IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN NOEL, TYLER NOEL,
BETSY BROUGHER and WILLIAM ATKINS,

Plaintiffs,

OPINION and ORDER

11-cv-379-bbc

v.

HCC INSURANCE HOLDINGS, INC.,

Defendant.

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Defendant HCC Insurance Holdings, Inc. has filed a motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) in this case for breach of contract. I am granting the motion in part and denying it in part.

Plaintiffs John Noel, Tyler Noel, Betsy Brougher and William Atkins allege that they are the former owners of Multinational Underwriters, LLC, an insurance company that focuses on international medical, travel and group insurance. They sold the company to defendant in 2007, but the parties maintained a relationship governed by the "membership interest purchase agreement." Among other things, the agreement entitled plaintiffs to more payments if the company performed at a certain level. In addition, plaintiffs Brougher and

Atkins continued to work at the company. The relationship did not go as plaintiffs hoped and ultimately Brougher and Atkins left the company. Plaintiffs contend that defendant breached the agreement in various ways before the relationship ended.

Plaintiffs' complaint includes a single count for breach of contract, but defendant divides the complaint into three distinct claims: (1) terminating plaintiffs Brougher and Atkins; (2) failing to give plaintiffs notice of certain decisions; and (3) making various decisions about the company in bad faith. In their response brief, plaintiffs say that they are not raising a separate claim regarding the terminations. Rather, that is part of their bad faith claim. Accordingly, the question before the court is whether plaintiffs have stated a claim that is plausible on its face with respect to claims that defendant did not give them notice of important business decisions and failed to make those decisions in good faith. Ashcroft v. Iqbal, — U.S. — , 129 S. Ct. 1937 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

With respect to the claim about notice, the parties dispute whether the agreement required defendant to provide notice to plaintiffs. Although plaintiffs did not attach the agreement to the complaint, I may consider it "because it is a central component to the complaint." Cancer Foundation, Inc. v. Cerberus Capital Management, LP, 559 F.3d 671, 675 (7th Cir. 2009).

At issue is Section 10.4(d) of the agreement:

> Purchaser will operate in good faith to maximize [Multinational Underwriters]'s growth and performance during the earnout period. For so long as Brougher shall be an employee of [Multinational Underwriters], [plaintiffs] shall have forty-five (45) days to object to any business decision of [defendant] having a potential effect on [Multinational Underwriters]'s growth and performance about which Brougher has actual knowledge (and [defendant] shall have a further thirty (30) day period to cure). If Brougher ceases to be an employee of [Multinational Underwriters] prior to the completion of the final Earnout Year, then with respect to any business decision of [defendant] that is made during the period in which Brougher is not an employee of [Multinational Underwriters] that has a potential effect on [Multinational Underwriters]'s growth and performance, [plaintiffs] shall have forty-five (45) days from the date Purchaser gives notice of such decision to the Representative to object to the decision (and [defendant] shall have a further thirty (30) day period to cure). Absent such an objection to such business decisions, [plaintiffs] forever waive their right to claim that such decision breached [defendant]'s obligation to operate in good faith to maximize [Multinational Underwriters]'s growth and performance. For the avoidance of doubt, [Multinational Underwriters]'s objection and Purchaser's decision whether or not to cure (i) will not be determinative of the issue of whether Purchaser has operated in good faith to maximize [Multinational Underwriters]'s growth and performance and (ii) will not otherwise relieve [Multinational Underwriters], the [plaintiffs] or the Noels of any obligation under this Agreement.

The key clause is that "[o]wners shall have forty-five (45) days from the date Purchaser gives notice of such decision to object to the decision."

On its face, this provision does not require defendant to provide notice to plaintiffs of any decision. Rather, it triggers a requirement on *plaintiffs* to act: if and when defendant gives plaintiffs notice of a decision "that has a potential effect on [Multinational Underwriters'] growth and performance," plaintiffs have 45 days to object or "forever waive"

a claim that defendant failed to act in good faith.

Plaintiffs argue that a notice requirement must be inferred because a contrary interpretation "impermissibly renders more than half of Section 10.4(d) meaningless or the entire clause illusory." Plts.' Br., dkt. #20, at 16. Plaintiffs do not clearly explain their position, but it seems to be that there would be no point in giving plaintiffs an opportunity to object unless defendant had an obligation to provide notice. This is simply wrong. The provision makes it clear that the purpose of giving plaintiffs an opportunity to object is to resolve potential disputes without litigation. In effect, it is an exhaustion requirement: if plaintiffs do not object in a timely manner, they cannot challenge that decision later in another forum. However, if defendant does not give plaintiffs notice of a decision, then plaintiffs have no obligation to attempt to resolve the matter internally before filing a lawsuit. That seems to be the situation in this case. Accordingly, I am granting defendant's motion to dismiss with respect to this claim.

With respect to plaintiffs' claim that defendant failed to act in good faith, defendant argues that plaintiffs have failed to show in the complaint that the decisions at issue "were anything other than ordinary business decisions, that any of these alleged decisions were made with a dishonest or improper motive, or that the decisions were made to deprive Plaintiffs of additional earnout funds." Dft.'s Br., dkt. #12, at 14. Defendant's point is well-taken, but I believe it is premature. The Court of Appeals for the Seventh Circuit has been

reluctant to impose a heightened pleading standard on plaintiffs, even after Twombly and Iqbal, particularly in cases involving intent. E.g., Swanson v. Citibank, N.A., 614 F.3d 400, 404–05 (7th Cir. 2010).

In this case, plaintiffs allege that defendant made a number of business decisions for no apparent reason, such as preventing the company president from making decisions, ignoring the business plan, refusing to pursue promising marketing projects, firing good employees and replacing them with inexperienced people and canceling lucrative contracts. That is sufficient to state a claim. I agree with defendant that it will be challenging for plaintiffs to prove their claim, but that is not enough to require dismissal. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."). Defendant's arguments are more appropriate in the context of a motion for summary judgment.

ORDER

IT IS ORDERED that defendant HCC Insurance Holdings, Inc.'s motion to dismiss for failure to state a claim upon which relief may be granted, dkt. #9, is GRANTED with respect to the claim by plaintiffs John Noel, Tyler Noel, Betsy Brougher and William Atkins that defendant breached the parties' agreement by failing to give plaintiffs notice of certain decisions. The motion is DENIED with respect to plaintiffs' claim that defendant breached

the agreement by failing to exercise good faith in making business decisions regarding the growth and performance of Multinational Underwriters, LLC.

Entered this 26th day of September, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge