 ("In addition, under the guise of negotiations, TH Lee has presented proposals that would have Great-West Investors essentially forfeit much or all of its 25% partnership stake."); ¶ 48 (". . . TH Lee has used section 12.2(c) as a club to attempt to force the Special Limited Partner to relinquish some or all of its interests in the partnership on unfavorable terms."); ¶¶ 49-50.
[56] OB at 7 (citing Compl. ¶ 49).
[57] Defs.' Reply Br. at 19.

might be able to prove that TH Lee breached § 12.2(c) by failing to negotiate in good faith toward such an agreement and that TH Lee and the Manager breached that section by failing to provide information to which Great-West was entitled under that section. Thus, the Court denies Defendants' motion as to Great-West's claims under Count VII that it is entitled to damages because Defendants breached § 12.2(c) by failing to negotiate in good faith and by failing to provide all the financial information to which Great-West was entitled under the provision.

2. Specific performance of § 12.2(c)'s requirements to negotiate in good faith with, and to deliver financial information to, Great-West.

Defendants also move to dismiss Great-West's claim under Count II for specific performance of those same provisions of § 12.2(c). "Specific performance is an equitable remedy firmly committed to the sound discretion of the court."[58] To earn such a remedy, a party seeking specific performance must show by clear and convincing evidence that (i) a valid and specifically enforceable contract exists between the parties; (ii) the party seeking specific performance was ready, willing and able to perform the contract; and (iii) the balance of the equities favors an order of specific performance.[59] Defendants argue that, under Delaware law, courts will not order specific performance of agreements to negotiate in good faith

[58] *Szambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007).
[59] *Id.*

and that Great-West has not adequately alleged that Defendants have acted in bad faith or have otherwise breached § 12.2(c).

Despite Defendants' arguments to the contrary,[60] an agreement to negotiate in good faith may be binding under Delaware law, however, and specific performance could, in theory, be an appropriate remedy for breach of such a provision.[61] In practice, the problems with ordering parties to negotiate in good faith are significant. "Indeed, courts of equity could not be expected to enter such orders except where any violation of the order (*i.e.*, any bad faith negotiation) would be easily detected. And, ordinarily, such detection would not be easy unless the substantive deal was substantially agreed to."[62]

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[60] The Defendants cite *The Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 2694914, at *4 (Del. Ch. Nov. 16, 2004), to show that this Court will not enforce an agreement to negotiate in good faith. That case, however, does not concern an express contractual provision to negotiate in good faith; instead the plaintiff in that case relied on the implied covenant of good faith and fair dealing to expand a provision mandating only that it be given the opportunity to negotiate a new commercial lease. The Court held that the implied covenant only applied to require the landlord to present its terms in good faith; it did not override the contract's express language to impose "a requirement that [the landlord] must alter his good faith terms to reach an agreement with the Tenant." *Id.* at *3.

[61] *See, e.g.*, *VS&A Comm. Partners, L.P. v. Palmer Broad. Ltd. P'ship*, 1992 WL 167333, at *4 (Del. Ch. July 14, 1992) (expressing reservations about a claim for specific performance of a contractual obligation to negotiate in good faith, but ultimately denying the motion to dismiss.); *J.W. Childs Equity Partners, L.P. v. Paragon Steakhouse Restaurants, Inc.*, at *3, 1998 WL 812405 (Del. Ch. Nov. 6, 1998) (holding that an agreement to negotiate further terms of a sales contract in good faith was binding, but that there was no binding commitment to actually enter a future agreement); *Itek Corp. v. Chicago Aerial Indus., Inc.*, 248 A.2d 625, 629 (Del. 1968) (reversing a grant of summary judgment for the defendant, where plaintiff had alleged the defendant had "willfully failed to negotiate in good faith and to make 'every reasonable effort' to agree upon a formal contract, as it was required to do" under the contract).

[62] *VS&A Comm. Partners,* 1992 WL 167333, at *4.

Still, it would not be impossible for Great-West to demonstrate that it is entitled to such relief. For example, Great-West contends that the good faith negotiations required under § 12.2(c) "must be premised on an analysis of the partnership's actual, reasonable expenses incurred over the prior ten-year period and in light of the full information" that it reasonably requests.[63] An order requiring Defendants to provide such information might be appropriate if Great-West could show that, in its absence, good faith negotiations would be impossible in light of the informational imbalance between the parties. Further, although it might be difficult to win an order enforcing other aspects of the duty to negotiate in good faith, the Court is not now prepared to state that there are no circumstances under which specific performance would be an appropriate remedy if Great-West can prove a breach of § 12.2(c). Thus, the Court denies the motion to dismiss Count II.

3. Breach of §§ 3.2(b), 12.1(b), and 12.2(c) by increasing the Expense Assumption in effect for 2010

Similarly, the Court may not now resolve the issues related to Great-West's claim that TH Lee and the Partnership improperly calculated the amount of the 2010 Expense Assumption and offset that amount from distributions due to Great-West in breach of §§ 3.2(b), 12.1(b), and 12.2(c) of the LP Agreement.

[63] AB at 13.

Section 3.2 of the LP Agreement subjects payments to members of an ownership class to various conditions, including the set-off provision of § 12.5, which allows the Partnership to withhold payments due to the Partnership from any payments due to the class. Section 12.1(b) details the requirement for limited partners to pay an Expense Assumption on a semi-annual basis. Great-West has advanced a reasonable interpretation that § 12.2(c) provides that good faith negotiations toward an agreement that would yield it 25% of the Partnership's Fee Income reduced by 25% of the Manager's actual expenses are a prerequisite to increasing the Expense Assumption for 2010 and beyond. If Great-West is able to demonstrate that its interpretation is the correct one and that those good faith negotiations did not take place, then it could prove that the Defendants improperly imposed a fee of $97,791,853 on Great-West for 2010 in breach of the provisions of the LP Agreement relating to the distribution of Fee Income. Because Great-West may be able to show that Defendants breached §§ 3.2(b), 12.1(b), and 12.2(c), the Court denies the balance of Defendants' motion to dismiss Count VII.

D. *Count III: Breach of Fiduciary Duty*

Great-West contends that TH Lee breached its fiduciary duties to Great-West by failing to negotiate in good faith toward an agreement on allocation of Fee Income and expenses "in contravention of section 12.2(c) of the Partnership

Agreement and the intent of the parties."[64] As demonstrated by the text delineating them, these claims arise entirely out of the parties' contractual obligations, and must therefore be dismissed. Under *Nemec v. Schrader*, "where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."[65] Although TH Lee, as General Partner, may owe fiduciary duties to Great-West as the Special Limited Partner, the wrongs of which Great-West complains in Count III arise entirely out of the contractual obligation to negotiate in good faith toward an agreement to allocate Fee Income and expenses and the same facts that Great-West uses to allege breach of that contractual obligation. Thus, the Court grants Defendants' motion to dismiss Count III of the Complaint.

E. *Count IV-VI: Reformation for Mistake or Fraud*

Great-West next contends that, if § 12.2(c) effects a 105% annual increase in the Expense Assumption in the event the parties cannot reach a new agreement regarding the allocation of Fee Income and expenses, then the Court should reform § 12.2(c) such that it, instead, allows only a 5% annual increase in the Expense

[64] Compl. ¶ 69.
[65] 991 A.2d 1120, 1129 (Del. 2010).

Assumption under those circumstances. The Court may reform a contract "only when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence."[66] Great-West presents three possible justifications for reforming the LP Agreement: mutual mistake (Count IV), unilateral mistake (Count V), and fraud (Count VI).

A claim for reformation based on a mutual mistake will survive a motion to dismiss under Court of Chancery Rule 12(b)(6) only if it alleges: (i) that the parties reached a definite agreement before executing the final contract; (ii) that the final contract failed to incorporate the terms of the agreement; (iii) that the parties' mutually mistaken belief reflected the true parties' true agreement; and (iv) the precise mistake the parties made.[67]

Great-West alleges that on July 19, 2007, Putnam's counsel, Mr. D'Oench, informed Mr. Kreisler of Putnam's and Great-West's belief that § 12.2(c) provided for a 5% annual increase. It further alleges that Mr. Kreisler agreed that § 12.2(c) had the meaning Great-West and Putnam ascribed to it as written, but that the wording should be modified to convey that meaning expressly. Great-West contends that Defendants were aware that Mr. Kreisler's words would be conveyed

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[66] *James River-Pennington Inc. v. CRSS Capital, Inc.,* 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995).
[67] *Joyce v. RCN Corp.*, 2003 WL 21517864, at *4 (Del. Ch. July 1, 2003).

to Great-West through Putnam.[68] Finally, Great-West contends that, while Mr. Kreisler's July 26, 2007 email to Mr. D'Oench did explain that the Partnership was not interested in making changes to the language of § 12.2(c), it did not actually retract Mr. Kreisler's representation that §12.2(c), as written, had the meaning Mr. D'Oench had ascribed to it.[69] Great-West became the Special Limited Partner by acquiring Putnam soon after these communications.

Read in the light most favorable to it, Great-West's allegations could support an inference that Mr. Kreisler never retracted the July 2007 representation that § 12.2(c) had the meaning Putnam's counsel had ascribed to it, and that he did not do so because the mistaken interpretation of Great-West and Putnam was consistent with Defendants' own interpretation of the provision at that time. Under these allegations, Great-West could conceivably prove that the parties had a definite agreement regarding the meaning of § 12.2(c), and had no reason to question that interpretation when they executed the Amended LP Agreement in August 2008. Nonetheless, the language of § 12.2(c) did not reflect that alleged agreement. As a result, Great-West has adequately alleged a mutual mistake claim.

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[68] Compl. ¶¶ 45, 47 n.5. ("Clearly thl partners and power corp/great west need to have a negotiation about those provisions . . . . ") (quoting Mr. Kreisler's email to Mr. D'Oench, dated July 26, 2007).
[69] Compl. ¶ 47.

In the alternative, Great-West presents a claim for reformation of the LP Agreement on the basis of unilateral mistake. To prove unilateral mistake "[t]he party asserting this doctrine must show that it was mistaken and that the other party knew of the mistake but remained silent."[70] The plaintiff must also show that the parties had come to a definite agreement that differed materially from the written agreement.[71] Great-West alleges that, if Defendants believed all along that § 12.2(c) provided for a 105% annual escalation of the Expense Assumption, the communications between Mr. D'Oench and Mr. Kreisler indicate both knowledge of Great-West's mistake and silence as to that mistake. Great-West's allegations could support an inference to that effect, and its allegations regarding mutual mistake satisfy the other elements of a unilateral mistake claim.

Great-West executed the Fourth LP Agreement on August 1, 2008. By that act, according to Defendants, Great-West waived any claim for mistake. As compared to the Third LP Agreement, the Fourth LP Agreement amended some of the language in § 12.2(c), but left unchanged the language concerning the default annual escalation of the Expense Assumption amount. Proof that, as of that date, Great-West knew that the escalation language provided for a 105% annual increase in the Expense Assumption might indicate that Great-West had waived its claims

[70] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151-52 (Del. 2002).
[71] *Id.*

that the LP Agreement should be reformed based on a 2007 mistaken interpretation of that language.[72] Great-West alleges, however, that its interpretation of the language had not changed between 2007 and 2008 and that there was no reason for it to have known of its mistake when it executed the 2008 Amended LP Agreement. Because the pleadings do not identify any additional communications between the parties between July 2007 and August 2008, the Court must accept, for purposes of the pending motion to dismiss, that Great-West had no reason to know of its mistake in August 2008 and did not waive its mistake claims by executing the Amended LP Agreement at that time.

Thus, the Court denies Defendants' motion to dismiss Counts IV and V, which seek reformation of the LP Agreement for mutual mistake and unilateral mistake, respectively.

Finally, under Count VI, Great-West seeks, on the basis of fraud, reformation of § 12.2(c) to establish a default annual escalator of 5%. To state a claim for fraud, a plaintiff must allege (i) a misrepresentation, which can take the form of a statement, omission, or active concealment of the truth; (ii) the defendant's knowledge that the representation was false; (iii) intent to induce the

[72] Restatement (Second) of Contracts § 380(2) (1981) ("The power of a party to avoid a contract for mistake . . . is lost if after he knows or has reason to know of the mistake . . . he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.").

plaintiff to act or refrain from acting; (iv) justified reliance on the misrepresentation; and (v) damage as a result of such reliance.[73]

The Defendants have not sought dismissal of Count VI under Court of Chancery Rule 9(b), which requires that fraud be pled with particularity.[74] Great-West has identified three alleged misrepresentations relating to this subject matter with the particularity necessary to support a fraud claim. Great-West alleges that in a July 19, 2007 telephone conversation between Mr. Kreisler and Mr. D'Oench, Mr. D'Oench represented (i) that he agreed that the intent of §12.2(c) was to establish a 5% annual increase in the Expense Assumption as the default in absence of other agreement and (ii) that his client would clarify the language to make that meaning clear.[75] Great-West alleges that, in a July 26 email to Mr. D'Oench, Mr. Kreisler retracted his previous representation that the language of § 12.2(c) would be clarified at that time, but represented (iii) that TH Lee would have to negotiate with Great-West regarding the provisions pertaining to the Expense Assumption at a future date.[76] According to Great-West, Defendants made these representations knowingly and with the intent to induce Great-West to become the Special Limited Partner and to enter the LP Agreement, and Great-

[73] *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *8 (Del. Ch. July 24, 2009).
[74] *See also H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 146-47 (Del. Ch. 2003).
[75] Compl. ¶ 45.
[76] *Id.* at ¶ 47 n.5.

West made its decisions to do so in reasonable reliance upon the alleged misrepresentations.[77]

Taken together, the representations identified by Great-West would reasonably have left it with the impression that Defendants agreed with it that § 12.2(c) was intended to effect a default annual 5% escalator in the Expense Assumption and that Defendants would negotiate to implement that intention after Great-West became the Special Limited Partner.[78] At face value, these allegations could support a claim for reformation based on fraud.[79]

Upon closer examination, however, the requirement of justifiable reliance on the alleged misrepresentations presents a significant challenge to the survival of this claim. First, Great-West's own arguments demonstrate the difficulty in establishing this element. During the October 18, 2010 hearing before the Court,

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[77] *Id.* at ¶¶ 95-99.

[78] To clarify, a negotiation regarding the language of § 12.2(c) expressing the magnitude of the default escalator created would be distinct from the negotiations in which § 12.2(c) requires the parties to engage before the default escalator may be triggered.

[79] These alleged misrepresentations do not allow the Court to draw any other inferences sponsored by Great-West in support of its fraud-based reformation claim. For example, Great-West, as a sophisticated party represented by counsel, could not show justifiable reliance on another party's interpretation that the existing language of § 12.2(c) effected by default a 5% annual escalation of the Expense Assumption. Further, in light of the retraction in Mr. Kreisler's July 26, 2007 email, Great-West cannot show that it reasonably relied upon any representation that Defendants would "clarify" the language of § 12.2(c) in the absence of further negotiations. Finally a representation that Defendants would engage in a more general or open-ended negotiation than one aimed at a 5% annual escalator cannot support a claim for reformation on the basis of fraud because the Court could only speculate as to the results such negotiations might achieve. *See Colvocoresses v. W. S. Wasserman Co.*, 28 A.2d 588, 589 (Del. Ch. 1942) ("The very purpose of reformation by Court of Equity is to make an erroneous instrument express correctly the real agreement between the parties; no court can make a new contract for them.").

Great-West seemed to take the position that whatever was said before it acquired Putnam regarding the meaning of § 12.2(c) did not affect its decision to become the Special Limited Partner or to enter the LP Agreement:

> To some extent none of this matters. Why? Well, we became a special limited partner by operation of law. We weren't negotiating with TH Lee about this provision. We—we were about to own this thing. We would have owned it regardless. We—we had just bought Putnam. It was going to be ours. So whatever this meant, whatever they might have said in 2007, we'd probably still be here today even if we'd said "Well, we're not going to sign this amendment." So what? We're still going to be the special limited partner because we stepped into Putnam's shoes.[80]

The Court is hesitant to dismiss an otherwise well-pled, even if only marginally so, fraud claim based on its counsel's argument, especially because in the context of a motion to dismiss the Court must generally consider only the allegations of the Complaint. Here, the Complaint does allege that Great-West justifiably relied on the alleged misrepresentations identified above.[81] Nonetheless, the argument quoted here does illustrate the challenge Great-West may encounter in proving justifiable reliance going forward.

Assuming it can overcome this difficulty, Great-West might also be able to establish the other elements of its claim for reformation on the basis of fraud. Although scienter would seem difficult to establish on the basis of the specific facts set forth in the Complaint, Great-West has alleged that Defendants acted

[80] Tr. at 55.
[81] Compl. ¶¶ 95, 99.

intentionally. Further, Great-West could conceivably show that, because of the alleged misrepresentations, the LP Agreement does not reflect the parties' real agreement that § 12.2(c) would, after negotiations that were to occur after Great-West acquired Putnam, impose by default a 5% annual escalator in the Expense Assumption.

Considering Great-West's allegations in the plaintiff-friendly light illuminating them on a motion to dismiss, they adequately state a claim for reformation on the basis of fraud, if only barely. Accordingly, the Court denies Defendants' motion to dismiss Count VI.

F. *Count VIII: Breach of the Implied Covenant of Good Faith and Fair Dealing*

Great-West contends that TH Lee arbitrarily used its discretion under the LP Agreement in a manner that deprived Great-West of the fruits of its bargain under the LP Agreement and thereby breached the implied covenant of good faith and fair dealing. The implied covenant inheres to every contract, and is "best understood as a way of implying terms in the agreement."[82] It provides "a limited and extraordinary legal remedy" that addresses only events that could not reasonably have been anticipated at the time the parties contracted.[83] "As a result,

[82] *E.I. duPont de Nemours & Co v. Pressman*, 679 A.2d 436, 443 (Del. 1996).
[83] *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) ("Delaware's implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not . . . .").

the implied covenant only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the contract."[84]

Here, Great-West has identified no contractual term for Court to imply. Instead, the arbitrary conduct of which Great-West complains in Count VIII is TH Lee's decision not to negotiate toward a new agreement on allocating Fee Income and to increase the Expense Assumption by 105% per year in the absence of that agreement, thus depriving Great-West of the benefit of its bargain. Although Great-West may ultimately be able to prove that TH Lee failed to negotiate in good faith as required under the LP Agreement, the LP Agreement does impose a 105% annual increase in the Expense Assumption in the absence of a new allocation agreement. In both cases, the parties' obligations and rights are expressly governed by contract. Therefore, the doctrine underlying the implied covenant of good faith and fair dealing does not apply, and the Court dismisses Great-West's claims under Count VIII.

[84] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch. 2009) *aff'd,* 976 A.2d 170 (Del. 2009).

V. CONCLUSION

For the reasons set forth above, the Court grants Defendants' motion to dismiss as to Counts III, VIII, and subpart (b) of Count I of the Complaint. Otherwise, Defendants' motion is denied. An implementing order will be entered.