whether he was entitled to a third ($1.5 million) of the accrued fees based on the fact that he had a right to one-third of C.R.I. revenues attributable to matters preceding his withdrawal from C.R.I. He was informed that his percentage interest in the partnerships was 24 percent, but that since the accruals did not relate to the pre-1990 period, he was not entitled to share in the proceeds from the accrued fees. Schwartzberg also asked about the initial investment of the BAC holders and requested copies of the merger agreement and the proposed proxy statement. Mr. Dockser told him the initial investment was approximately $250 million and agreed to provide him with the merger information.

Shortly after this meeting plaintiff engaged counsel and on October 3, 1995 that counsel telecopied a letter to Dockser and Willoughby noting that plaintiff had potential claims arising from the Asset Management Agreement, the CRITEF merger, the CRIMII MAE transaction, and certain other partnerships. The letter requested that Dockser and Willoughby provide documents in order that the potential claims might be investigated. Plaintiff's counsel thereafter met with counsel for Dockser and Willoughby but no resolution resulted and no documents were provided.

In November of 1995, still unable to resolve the budget issue, C.R.I. filed a declaratory judgment action in Maryland state court seeking to have the court decide the budget amount for 1996. The parties then met on December 8 and Schwartzberg presented a settlement proposal.[7] But once again the parties could not reach agreement.

F. *Schwartzberg's Solicitation and Publicity Campaign*

Schwartzberg next filed a countersuit in Maryland in January 1996 alleging, among other things, breach of fiduciary duty on the part of Dockser and Willoughby in connection with the consideration they received or will receive in the CRITEF and CRIMII MAE transactions. The suit also alleged self-enrichment by Dockser and Willoughby in slashing the annual budget of CMS from $1.25 million to $500,000.

Around this same time, Schwartzberg initiated a campaign against C.R.I. Specifically he initiated a consent solicitation to replace C.R.I. as

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[7]Although CMS (Schwartzberg's company) had previously provided both asset management services and disposition services under the Asset Management Agreement, Schwartzberg's proposed settlement provided that CMS would return the asset management function to C.R.I. and only perform the disposition services. Pursuant to his proposal C.R.I. and CMS would enter contracts with 10 year terms that would pay CMS $500,000 a year and Schwartzberg up to $150,000 annually.

managing general partner of Capital Housing Partnerships, a series of over 125 real estate limited partnerships (not including the partnerships or the Funds) of which Schwartzberg was one of the general partners.[8] On January 18, 1996, he issued a press release announcing his consent solicitation with respect to the Capital Housing Partnerships; describing his lawsuit in Maryland, including its allegations that Dockser and Willoughby are self-dealing with respect to the CRITEF merger and the CRIMII MAE transaction and that Dockser and Willoughby stand to personally receive $9.3 million if the CRITEF merger is consummated[9]; and stating that two of these transactions were currently the subject of litigation by other C.R.I.-related investors.[10]

On February 1, 1996, Schwartzberg served letters on CRITEF Associates and CRITEF III Associates demanding inspection of lists of registered holders of BACS.[11] His stated purpose for this demand was "to permit [him] to communicate with the holders of the BACs in connection with the replacement of CRITEF Associates as managing general partner of the Partnership in accordance with the provisions of CRITEF's partnership agreement." PX1 (emphasis supplied). In a letter a few days later, Dockser and Willoughby rejected these demands. On February 6, 1996, plaintiff served additional demands on CRITEF Associates and CRITEF III Associates requesting to inspect numerous documents concerning the underlying properties securing the bonds.[12] The purpose

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[8]At least five of these partnerships subsequently did designate Schwartzberg as managing general partner to replace C.R.I.

[9]Mr. Schwartzberg testified that he arrived at the $9.3 million figure by adding the $4.75 million price of the Redemption Agreement (C.R.I.'s sale of its interest in AP CAPREIT, including CRICO, to AP CAPREIT) to the $4.55 million C.R.I. was to receive for the accrued mortgage servicing fees. Tr. T. 89. However, the proposed CRITEF merger agreement only provided for the cancellation of a portion of the potential give-back obligation under the Redemption Agreement (the termination refund that might be payable if certain management contracts are canceled); a refund that was capped at $3.5 million and of which only $1.3 million pertained to CRITEF Fund properties. In addition, the $4.55 million for accrued fees were reduced to $2 million on February 1 as a result of the agreement in principle reached in the class action litigation brought challenging the CRITEF merger.

[10]Approximately two weeks prior to the press release, one of these suits had been dismissed with leave to amend.

[11]Schwartzberg also sought inspection of the partnership agreements for CRITEF Associates and CRITEF III Associates. Those agreements were produced to Schwartzberg during discovery.

[12]The requested documents included among other things: audited financial statements for the past couple of years; a list of capital improvements over $5,000 for 1993, 1994, and 1995 and projected for 1996; current traffic reports by week for the fourth quarter in 1995 and the comparable quarter for the prior year, including occupancy by unit type, move-ins, and move-outs; on a property by property basis, the name, address, and telephone number, of the local managing general partner as well as the accountant; and a copy of the fairness opinion

of this demand, according to plaintiff's letter, was "to evaluate the fairness of the [proposed CRITEF merger]." Dockser and Willoughby did not respond to these February 6 demands.

Also on February 6, C.R.I. informed plaintiff that they were terminating the Asset Management Agreement and plaintiff, in turn, issued another press release. In this press release, plaintiff announced that five of the Capital Housing Partnerships to date had designated him as managing general partner to replace C.R.I.; stated that the attempted termination of the Asset Management Agreement was a retaliatory measure by Dockser and Willoughby, who are self-dealing at the expense of the individual investors; and again repeated his allegation that Dockser and Willoughby stand to personally receive $9.3 million if the CRITEF merger is consummated.

On February 14, one day before he initiated this litigation, Schwartzberg issued an additional press release stating that the increased price being offered the BAC holders pursuant to the agreement reached in the class action litigation "appear[ed] inadequate and not in the best interests of CRITEF's public investors." This last press release also indicated that C.R.I. had refused to provide Schwartzberg with a list of the investors in the CRITEF partnerships, that Schwartzberg is opposing the transaction until C.R.I. provides him with financial statements for each of the eighteen properties, and that he was "urging other investors not to vote for the transaction until such time that the real values can be assessed." Finally, in this press release plaintiff again referred to the $9.3 million figure as self-dealing, specifically stating that "CRI, by its own admission, is attempting to 'cram down' this merger because its principals stand to benefit by an additional $4.55 million, on top of the $4.75 million they have already received from Apollo, if the CRITEF-CAPREIT transaction is consummated."

In response to these press releases and actions by the plaintiff, Dockser and Willoughby filed lawsuits in the Maryland state court and the United States District Court for the Southern District of New York seeking injunctions against plaintiff's solicitation efforts on the ground that he was making misleading statements with respect to the personal benefits Dockser and Willoughby would realize in connection with the merger, for using confidential information in violation of the Asset Management Agreement, and for soliciting BAC holders without complying with securities laws. Both courts have now issued injunctions against Schwartzberg.

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and merger agreement.

II. The Parties' Contentions

Mr. Schwartzberg proffers several independent avenues of analysis, each of which, in his view, lead to the conclusion that he has a right to the relief he seeks. He argues that 1) the partnership agreements of both CRITEF Associates and CRITEF III Associates grant him a right to the information sought; 2) based upon his status as a general partner of CRITEF Associates he has a right to the requested information pertaining to that partnership by virtue of Section 1519, or alternatively, Section 1520 of the Delaware Uniform Partnership Law; and 3) based upon his status as a limited partner of both CRITEF Associates and CRITEF III Associates, he has a right to the information sought under Section 17-305 of the Delaware Revised Uniform Limited Partnership Act.

Defendants, in turn, attempt to erect numerous barriers to block plaintiff's avenues of access to the list of BAC holders and financial records of the properties.[13] First they argue that plaintiff is only a

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[13]As an initial matter, defendants even suggest that this court lacks subject matter jurisdiction to determine whether, with respect to CRITEF Associates, plaintiff is entitled to relief pursuant to 6 *Del. C.* §§ 1519-20. Their theory is that the Chancery Court does not have jurisdiction over a partner's request to inspect partnership books because, absent statutory authority, inspection requests must be brought in the Superior Court pursuant to a mandamus proceeding. *See Shaw v. Agri-Mark, Inc.*, Del. Supr., 663 A.2d 464, 467-68 (1995). Moreover, they say that, although this court clearly has jurisdiction over Count II (plaintiff's request for relief under § 17-305) by virtue of 6 *Del. C.* § 17-305(e), this court cannot exercise concurrent jurisdiction over a legal claim (Count I) where this court's equity jurisdiction is based on such specific statutory authority.

In addition to the fact that such a conclusion in this case would defy any notion of judicial efficiency, defendants initially ignored 6 *Del. C.* § 17-111. Defendants were relegated to make the strained argument, in a post-trial letter to the court, that 6 *Del. C.* § 17-111 is strictly limited to enforcement of rights and obligations created by limited partnership agreements and does not reach statutory rights under the Delaware Revised Uniform Limited Partnership Act arising independent of such agreements. The plain language of the statute, however, vests this court with jurisdiction. It provides:

> Any action to interpret, apply or enforce the provisions of a partnership agreement, or the duties, obligations or liabilities of a limited partnership to the partners of the limited partnership, or the duties, obligations or liabilities among partners or of partners to the limited partnership, or the rights or powers of, or restrictions on, the limited partnership or partners, may be brought in the Court of Chancery.

Although plaintiff might look to 6 *Del. C.* § 1519-20 to determine his rights, it is only because 6 *Del. C.* § 17-403 incorporates those rights. Thus, a request for enforcement of any statutory rights pursuant to the Delaware Revised Uniform Limited Partnership Act by a general partner in a Delaware limited partnership against that partnership or her co-partners is properly brought in the Court of Chancery.

"nominal" general partner of CRITEF Associates because he sold his substantial interests in 1990 and allegedly retained the general partner status as a formality, solely to avoid certain tax consequences. He is therefore estopped, they say, from relying on a general partner's right to information provided for in Sections 1519 or 1520.

The defendants also contend that the information requested is technically the records of the Funds (which are separate limited partnerships) rather than the Partnerships and plaintiff is not a partner of the Funds. Being the records of the Funds, defendants assert that the partnership agreements as well as the statutory provisions providing for access to the books of the Partnerships do not provide a basis for giving plaintiff the information.

Finally, they contend that plaintiff's motivation in seeking these records is, in part, to jeopardize the merger of the Funds—a merger that they (his previous business partners) put together—in order to extract concessions from them with respect to other pending litigation between them and himself and, in part, to seek to replace the Partnerships as manager of the Funds while such competition is not of course proscribed in general — new social benefits are thought to be occasioned by such competition — it is not a proper use of an investor's right to inspect books and records of an entity to use the information disclosed to competitively injury the entity. Such an improper purpose, defendants argue, precludes plaintiff from inspecting the records pursuant to the statutory information rights of a partner, general or limited.

Plaintiff's application for relief will be denied for the reasons set forth below.

III. Decision

[1] I pass over the questions whether the records sought may be considered records of the Partnerships or whether Mr. Schwartzberg is estopped to claim rights as a general partner of CRITEF Associates. I find it unnecessary to address these questions because I conclude that the evidence established that the sole or predominant reason plaintiff seeks the list of BAC holders and financial records of the properties is 1) to attempt to replace the partnerships as general partners of the Funds and, in the process 2) gain leverage against Dockser and Willoughby with respect to other litigation pending between them, all of his personal financial advantage and at considerable risk to the financial welfare of the Partnerships. These purposes meet a two part test for "improper purpose"; they are personal to the individual seeking access and they are adverse to the interests of the partnership considered jointly (that is, from

the perspective of all partners). In my opinion, even assuming plaintiff's statutory rights to information as a partner (general or limited) would otherwise entitle him to access these records controlled by the Partnerships, the improper purpose that defendants have established confer on the Partnerships a defense to his claims.

IV. Discussion

A. *The Sources of Rights Asserted:*

Plaintiff asserts two sources of rights: the partnership agreements and the statutes governing partnerships. Under the latter he asserts rights as a limited partner and with respect to CRITEF Associates, the rights of a general partner.

With respect to the relevant partnership agreements, the pertinent provision of each provides as follows:

> XX. BOOKS AND RECORDS
>
> (a) The books and records of the Partnership shall be maintained in accordance with sound income tax accounting principles.
>
> (b) The Partnership shall keep at its Office the following records, which are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours:
>
> > (i) current list of the full name and last known or business address of each Partner, set forth in alphabetical order;
> >
> > (ii) copy of this Agreement, together with executed copies of any powers of attorney pursuant to which this Agreement, and any amendments hereto, have been executed;
> >
> > (iii) copies of the Partnership's federal, state and local

> income tax returns and reports, if any, for the three most recent years;
>
> (iv) copies of (1) any effective written partnership agreements and (2) any financial statements of the partnership for the three most recent years; and
>
> (v) the Partnership books.

[2] With respect to statutory sources of inspection rights, the rights of a general partner are broad. Section 17-403 of title 6 of the Delaware Code provides that unless otherwise provided in the partnership agreement, a general partner of a Delaware limited partnership "has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners." The Partnership statute provides in Section 1519, that:

> The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

It is to be noted that neither the partnership agreements nor Section 1519 contain an express limit concerning "purpose" and thus in each instance one must begin with the recognition that a partner has no obligation to prove that it has a "proper purpose" in order to enforce one of these rights to the prescribed access.[14]

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[14]As for the rights of a limited partner in a Delaware limited partnership, section 17-305 of the Revised Delaware Uniform Limited Partnership Act makes clear that a limited partner's right to inspect books and records and to otherwise access information regarding the partnership is limited to "purpose[s] reasonably related to the limited partner's interest as a limited partner." The limited partner must make any demand in writing and set forth the purpose of such demand. 6 *Del. C.* § 17-305(d) (1991). Moreover, a general partner may deny a limited partner's demand for information if "the general partner in good faith believes [disclosure] is not in the best interest of the limited partnership." 6 *Del. C.* § 17-305(b) (1991). Thus, the limited partner must demonstrate a proper purpose in requesting such information. Plaintiff has clearly not done so here.

B. Inferring An Improper Purpose Defense

[3-4] This recognition does not conclude the subject of purpose, however, since neither the partnership agreements nor Section 1519 expressly negate the notion that a defense of improper purpose is implied in the grants.[15] It is of course generally recognized that implicit obligations consistent with the text of written obligations may, indeed under correct conditions should be inferred under both statutes and contracts. *E.g. Skouras v. Admiralty Enterprises, Inc.*, Del.Ch., 386 A.2d 674 (1978)(purpose adverse to corporation negates stockholders statutory right to access to books) The conditions under which an implied contractual obligation may be inferred were narrowly construed by this court in *Katz v. Oak Industries, Inc.*, Del. Ch., 508 A.2d 873 (1986); *see also E.I. DuPont DeNemours and Co. v. Pressman*, Del. Supr., C.A. No. 35, 1995, Veasey, C.J. (May 2, 1996), 1996 Del. LEXIS 179, at *22 (citing *Katz* with approval on this point). It was there stated that an obligation may be inferred when, given the terms of the express contract made and the circumstances of the contracting process, it is more likely than not (actually in *Katz* the court said, "it is clear that" but that test is probably too high) that if the parties *had* thought to address the subject, they would have agreed to create the obligation that is under consideration by the court *ex post facto*. 508 A.2d at 880. While this test requires resort to a counterfactual world --what if-- it is nevertheless

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[15]In fact, treatises and cases in other jurisdictions have suggested that there may be an implicit proper purpose requirement in provisions equivalent to Section 1519. *See* J. William Callison, *Partnership Law and Practice* § 11.02, at 11-4 to 11-5 (1994) ("UPA § 19 does not require that a partner have a proper purpose to obtain access to partnership books, although such a requirement probably would be imposed by the courts in the appropriate case."); *Bromberg and Ribstein on Partnership* § 6.05 at 6:57 (1994) ("Perhaps a proper purpose limitation, like that in most corporate statutes, is implicit in the right of access."); *Sanderson v. Cooke*, 175 N.E. 518, 520 (N.Y. 1931) (concluding that the right of inspection by an agent may be refused if that inspection is wanted for an improper purpose). Of course the rights of a general partner to access information are fundamental and generally interpreted as broad as feasible. Their rights to information can be thought analogous to a director's right to inspect books and records of the corporation to which he serves as a fiduciary. *See Holdgreiwe v The Nostalgia Network, Inc.*, Del. Ch., C.A. No. 12914, Allen, C. (Apr. 29, 1993), Mem. Op. at 5 (noting the importance of a director's right to information). This does not mean, however, that there are no circumstances in which a court could find the denial of access justified. As in the corporate context, and although courts should be slow to do so, a court may deny the right to inspect books and records even though the statutory requirements have been satisfied. *See Skouras v. Admiralty Enter. Inc.*, Del. Ch., 386 A.2d 674, 678 (1978) ("[E]ven if a proper purpose for a demand is demonstrated and such demand is shown to be reasonably related to a plaintiff's interest as a stockholder, nonetheless such demand must not be for a purpose adverse to the best interests of the corporation.").

appropriately restrictive and commonsensical. Let me turn to an application of it to these obligations.

Imagine individuals negotiating the terms of a partnership agreement with respect to access to information. Certainly all investors, whether limited partners or general partners will start with a bias in favor of access. Ongoing information will allow assessment of the investment and inform investment decisions--minimally buy, sell or hold decisions, but also perhaps voting or other choices open to the partner. Therefore cheap and ready access might be an expected default rule with respect to partners access to information. But there are costs of various kinds in allowing such access as well. So at some point it might be preferred by some to limit access or condition it. Arguably all relevant statutes, but certainly the limited partnership act allows this.[16]

In one set of circumstances, however, it seems rather clear that all rational investors (looking at the matter *ex ante*) would elect to restrict access. That is when it is clearly established (by some reliable process) that the access will actually hurt the value of the joint investment. People will disagree perhaps when it is the case that access will harm or risk harm to the joint investment, but accepting both that the negotiators do trust some *ex post* process for determining it and assuming that they don't know *ex ante* whether or not they will be the investors with a private motivation (private gain) to seek such jointly hurtful access, there is little reason to suppose that they would not agree that access for an improper purpose should be restricted. Trust of the process is not a small matter, since the gatekeeper, if it is an interested party, may well have an incentive to restrict access in the name of protecting joint investment when in fact it seeks to protect only managerial control. Thus one cannot assume that rational negotiators would confer on managing partners discretion to determine what access would threaten harm to joint investment.

If I ask the question *Katz* suggests in the context presented here, that is had the parties to the Partnership agreements thought to address the subject at the time of the formation of the entities, would they have agreed that access to Partnership information should be afforded to a partner in order to facilitate his attempt to replace the Partnership in its sole activity, only one answer is possible.[17]

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[16]With respect to Delaware limited partnerships, Section 17-403 of title 6 of the Delaware Code provides that general partners have the rights of partners in general partnerships "[e]xcept as provided . . . in the partnership agreement."

[17]The analysis would be no different, I conclude, though perhaps a bit less obvious, if one asks whether access should be provided to enable one partner to facilitate an attack upon

[5] In the absence of an explicit contractual provision or statutory language to the contrary, and in circumstances in which, as here, a partner denying another partner access to partnership business records can show that the partner seeking access is doing so for a purpose personal to that partner and adverse to the interests of the partnership considered jointly, the court is warranted in denying the request for access.

I note that I consider this matter entirely from the perspective of the partnerships, because it is in the capacity of a partner in those entities that Mr. Schwartzberg sues. The rights of the BACS holders are not of concern to me at this juncture, although, as mentioned, there is a pending class action in this court in which the rights of those persons are the central concern.

In the circumstances presented, I find the defendants warranted in their refusal to disclose to plaintiff the information he requested. Plaintiff's request for relief is therefore denied.

TAYLOR v. LSI LOGIC CORP.

No. 13,915

Court of Chancery of the State of Delaware, New Castle

June 21, 1996

Following a majority shareholder's buyout, the plaintiff, a former minority shareholder, brought suit individually and on behalf of the other former minority shareholders alleging that the majority shareholder breached its fiduciary duty to the minority shareholders. Plaintiff then filed an amended complaint to expedite proceedings. The defendants moved to dismiss the amended complaint on three grounds: (1) the doctrine of *forum non conveniens*, (2) plaintiff failed to plead a colorable

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a merger negotiated by the general partner of CRITEF III Associates and by the managing partners of CRITEF Associates. Since none of the original negotiators could know originally whether they would be dissenters or not it is I suppose unlikely that they would have agreed to a provision designed to facilitate costly disputes.

claim under Canada law, and (3) plaintiff cannot establish she will suffer irreparable harm.

The court of chancery, per Vice-Chancellor Steele, granted the motion to dismiss, holding that the doctrine of *forum non conveniens* is appropriate where the sole connection any party has with Delaware is the defendant's place of incorporation. The court of chancery did not address the defendant's assertions that the plaintiff failed to plead a colorable claim or that the plaintiff cannot establish that she will suffer irreparable harm.

1. Pretrial Procedure ⚷ 681

On a motion to dismiss, Delaware courts only consider those matters which the parties refer to in the pleadings.

2. Pretrial Procedure ⚷ 687

On a motion to dismiss, Delaware courts will consider all plead facts to be true and will draw all inferences in the light most favorable to the nonmoving party.

3. Pretrial Procedure ⚷ 689

On a motion to dismiss, Delaware courts will not accept conclusory allegations as true.

4. Pretrial Procedure ⚷ 624

Delaware courts will not dismiss a complaint unless it appears to a reasonable degree of certainty the plaintiff would not be entitled to relief under any set of facts which the plaintiff could prove in support of the claim.

5. Courts ⚷ 28

When addressing a motion to dismiss based on *forum non conveniens*, Delaware courts consistently uphold a plaintiff's choice of forum except in the rare case where the defendant establishes overwhelming hardship and inconvenience.

6. Courts ⟹ 28

In making the *forum non conveniens* analysis, a court weighs the following six factors: (1) the applicability of Delaware law; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency of a similar action or actions in another jurisdiction; (5) the possibility of a view of the premises if appropriate; and (6) all other practical consideration which would make the trial easy, expeditious, and inexpensive. A defendant has the burden to prove the combination and the weight of the factors to be considered balance overwhelmingly in favor of the defendant.

7. Corporations ⟹ 640

The internal affairs doctrine requires that Delaware courts apply the law of the place of incorporation in determining the matters of substantive law concerning the internal affairs of a corporation.

8. Corporations ⟹ 638

Canadian courts should interpret the public policy of Canada where the inter-corporate relationships are entirely a creature of the law of the foreign jurisdiction.

9. Courts ⟹ 29

While Delaware courts have the ability to interpret the policy underlying the statute of another country, it is altogether a different matter to conclude Delaware should interpret that policy in the absence of any meaningful tie to this jurisdiction.

10. Courts ⟹ 29

Delaware should decline to entertain litigation where plaintiff's choice of forum is only predicated on the fact that Delaware is the majority shareholder's state of incorporation.

11. Courts ⟹ 28

In a motion to dismiss for *forum non conveniens*, the absence of an action in an appropriate jurisdiction does not control.

Joseph A. Rosenthal, Esquire, and John G. Day, Esquire, of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware; H. Adam Prussin, Esquire, of Silverman, Harnes & Harnes, New York, New York, of counsel; and Berman, DeValerio, Pease & Tabacco, San Francisco, California, of counsel, for plaintiff.

R. Franklin Balotti, Esquire, and Robert Stearn, Jr., Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Dennis J. Block, Esquire, and Michael J. Maimone, Esquire, of Weil, Gotshal & Manges, New York, New York, of counsel, for defendant.

STEELE, *Vice-Chancellor*

CONTENTIONS OF PARTIES

Plaintiff, Ethel Taylor ("Taylor"), is a public shareholder of LSI Logic of Canada, Inc., ("LSI Canada"). Plaintiff alleges Defendant, LSI Logic Corporation ("LSI") a Delaware corporation, breached its fiduciary duty as a majority shareholder of LSI Canada to LSI Canada's minority shareholders.

Plaintiff brought this action individually and on behalf of LSI Canada's former minority shareholders. Plaintiff filed an Amended Complaint and moved to expedite proceedings. This Court declined to expedite on June 9, 1995.

Defendant moves to dismiss the Amended Complaint on three grounds. First, LSI contends this Court should dismiss the Amended Complaint based on the doctrine of *forum non conveniens*. Second, LSI alleges plaintiff has failed to plead a colorable claim under Canada law. Third, LSI insists this Court should deny Plaintiffs request for injunctive relief, because Plaintiff cannot establish she will suffer irreparable harm.

BACKGROUND

LSI is a Delaware corporation with its headquarters in Milpitas, California. LSI primarily engages in the design, development, manufacture, and marketing of customized, integrated circuit products. LSI owned approximately 55 percent of LSI Canada's outstanding common stock at the time Plaintiff brought this action.

LSI Canada is incorporated under the law of Canada with its headquarters in Calgary, Alberta. LSI Canada designs computer systems for its Canada customers.

On November 29, 1994, LSI publicly announced it intended to purchase the remaining 45 percent of LSI Canada's common stock for $3.30 (Canadian) per share. The announcement also included a plan to terminate all of LSI Canada's design and manufacturing operations and to convert LSI Canada into a distributor of LSI's products in Canada. None of the proposed negotiations or transactions took place in Delaware or implicated Delaware law.

After LSI's announcement, LSI Canada's outside directors hired ScotiaMcLeod, an investment banking firm, to perform a valuation of LSI Canada's common stock. ScotiaMcLeod concluded LSI Canada's shares were worth more than LSI's $3.30 (Canadian) per share offer. On February 3, 1995, LSI announced it had suspended plans to purchase LSI Canada's common stock because of substantial differences of opinion regarding the value of the stock.

On May 2, 1995, LSI revised its tender offer and announced it was offering LSI Canada's minority shareholders $4.00 (Canadian) per share.

The Offer to Purchase, ("the Offer") disclosed the Offer was conditional on LSI Canada tendering at least 30.3 percent of LSI Canada's common stock and not withdrawing them.[18] The Offer remained opened until July 6, 1995.

The Offer announced LSI would (1) eliminate all of LSI Canada's independent design and manufacturing functions; (2) convert LSI Canada into a distributor of LSI products; and (3) use this downgrading of LSI Canada's business as a justification for raising drastically the "transfer" prices it charges LSI Canada for computer systems and other products.

The Offer also revealed ScotiaMcLeod's valuation of LSI Canada's stock. The valuation indicated the shares were worth between $4.90 and $5.90 (Canadian) per share.[19]

LSI Canada issued its response to the Offer in the "Directors' Circular" which states in pertinent part:

> The Independent Committee concludes that the Proposed Offer does not reflect the fair market value of the Shares. Nonetheless ... the Independent Committee believes that

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[18]The 30.3 percent LSI Canada tendered is approximately 66.6 percent of the common shares which LSI does not own.

[19]LSI hired Prudential which reviewed ScotiaMcLeod's valuation methodologies. Prudential employed a comparable company capitalization approach. It advised LSI the reasonable value would was between $2.99 to $3.37 (Canadian) per share.

> is will be increasingly difficult for LSI Canada to diversify its business activities or to resist the intention of LSI to operate LSI Canada under its global business model and to implement the proposed transfer pricing arrangements, which the Independent Committee believes will materially reduce the profitability of LSI Canada.
>
> On that basis, the Independent Committee recommends to the Board that it recommend that Shareholders review these factors and seriously consider accepting the Proposed Offer.

Subsequently, LSI Canada's shareholders, including Plaintiff, tendered their shares. The shareholders tendered approximately 10.1 million shares. LSI Canada purchased the remaining 1.6 million shares outstanding through a 1.6 million-to-one reverse stock split that cashed out the public's shares at $4.00 (Canadian) per share.

CONCLUSIONS OF LAW

Standard of Review for Motion to Dismiss

[1-4] On a motion to dismiss, Delaware courts only consider those matter which the parties refer to in the pleadings. ***James River-Pennington Inc. v. CRSS Capital, Inc.***, Del. Ch., C.A. No. 13870, Steele, V.C. (Mar. 6, 1995), Mem. op. at 9 *(citing **Hart Holding v. Drexel Burnham Lambert***, Del. Ch., 593 A.2d 535, 538 (1991)). Delaware courts will consider all plead facts to be true and will draw all inferences in the light most favorable to the nonnoving party. ***Id.*** at 10 (*citing **Grobow v. Perot***, Del. Supr., 539 A.2d 180, 187 n.6 (1988)). However, a court will not accept conclusory allegations as true. ***Id.*** Delaware courts will not dismiss a complaint unless it appears to a reasonable degree of certainty the plaintiff would not be entitled to relief under any set of facts which the plaintiff could prove in support of the claim. ***Id.*** (*citing **Rabkin V. Philip A. Hunt Chem. Corp.***, Del. Supr., 498 A.2d 1099, 1104 (1985); ***In re USACafes, L.P. Litig.***, Del. Ch., 600 A.2d 43, 47 (1991)).

Motion to Dismiss the Amended Complaint based on *Forum Non Conveniens*

[5-6] Defendant claims this Court should dismiss the Amended Complaint based *on forum non conveniens*. In addressing a motion to dismiss an amended complaint based on *forum non conveniens*, Delaware courts consistently uphold a plaintiff s choice of forum except in the rare case where the defendant establishes overwhelming hardship and inconvenience. ***Chrysler First Business Credit Corporation v. Locust Limited Partnership***, Del. Supr., 669 A.2d 104, 105 (1995) (*citing* ***General Foods Corp v. Cyro Maid, Inc.***, Del. Supr. 198 A. 2d 681 (1964)).

In making the forum non conveniens analysis, a court weighs six factors:

(1) the applicability of Delaware law;
(2) the relative ease of access to proof,
(3) the availability of compulsory process for witnesses;
(4) the pendency or non-pendency of a similar action or actions in another jurisdiction;
(5) the possibility of a view of the premises, if appropriate; and
(6) all other practical considerations which would make the trial easy, expeditious, and inexpensive.

Harbor Finance Partners v. Sunshine Mining and Refining Company, Del. Ch., C.A. No. 14159, Steele, V.C. (February 16, 1996), Mem. op. at 6-7. A defendant has the burden to prove "the combination and the weight of the factors to be considered balance *overwhelmingly* in favor of the defendant." (emphasis added) ***Macklowe v. Planet Hollywood, Inc.*** Del. Ch., C.A. No. 13689, Steele, V.C. (Oct. 4, 1994) Mem. op. at 8 (*citing* ***Miller v. Phillips Petroleum Co. Norway***, Del. Supr., 537 A.2d 190, 202 n.24 (1987) (*quoting* ***Kolber v. Holyoke Shares, Inc.***, Del. Supr., 213 A.2d 444, 447 (1965)).

1. The Applicability of Delaware Law

[7] Plaintiff concedes Canada law applies. According to the *internal affairs doctrine*, this Court must apply the law of the place of incorporation (Canada) in determining the matters of substantive law concerning the internal affairs of a corporation. ***McDermott Inc. v. Lewis***, Del. Supr., 531 A.2d 206 (1987). Here, the law of Canada, not

Delaware controls. Accordingly, this factor weighs in favor of LSI's Motion to Dismiss the Amended Complaint.

2. The Relative Ease of Access to Proof

LSI must establish litigating in Delaware would cause inconvenience in accessing sources of proof. ***Kolber v. Holyoke Shares, Inc.***, Del. Supr., 213 A.2d 444, 446 (1965). LSI argues all sources of proof are located either in California or Canada making Plaintiff's choice of a Delaware forum inconvenient. One fact is clear -- none of the sources of proof for any contention are located in Delaware.

Plaintiff responds LSI has failed to demonstrate this case involves a large number of documents and records. Plaintiff contends the mere absence of sources of proof in Delaware fails to establish proceeding in Delaware as opposed to California or Canada would be any more inconvenient.

LSI itself, a Delaware Corporation, cannot reasonably argue surprise at the inconvenience of litigating in its corporate home. However, the factual focus of this case is on the value of the shares of a Canada corporation and the actions of a Delaware corporate majority shareholder effecting that share value. I can see no clear advantage nor clear disadvantage in access to evidence by litigating in any one of the three jurisdictions as opposed to another.

3. The Availability of Compulsory Witnesses

LSI argues it would be difficult for a Delaware court to issue compulsory process to the directors and officers of LSI Canada who are potential non-party witnesses for this action. Defendant cites ***Sumner Sports Inc. v. Remington Arms Co.***, Del. Ch., C.A. No. 12508, Chandler, V.C. (Mar. 4, 1993), Mem. op. at 10 to support its contention. In ***Sumner Sports Inc.***, this Court found it would be difficult to issue compulsory process to foreign nationals or officials of Canada corporations. This is so especially where the claims against the foreign defendants do not arise out of business transacted in Delaware. ***Id.***

Plaintiff argues LSI has no basis for alleging any difficulties in securing compulsory process. Plaintiff contends the only witnesses needed to testify in this case are LSI's own employees. I disagree. Plaintiff alleges LSI's offer was coercive. In order to support her allegation, Plaintiff would undoubtedly need LSI Canada's employees' and/or Directors' testimony to resolve this dispute.

The Plaintiff complains of actions of a Delaware corporation acting as a majority shareholder of a Canada corporation. Obviously Canada courts would find it easier to serve process to the necessary witnesses in Canada in order to determine whether Plaintiff s allegations have merit. This factor weighs in favor of Defendant's Motion to Dismiss.

4. The Possibility of Viewing the Premises

This factor is irrelevant.

5. The Pendency of Similar Actions

There is an action pending in California focusing on the same subject matter, but the Delaware action is the first filed action. LSI stayed the later filed action in California pending disposition of this case. [8-9] While I recognize no suit is pending in Canada at this time, Canada courts should interpret the public policy of Canada where the inter-corporate relationships are entirely a creature of the law of the foreign jurisdiction. ***Taylor v. LSI Logic Corporation***, Del. Ch., C.A. No. 13915-NC, Steele, V.C. (June 19, 1995), Letter Op. at 4. Canada's courts have broad statutory authority to address the alleged oppression of minority shareholders. One critical element seems to be missing -- - Canada law does not recognize the broad range of discretion granted to Delaware courts to award attorneys' fees. While Delaware courts have the ability to interpret the policy underlying the statute of another country, it is altogether a different matter to conclude Delaware *should* interpret that policy in the absence of any meaningful tie to this jurisdiction.

Plaintiff contends Delaware is the appropriate forum for resolving this matter. I disagree. This case involves the application of an aggressive Canada law to a transaction that occurred in Canada. I conclude this Court should take interest in issues focusing on the *internal* affairs of Delaware corporations. The same aggressive stance rings hollow when the sole role played by a Delaware interest is a Delaware corporation acting as a majority shareholder in a foreign corporation where the foreign jurisdiction's laws and courts contain rights, remedies and access to process equal to or broader than our own. Ironically, the sole Delaware player in the current tactical game opposes litigation on its own home field. Although it is not unusual for Delaware courts to deal with open questions of the law of sister states or of foreign countries, ***Kolber v. Holyoke Shares, Inc.***, De. Supr., 213 A.2d 444, 446 (1965),

I find a Canada court would be a more appropriate forum for adjudicating Canada's statutory policy. On the facts of this case, Canada can better interpret its own statutory law, legislative history, and policy rationales.

6. All Other Practical Considerations Which Would Make the Trial Easy, Expeditious and Inexpensive

[10] Finally, in order to facilitate, to expedite, and to economize costs in this case, Delaware should decline to entertain this litigation. Plaintiff is a Canada citizen who owned shares in a Canada corporation. Her allegations are based on the Canadian Business Corporation Act and the Ontario Securities Act. Delaware has no interest in resolving this dispute between a minority shareholder of a foreign corporation and a Delaware corporation which happens to be the majority shareholder in the foreign corporation. This is not a case where a plaintiff is suing derivatively on behalf of a Delaware corporation. Rather, Plaintiff's choice of forum is only predicated on the fact Delaware is the majority shareholder's state of incorporation.

Although LSI is a Delaware corporation, none of the transactions occurred in this state. The scope of LSI's fiduciary duties to LSI Canada and/or its minority shareholders are defined by Canada law and should be interpreted by a Canada court. All the disclosures concerning the Offer took place in Canada. It is not in the best interest of this Court to allow this case to proceed in Delaware when Canada courts have the resources and knowledge to resolve this matter efficiently and effectively. It simply makes sense to conclude Canada's courts have a greater interest in the outcome of this case and that they should resolve the application of Canada laws to a Canada corporation and its investors.

CONCLUSION

[11] Based on the foregoing analysis, I conclude this action should not proceed in Delaware. It may well be unusual to find a forum where no suit is pending to be a more appropriate forum for resolving an intra corporate dispute. However, the absence of an action in Canada does not control. *See* ***Williams Gas Supply v. Apache Corp.***, Del. Super., C.A. No. 90C-AU-1, Babiarz, J. (Feb. 12, 1991), *aff'd*, Del. Supr., 594 A.2d 3 (1991). The overwhelming practical considerations suggest Delaware is not an appropriate forum where the sole connection any party has with Delaware is the Defendant's place of incorporation. The complaint is dismissed based upon the doctrine of *forum non conveniens*. In reaching

this conclusion, I do not need to address the assertions that Plaintiff failed to plead a colorable claim under Canada law nor that the sweeping statutory remedies afforded her under Canada law prohibit any rational conclusion she faces irreparable injury. The complaint is dismissed.

IT IS SO ORDERED.

US WEST, INC. v. TIME WARNER INC.

No. 14,555

Court of Chancery of the State of Delaware, New Castle

June 6, 1996

Plaintiff, a limited partner, commenced suit seeking an injunction preventing defendant, the controlling general partner, from acquiring, through merger, ownership of another corporation, Turner Broadcasting System (TBS). Plaintiff asserted that because their limited partnership agreement precluded any partner from competing with the partnership, the defendant was not authorized to continue with this transaction. Plaintiff also asserted that because the defendant was a controlling general partner, the defendant owed a duty of loyalty to their limited partnership. Finally, plaintiff asserted that defendant misled it into entering into the partnership by failing to inform it of defendant's interpretation which allowed defendant to acquire control of TBS. Defendant contended that the language of the agreement both on its face and when read in context with the negotiations was inconsistent with plaintiff's claim. The defendant also asserted that this acquisition involved no breach of loyalty or fraud.

The court of chancery, per Chancellor Allen, concluded that plaintiff failed to establish facts entitling it to the relief sought. Therefore, the claims asserted by plaintiff were dismissed with prejudice because: (1) the defendant retained the right under amended section 5.5 of the Limited Partnership Agreement to increase its ownership stake in TBS, (2) the defendant did not mislead plaintiff in that connection and defendant's failure to disclose to plaintiff the Hersh memorandum was neither intentional nor actionable; and (3) the exercise of the legal right

to increase its stake in TBS, as contemplated by the agreement of merger, would not itself constitute a violation of the fiduciary duty of loyalty owed by the defendant to the limited partnership and to the plaintiff, as a limited partner.

1. Federal Civil Procedure ⚷ 1042, 1043, 1044, 2124
Pleading ⚷ 343, 344

When a motion for judgment on the pleadings is filed, the court may exercise discretion by reserving decision on it in order to permit the creation of an evidentiary record at trial where there lies a risk that a trial might be required on remand of an appeal of that decision.

2. Contracts ⚷ 143(1)

In construing the meaning of written contracts, the court's first obligation to the parties is to determine the nature and scope of the contractual rights and obligations they created, which will often be the primary issue to resolve, and to enforce those rights and obligations in accordance with law. The "accordance with law" condition is meant to incorporate all of the law dealing with defenses and remedies that a court should consider in enforcing a contract.

3. Contracts ⚷ 147(1)

The court's ultimate guide in determining those legal entitlements is to attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted.

4. Contracts ⚷ 143(1), 147(1), 147(2), 152
Evidence ⚷ 448

The primary rule of construction is this: where the parties have created an unambiguous integrated written statement of their contract, the language of that contract as understood by a hypothetical reasonable third party will control. This first principle might be referred to as the clear meaning rule.

5. Contracts ⚷ 147(1), 152

This first principle is an assessment of whether the reasonable expectations of the parties are convincingly established by the words of

the contract standing alone — the language being so unequivocal that no reasonable person could have expectations inconsistent with such language.

6. Contracts ⟹ 147(1)

The clear meaning rule helps deal with the problem of unforeseen circumstances, making them irrelevant. If contracting parties, mindful of their imperfect information about the future, draft procedural or substantive default terms designed for unforeseen circumstances, such mechanisms are enforceable under the clear meaning rule if they are clearly set forth.

7. Contracts ⟹ 143(2), 169

The clear meaning rule, the first principle of contract interpretation, will not resolve all cases.

8. Contracts ⟹ 143(2), 169, 170(1)
Evidence ⟹ 448

The second principle of contract interpretation, the parol evidence rule, holds that where the language of a written integration is susceptible to more than one reasonable interpretation, the court will consider proffered admissible evidence bearing upon the objective circumstances relating to the background of the contract. Such evidence may include statements made during the course of the negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry.

9. Contracts ⟹ 169
Evidence ⟹ 448

These extrinsic sources of contextual information may permit a court to ascribe a single "correct" or single "objectively reasonable" meaning to a contract term that appears on its face capable of two or more inconsistent interpretations. That is, a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstance of this negotiation.

10. Contracts ⚷ 169, 170(1)
Evidence ⚷ 448

Where a hypothetical contract may be identical in material respects to a series of earlier contracts between the same parties in which performance of a particular type was tendered and accepted, that prior history will demonstrate what an objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be if the operative language in all of those contracts was and is ambiguous. It is that reasonable understanding that a court will enforce.

11. Contracts ⚷ 169, 170(1)
Evidence ⚷ 448

The parol evidence rule guides a court with respect to the materials from which it will define the nature and scope of contractual obligations, but it does not specify in what way the court will use those materials in making such determinations.

12. Contracts ⚷ 170(1)

If the inference from the prior course of dealing is so powerful, then the logical operation employed in determining what an hypothetical bargainer would understand the ambiguous words to mean receives little attention.

13. Contracts ⚷ 147(1), 170(1)

The process through which a court determines the existence and scope of legal rights and duties where contract language is ambiguous and the prior course of dealing is not so obvious is structured through the third principle of contract law. This third principle holds that only an objectively reasonable interpretation that is in fact held by one side of the negotiation and which the other side knew or had reason to know that the first party held can be enforced as a contractual duty.

14. Contracts ⚷ 147(1)

This third principle is capable of resolving disputes arising from ambiguous contract language because it is logically impossible for a contracting party, operating in good faith, both to have a subjective

interpretation of ambiguous language different from that of her counterparty and to know of her counterparty's differing interpretation.

15. Contracts ⟹ 143(2), 170(1)

While the subjective understanding of a contracting party is not ordinarily a relevant datum in determining the existence and scope of contractual obligation, where ambiguity in contract language is not easily resolvable by extrinsic evidence, it may be necessary for the court, in considering alternative reasonable interpretations of contract language, to resort to evidence of what one side in fact believed the obligation to be, coupled with evidence showing that the other party knew or should have known of such belief. This last principle of contract construction might be called the forthright negotiator principle.

16. Contracts ⟹ 15
Evidence ⟹ 448

If extrinsic evidence does not make it clear which alternative interpretation of ambiguous contract language was intended by the parties to define their respective rights and duties, and neither party knew or had reason to know of the reasonable, differing interpretation held by its counterparty then, inescapably, the parties have failed to contract on that subject and no contractual rights and duties have been created.

17. Contracts ⟹ 15
Torts ⟹ 3

What rights and duties may arise in such a circumstance may present a complex question of the law of tort or of restitution, but the remedies will not strictly speaking be contractual.

18. Contracts ⟹ 152, 162

While redundancy is sought to be avoided in interpreting contracts, this principle of construction does not go so far as to counsel the creation of contract meaning for which there is little or no support in order to avoid redundancy.

19. Contracts ⟹ 143(2), 152
Evidence ⟹ 448
Pleading ⟹ 350(3)

Although defendant's interpretation of the relevant contract language represented the better technical interpretation, based upon the written words of the contract alone, neither party's interpretation presents a convincing case of being the single reasonable interpretation of the language. For this reason, defendant's motion for judgment on the pleading is denied, and the court must review the evidence illuminating the evolution of the amended provision.

20. Contracts ⟹ 143(1), 175(1)

Where a party is negotiating the terms upon which it seeks admission to an ongoing partnership, it should, absent deliberate manipulation and in the presence of partnership terms whose legal meaning is not entirely clear, be held to know that which a reasonable investigation would show concerning the accepted understanding of provisions governing the partnership.

21. Contracts ⟹ 147(1), 170(1), 170(2), 175(3)

Where plaintiff entered an ongoing partnership with knowledge that under the agreement defendant possessed rights to acquire additional stock in TBS (and the exercise of those rights could, under some set of circumstances, cause defendant to control TBS), was told by defendant's executives that defendant had to maintain sufficient financing flexibility to exercise those rights, and that any TBS assets that defendant may come to control, that were within the scope of the limited partnership's business, would be offered, and where plaintiff did not make an affirmative effort to understand the interpretation of the ambiguous section of the agreement, it knew or should reasonably have known that defendant reasonably believed itself entitled to increase its TBS stake.

22. Contracts ⟹ 147(1), 170(1)

Defendant had no ground to reasonably understand plaintiff's proffered understanding that the agreement prohibited defendant from increasing its investment in TBS where plaintiff gave no objective indication of such an understanding.

23. Contracts ⟹ 143(1), 170(1)

The interpretation of the disputed section of the partnership agreement advanced by defendant succeeded in identifying the contractual rights and duties created by the parties where: (1) the agreement is capable of alternative reasonable constructions; (2) the reasonable reading put forward and relied upon by defendant is one that plaintiff knew at the time, and in all events, should have known of given the circumstances; and (3) that the alternative construction advanced by plaintiff was not understood, nor should it have been understood by the defendant.

24. Corporations ⟹ 325
Partnership ⟹ 70, 366

The equitable obligation imposed upon fiduciaries in circumstances of trust and dependency extends to the defendant as the entity that controls the limited partnership, even though it does so through the intermediation of several wholly owned subsidiaries that serve as the general partners of that enterprise.

25. Partnership ⟹ 70, 366

At the core of the fiduciary duty is the notion of loyalty — the equitable requirement that, with respect to the property subject to the duty, a fiduciary always must act in a good faith effort to advance the interests of his beneficiary.

26. Corporations ⟹ 307

Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision.

27. Corporations ⟹ 307, 316(1)

The duty of loyalty requires a fiduciary to refrain from self-interested transactions with the corporation unless the terms of such transaction are entirely fair.

28. Corporations ⟹ 310(1), 314(2)

The duty of loyalty requires that corporate fiduciaries not prefer their own interests to corporate interests even in transactions in which neither the fiduciary nor an affiliate is a participant.

29. Corporations ⟹ 310(1)

The duty of loyalty requires candid disclosure when a fiduciary seeks action by *cestui que trusts*.

30. Corporations ⟹ 310(1)

The duty of loyalty mandates that those in control of corporate processes do not unfairly manipulate those processes to retain such control.

31. Corporations ⟹ 315

The fair treatment that a fiduciary owes to his beneficiary includes the obligation not to take for oneself profitable opportunities that come to the beneficiary under certain sets of circumstances.

32. Partnership ⟹ 70, 366

The fiduciary duty of loyalty may be argued to prohibit defendant from acquiring a competitor of the limited partnership, even assuming that the partnership agreement does not do so.

33. Partnership ⟹ 70, 366

The principles of fiduciary loyalty upon which the corporate opportunity doctrine was erected apply analogously to partnership fiduciaries.

34. Partnership ⟹ 71, 366

Partnerships are amenable to greater freedom to contractually shape the set of legal relationships that constitute partnership than are corporations.

35. Partnership ⇐ 71, 366

The greater contractual freedom partnerships enjoy to shape the set of legal relationships that constitute the partnership may include clear contracting with respect to fiduciary duties. DEL. CODE ANN. tit. 6, § 17-406 (1993).

36. Corporations ⇐ 39, 40
Partnership ⇐ 366

Under Delaware law, all forms of business organization that entail passive investors and active managers permit parties at the time of contracting to specify a great deal bearing on the exercise of managerial power, and passive investors in all forms of enterprise have a powerful incentive, insofar as self-interested transactions by the managers are involved, to retain the possibility of later judicial review under a fairness standard.

37. Partnership ⇐ 71, 366

The underlying principles of fiduciary analysis in both the corporate and the partnership context reflect a similar principle: given no defect in process, explicitly negotiated and validly adopted provisions of a constitutional document will be enforced.

38. Corporations ⇐ 315

The fundamentals of misappropriation of a corporate opportunity may be stated as follows: is the opportunity in the line of business of the corporation or other entity to whom the duty is owed; would the opportunity be advantageous to the entity; does the entity have the means to take advantage of the opportunity; and will taking the opportunity bring an officer or director into conflict with the entity?

39. Fraud ⇐ 3, 16, 17

The elements of fraud are well established: plaintiff must show that defendant (1) made a false statement or omitted to disclose a fact under circumstances in which it had a duty to make disclosure (2) with an intent to deceive plaintiff, and (3) the matter falsely stated or omitted was material to plaintiff (4) who reasonably relied upon it (5) to his detriment.

40. Fraud ⇐ 4

Plaintiff failed to prove the element of intent to defraud where defendant's omission to disclose memorandum, which was a written manifestation of its interpretation of the partnership agreement, is explained by oversight and miscommunication. Defendant's agents reasonably assumed that plaintiff's financial advisor, who was privy to the memorandum, had shared the original parties' understanding concerning the agreement.

41. Contracts ⇐ 94(1), 94(3)
Fraud ⇐ 4, 6

Under a theory of equitable fraud, a court of equity may give relief to a party who has reasonably relied upon a false statement to his detriment. Notably missing from the equitable fraud concept is a requirement to establish scienter as a necessary element of the claim.

42. Contracts ⇐ 94(1)
Equity ⇐ 21, 23, 43
Fraud ⇐ 6, 7

Equitable fraud can only be applied in those cases in which one of the two fundamental sources of equity jurisdiction exist: (1) an equitable right founded upon a special relationship over which equity takes jurisdiction, or (2) where equity affords its special remedies, i.e., rescission or cancellation.

43. Contracts ⇐ 94(1)
Fraud ⇐ 7
Partnership ⇐ 20, 25, 98

The special relationship prong of equitable jurisdiction is not present in plaintiff's claim of fraud in the inducement of the relationship where the negotiations were between arm's-length bargainers of great sophistication.

44. Contracts ⇐ 94(2), 94(3), 94(5)
Partnership ⇐ 98

The court will not impose under the equitable fraud rubric an equitable remedy that would be the functional equivalent of implying and

specifically enforcing a covenant by defendant not to exercise what is otherwise a reserved right when the failure to disclose the memorandum resulted from excusable neglect or innocent misunderstanding and plaintiff forwards a dubious claim of reliance and materiality.

A. Gilchrist Sparks, III, Esquire, Kenneth J. Nachbar, Esquire, Alan J. Stone, Esquire, Donna L. Culver, Esquire, David J. Teklits, Esquire, and S. Mark Hurd, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for plaintiffs.

Charles F. Richards, Jr., Esquire, Anne C. Foster, Esquire, and Raymond J. DiCamillo, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Robert D. Joffe, Esquire, Rory O. Millson, Esquire, and Sandra C. Goldstein, Esquire, of Cravath, Swaine & Moore, New York, New York, of counsel, for defendants.

ALLEN, *Chancellor*

Increasingly, large scale business projects are undertaken in legal forms that, through complex contracting, allow for joint corporate investment and for specified allocation of managerial authority. Such forms offer evident advantages: access to capital, to specialized knowledge and relationships, and potentially to operating synergies. But, because the participants in such joint venture projects often have important investments in related businesses held outside the joint venture structure, the venturers will not have identical incentives in all future situations. Such differing incentives will in time lead to costly disputes unless the contractual document establishing the venture at the outset clearly resolve particular disputes in a way the parties accept later, when these differences arise.[20] This case is an example of the kind of contractual problems that this organizational form can generate.

The joint venture involved is Time Warner Entertainment, ("TWE") a Delaware limited partnership that engages in a range of businesses including entertainment, cable television, telephony and related fields. Time Warner, Inc., a Delaware corporation, indirectly owns a 74.49% interest in TWE and, through subsidiaries, acts as its managing

[20]In its standard form the publicly financed corporation, with its centralized management and diversified (rationally passive) investors, reduces these costs. The publicly financed corporate form of course has other much discussed characteristic costs associated with having centralized management and disaggregated shareholders.

partner. US WEST, Inc., a Delaware corporation, owns a 25.51% limited partnership interest and possesses certain management rights. This suit by US WEST, Inc, (with its affiliates hereafter referred to as "US WEST") seeks an injunction against Time Warner, Inc., (hereafter, together with its relevant affiliates, referred to as "Time Warner" or "TWI") preventing Time Warner from acquiring, through merger, ownership of Turner Broadcasting System, Inc. ("TBS"), a Georgia corporation. TWI has for some years owned a substantial minority interest in TBS and is now party to an agreement by which it plans to acquire all of the stock of that company.

I.

A. Overview of the Parties' Positions

In seeking this relief US WEST asserts claimed rights under the 1993 Admission Agreement through which it invested approximately $2.5 billion in TWE in exchange for its limited partnership interest and other rights. While TWE originally had two other limited partners (the "Original Limited Partners"), by the time this suit was initiated those investors had exchanged their limited partnership interest in TWE for stock in Time Warner itself, leaving US WEST as the sole limited partner of TWE.

In support of the requested relief it is alleged that Section 5.5 of the 1991 TWE Limited Partnership Agreement (as amended and restated by the 1993 Admission Agreement) precludes any partner from competing with the partnership in the business of producing and distributing video programming and filmed entertainment products, subject to certain stated exceptions. US WEST asserts that TBS does complete in these businesses and that no exception to the non-competition provision authorizes Time Warner to engage in these businesses indirectly through the ownership of TBS. Furthermore, given the unique nature of its interest in TWE and the on-going nature of the threat to the welfare of TWE that US WEST perceives that a TWI-TBS transaction represents, plaintiff asserts that a grant of an injunction is appropriate.

Beyond the theory predicated on a breach of amended Section 5.5 of the Partnership Agreement, US WEST also asserts a second ground for relief. That claim is that TWI as a controlling general partner owes a duty of loyalty to TWE. That duty, it is said, includes the obligation not to compete with TWE in its lines of business and the duty not to take, on its own or through other entities (in which it may have a higher proportion of the equity -- as would be the case with TBS), business

opportunities that fall within TWE's line of business and that it is able to finance undertaking. Yet if the TBS acquisition is permitted to go forward, according to US WEST, TWI will be placed in the impossible position of a fiduciary running competing businesses for different sets of investors. This problem is especially acute, according to US WEST, because TBS has changed in significant respects since the Admission Agreement was negotiated; it now owns, as it previously did not, two movie studios (New Line Cinema and Castle Rock Entertainment, Inc.) which will compete frontally with TWE's Warner Brothers Studios. Thus, US WEST claims that even if the non-competition provisions of the restated partnership agreement were deemed not to prevent this acquisition, Time Warner's duty of loyalty as a fiduciary must be deemed to do so.

Finally US WEST asserts that Time Warner has deliberately mislead it by (1) failing to disclose to it an informal representation given at the time the Original Limited Partners entered into the Partnership Agreement to afford to TWE an option to acquire TBS from TWI at its fair market price, in the event that TWI thereafter acquired control of TBS, and (2) failing to inform it that Time Warner understood that Section 5.5 and Schedule 5.5 permitted TWI to acquire control of TBS without the prior consent of US WEST.

In response to the first of these assertions, Time Warner concurs that in general the partners of TWE are bound by Section 5.5(a) of the amended Partnership Agreement not to compete with TWE in either the cable television business (called "Co-managed Businesses" in the Admission Agreement) or the programming or filmed entertainment businesses, but it asserts that exceptions to that prohibition originally stated in the 1991 Partnership Agreement and preserved the 1993 amendment of Section 5.5 nevertheless authorize the TBS acquisition. Thus, Time Warner most basically asserts that the language of the amended Partnership Agreement both on its face and when read in context of the relevant negotiations is inconsistent with plaintiffs' claim.

With respect to the argument that a fiduciary duty to TWE or US WEST prevents or should in equity prevent it from accomplishing the planned transaction, TWI asserts first that the contract itself specifically treats the subject and that, under general principles, there is therefore no room for implying other obligations. Secondly, TWI asserts that the acquisition of TBS involves no breach of loyalty in any event. Assuming that its contract does permit the exercise of a power to increase its ownership of TBS, Time Warner says that it ought not to be presumed to be unable to operate TBS and TWE in a way that is wholly fair to the minority investor in TWE. Its dual role may present it with management

challenges, but there are, it asserts, some tools available for dealing with them. First, not all programming or film opportunities that come or will come to TBS will be properly deemed opportunities of TWE. *Broz v. Cellular Info. Systems, Inc.*, Del.Supr., 673 A.2d 148 (1996). Second, US WEST might consent to the allocation of a business opportunity to which TWE might claim entitlement. Third, TWI notes its willingness to transfer TBS' programming and entertainment assets to TWE at a fair price. Finally, if its ownership of both interests created problems that were otherwise not resolvable, TWI could undertake dispositions of TBS "programming and filmed entertainment" assets and thereby avoid any question of competing with TWE. In all events, according to TWI, *owning* the TBS assets itself can cause no actual financial harm to TWE and thus closing the TBS acquisition should in no event be the occasion of injunction.[21]

Large stakes are at issue and thus as one can easily imagine the positions and counter-positions of the parties are greatly more elaborate and subtle than this introductory statement reflects. The facts that provide the context for the Admission Agreement are in certain important respects contested. In all events, the foregoing summary of the issue and the positions of the parties may do as a quick first glance over the

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[21]This position--that equitable relief on any fiduciary duty claim would be premature at this time since closing on the acquisition would not itself subject TWE to any greater commercial competition than it now faces--in this setting would deserve consideration even if one assumed the substantive claim to have merit. Stepping back from the details of the present dispute to look at the parties' situation, what seems apparent is that if the TWE structure ever represented a sound long-term strategic structure, it probably no longer does, at least for these parties. TWI is committed to acquiring the TBS assets; it has, for example, long coveted CNN, an asset created by TBS. For its part, US WEST was not in the first place an enthusiastic investor in TWE's "content" assets (*i.e.*, those assets dedicated to the production of video and filmed programming). Its initial interest was in TWE substantial cable systems, and it professes no interest in further substantial investment in the content end of TWE's business (assuming I suppose that such investment did not reflect a discount price) where it has no real management role. Were TBS acquired by TWI, it would appear to make the most sense to finance and manage TBS assets together with the other substantial programming and filmed entertainment assets managed by TWI affiliates through TWE. But assuming TWE remains in its present configuration, the contribution of the TBS assets to TWE would require either a substantial additional investment by US WEST in "content" assets or a substantial dilution of its 25% interest. US WEST's assent to either of these appears to be problematic. Thus, for example, the parties reported inability to agree on a transaction in the form contemplated by the "Hersch Memorandum" is not surprising. *(see* p.11 *infra)*. The most sensible and likely outcome therefore appears to involve an unwinding of the TWE structure. This lawsuit can be seen as a step in that negotiation process. In this context, an argument that closing the TBS acquisition will not *itself* cause financial injury to TWE and thus ought not be enjoined on fiduciary principles, is an argument that touches upon important questions of timing and ought not be brushed aside as *merely* temporizing.

battlefield across which are arrayed a profusion of factual and legal disagreements.

B. Procedural Setting

[1] The complaint was filed on September 22, 1995 and the parties agreed to an intensive discovery schedule and an early trial. Following discovery and only weeks before the scheduled trial, TWI filed a motion for judgment on the pleadings. It asserted that the relevant contractual documents made it unambiguously clear that it was permitted to acquire control of TBS. That motion, which US WEST of course resisted, was not decided. Rather, in an effort to reach a conclusive final adjudication as promptly as possible, I reserved decision on it in order to permit the creation of an evidentiary record at trial. This exercise of discretion was not premised upon an unstated view of the merits of that motion, but on an understanding of the fallibility of human judgment: even if TWI were to prevail on its pretrial motion, there would exist risk that a trial might nevertheless be required on remand of an appeal of that decision. Thus, given the parties need for a prompt and final determination, that motion was held in abeyance while a record of relevant evidence was created.

C. Decision

The trial occupied eight days, concluding on March 22, 1996. Post trial briefing and oral argument was completed on May 6, 1996. This is the Courts decision on the evidence presented. For the following reasons I conclude that plaintiff has failed to establish facts entitling it to the relief it seeks. Specifically, I conclude that the best reading of the relevant language, under the legal test described below, is that Time Warner retained the right under amended Section 5.5 of the TWE Limited Partnership Agreement to increase its ownership stake in TBS; that it did not mislead US WEST in that connection, and that its failure to disclose to US WEST the so-called Hersch memorandum was neither intentional nor actionable in the circumstances; and finally that exercise of the legal right to increase its TBS stake, as contemplated by the agreement of merger, will not itself constitute a violation of the fiduciary duty of loyalty owed by TWI to TWE and its limited partner.

There are pending counterclaims against US WEST that were tried simultaneously with the foregoing claims. I am not now, and will not for some time be in a position to express a judgment on those claims. Therefore, concluding that there is not just reason for delay in doing so, I will direct that a final judgment be entered under Court of Chancery

Rule 54(b), in a form to be agreed upon by the parties, dismissing plaintiffs' complaint with prejudice.

II.

A. Background: The Merger of Time Inc. and Warner Communications: The pertinent background might begin with considerations leading to the merger of Time Inc. and Warner Communications, Corp. in early 1990 to form Time Warner, Inc. That merger originated in the strategic thinking of Gerald M. Levin, then Executive Vice President of Time, Inc. Mr. Levin strategic vision was set forth in a memorandum dated August 11, 1987, to then Time, Inc. CEO Richard Munro, in which Levin stated:

> I am now convinced that our primary long-term objective should be to bring about the strategic consolidation of Time Inc., Warner Communications, and TBS. The resulting company would be a complete, world-class entertainment and publishing giant with well in excess of a billion dollars of operating income.
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> This would be an operating company, not a financial construct, with sufficient internal cash generation to fuel new development. Indeed, the cross-section of businesses, particularly in entertainment, would provide growth opportunity across cable, CD's, home video and pay-per-view. The strength of the new company would be in its operating management and philosophy, its extraordinary distribution capabilities, and in its handling of a diverse array of talent.

(emphasis in original). Mr. Levin is now CEO of Time Warner and is the moving power behind the current proposed acquisitions of TBS by Time Warner.

Prior to the merger between Time and Warner, each had been a substantial shareholder of TBS. Following the merger TWI owed sufficient Class C Preferred Shares of TBS to approximately equal a 20% interest in TBS. Under certain agreements with other TBS shareholders, including Mr. R.E. "Ted" Turner, Tele-Communications Inc. ("TCI") and other cable company investors (the "TBS Shareholders Agreement"),

Time Warner had and continues to have the right to acquire additional shares in TBS under certain circumstances. One such circumstance would occur if Ted Turner proposed to accept a *bona fide* offer from an unaffiliated party to purchase all of his shares. In that event the TBS Shareholders Agreement gives a right of first refusal to the Class C investors (a group of 29 cable companies including Time and Warner). A second aspect of the agreement involved the right to purchase shares *pro rata* from any of the other cable investors that wished to dispose of shares other than to a permitted transferee.[22] In some circumstances, exercise by Time Warner of its rights under the TBS Shareholder Agreement would allow it to acquire control of TBS.

B. Formation of TWE: The Time-Warner merger involved the distribution of substantial amounts of cash (in addition to stock) to the shareholders of Warner Communications and, as a consequence, following the merger, the resulting entity, Time Warner Inc., had an initial balance sheet burdened with substantial debt. Soon after the merger, Time Warner began to consider means to reduce its debt. It considered structuring a partnership through which Time Warner could sell minority interests in certain of its businesses, while forming international strategic alliances with technologically sophisticated parties.

In this connection, TWI began negotiating with C. Itoh & Co. (now known as "Itochu") and Toshiba Corp., two Japanese corporations, (together, the "Original Limited Partners") in late 1990. On October 29, 1991, Time Warner, and the Original Limited Partners signed the Time Warner Entertainment partnership agreement.[23] The Original Limited Partners together contributed $1 billion to the partnership in exchange for a combined limited partnership interest of 12.5%. Time Warner contributed substantially all of its filmed entertainment, programming and

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[22]In addition, the parties cannot enter into agreements with respect to the disposition, voting or holding of any TBS stock except in certain limited circumstances; and the transfer of the Class C Preferred to any party other than the original cable company investors or their parents or subsidiaries would result in a conversion of those shares into Class B Common. Furthermore, Time and TCI agreed to work to achieve parity in their ownership of TBS shares and also agreed not to dispose of TBS shares without first offering those shares to the other.

[23]Among the TWI affiliates that signed the Partnership Agreement were: Home Box Office, Inc., Warner Bros., Inc., Warner Communications, Inc., and Warner Cable Communications, Inc. The resulting limited partnership consisted of four general partners--American Television and Communications Corporation, Warner Communications, Inc., Warner Cable Communications Inc., and Time Warner Operations Inc.--all wholly owned subsidiaries of Time Warner --and two limited partners, Itochu and Toshiba Corp. American Television and Communications Corporation and Warner Communications, Inc. served as the managing partners of TWE.

cable assets to the Partnership. Among the assets Time Warner did not contribute, however, was any interest in TBS.

Because TBS included various programming and broadcasting assets similar to those that Time Warner was to contribute to the partnership, the Original Limited Partners had asked TWI to contribute its TBS shares to the partnership. Time Warner, however, declined to do so stating that under the TBS Shareholders Agreements, it could not transfer its TBS interests without risking the loss of valuable rights, *i.e.*, potentially exposing its shares to the first refusal rights of other TBS investors. Alternatively, it was proposed that Time Warner agree to contribute TBS to TWE at fair market value in the event that Time Warner later acquired control of TBS. Although sympathetic to this arrangement as a business matter (it would make obvious sense to manage in the TWE structure any TBS assets acquired by TWI), Time Warner restated its concern that its consent to this request would potentially expose its TBS shares to claims that first refusal rights had been triggered. TWI was prepared to say that it would be its intention to contribute the TBS assets to TWE for fair value if it later did acquire control of TBS; however, it was unwilling to express that intention in the form of a binding legal obligation.

Not wholly content with such oral assurance, the attorney for the Original Limited Partners, Dennis Hersch, Esquire of Davis Polk & Wardwell, memorialized Time Warner's statement in a memorandum confirming that it was "the spirit of the parties" to follow the terms and conditions of an unsigned side letter outlining TWI's intent to offer TBS to TWE at a fair price if it were ever acquired. On October 29, 1991, Mr. Hersch sent this file memorandum to Mr. Robert Schumer of Paul, Weiss, Rifkind, Wharton & Garrison who served as lead counsel for Time Warner in the deal attaching the proposed side letter (together, the "Hersch Memorandum"). Upon receiving the Hersch Memorandum, Mr. Schumer sent a copy to Peter Haje, the general counsel of Time Warner. The memo, however, was not disclosed in SEC filings, to TBS shareholders or to US WEST until it was produced in this lawsuit.

C. US WEST Becomes a Partner. By 1992, Time Warner recognized that with a convergence in the communication and information/entertainment businesses TWE would benefit from expertise in telephony operations and consequently began talks with potential partners including Bell Atlantic, Ameritech, and eventually US WEST.

Around the same time, the strategic planning group within US WEST informally known as the "Cottage Group" projected that US WEST, and telephone companies generally, would increasingly face new

types and sources of competition, particularly from cable companies (whose broadband cable can carry information more efficiently than can the copper wires that historically comprise telephone networks). The Cottage Group came to the view that US WEST should aim to become a provider of integrated communications, entertainment and information services through broadband wire and wireless networks worldwide. To achieve that goal, the Cottage Group recommended developing broadband networks outside US WEST's region, either in partnership with cable companies or by acquiring cable assets. The board approved this strategic goal. Pearre Williams, President of US WEST's Corporate Development Group, was therefore directed to contact cable operators to determine the feasibility of joint ventures to develop a broadband network ("full service network") that could supply telephony as well as other services.

The first contacts between US WEST and Time Warner occurred in the Spring of 1992. Although open to the possibility of investing in TWE and cognizant of the increasing interrelations between the telecommunications and entertainment industries, US WEST primarily expressed interest in participating in some way in Time Warner's substantial cable properties. Time Warner, however, was interested in admitting investors at the TWE level. Mr. Oded Aboodi, the chief negotiator for Time Warner, took the sensible view that for the partnership to succeed, the partners must have consistent economic interests across the different, but increasingly interrelated segments of TWE's businesses. Mr. Aboodi explained that this joining of interests would permit the partnership flexibility by making less important to partners the financial terms of transactions between business centers within TWE. In addition, a partner with a cable only investment might, for example, act as a drag on efforts to grow all segments of TWE's business and promote the best interests of TWE generally. Influenced also by its own long-term strategic objectives towards becoming a leading information, communication and entertainment company, US WEST accepted TWI's position that any US WEST investment should be in all of TWE's businesses.

US WEST retained Lehman Brothers, Inc., as its financial advisor in the negotiations. Lehman had advised the Original Limited Partners with respect to their investment in TWE and thus US WEST sought to benefit from the understanding of the complex financial structure of TWE that Lehman gained during the 1991 transaction. Lehman, however, did not volunteer other information it had learned representing the Original Limited Partners in the 1991 transaction.

D. Negotiating the Non-Compete Provisions: As in the negotiations leading up to the 1991 partnership agreement, the parties to these negotiations spent considerable time on the non-compete provisions, negotiating non-compete issues almost daily from December 1992 through May 1993. Time Warner and US WEST initially disagreed over whether US WEST would be bound by the non-competition provisions in the 1991 Partnership Agreement. Time Warner sought to use the 1991 Partnership Agreement with Toshiba and Itochu as a model for US WEST's admission into the partnership and tried at first to convince US WEST to agree to the non-compete provisions in the 1991 agreement. But US WEST wanted instead to negotiate for itself separately applicable, less restrictive non-competition provisions that would allow it the freedom to pursue investments outside the partnership in other cable companies, programming companies, information services, international activities, telephone companies, and content activities. For example, in March 1993, US WEST specifically proposed that it retain the freedom to invest in "content" outside of the TWE partnership provided that it gave a right of first opportunity to the Partnership. US WEST wanted the freedom to make investment outside the partnership because of its limited management powers over the content (*i.e.*, programming and entertainments) side of the business and its desire to retain the flexibility to respond to future opportunities. Time Warner insisted, however, that any deviation from the non-competition provisions in the 1991 agreement take the form of amendments to the 1991 Partnership Agreement and exceptions to those provisions that the parties negotiated.

US WEST acceded to Time Warner's view that TWE be the primary vehicle through which the partners would exploit cable, filmed entertainment and programming opportunities. The final non-compete clause, therefore, contains no broad exception for it, and the negotiations concerning Section 5.5 more narrowly focused on the scope of US WEST's exceptions to the basic restraint of Section 5.5(a). The parties, however, did not generally discuss the meaning or scope of the exceptions for Time Warner incorporated in the original Partnership Agreement and continued in the 1993 amendment to Section 5.5. Consequently, mention of Time Warner's rights in TBS during the negotiations was limited.

Nevertheless, US WEST was made aware of the TBS stake and of the TBS stockholders agreements. It was told both that TWI might "monetize" that stake (*i.e.*, sell it or trade it for another asset) and that in any case TWI thought it should maintain the financial capacity to exercise all of its rights under the TBS Shareholders Agreement, in the event those rights were triggered. The parties, however, did not explicitly

discuss whether Time Warner had the right under the partnership agreement to increase its interest in TBS without the consent of the limited partners. Furthermore, TWI made no representations concerning its present intention or future plans concerning its TBS stake upon which a reasonable party could rely. Its plans were not fixed and it made its desire for flexibility explicit.

The parties' negotiations over competition focused primarily on US WEST's content related activities outside the partnership. The resulting non-compete provisions granted US WEST investment opportunities in filmed entertainment, programming and cable that would have been unavailable under the 1991 Agreement, and included US WEST's own Schedule of Restricted Businesses exempted from the non-compete. As in the case of the Original Limited Partners under the 1991 agreement, US WEST also had the right after four years to terminate the non-compete with respect to Time Warner's content businesses. But it was agreed that if US WEST terminated the non-compete in this manner, it would then have to sacrifice all board representation, all veto rights, and all rights to information concerning those businesses.

During the negotiations, Time Warner had expressed some concern about US WEST using the investments listed on US WEST's Schedule of Restricted Business to compete *in new lines of businesses* and thereby circumvent the non-compete provision of Section 5.5(a). In this regard, Time Warner representatives asserted that US WEST should not be able to use scheduled exception such as Telewest, a UK company in which US WEST had a substantial minority interest at the time, to acquire a movie studio (Paramount was mentioned at that time) that would compete with the TWE's filmed entertainment business. The parties resolved this issue by amending Section 5.5(b)(iii) to specify that the partners could not encourage companies in which they had an interest to engage in competitive activity.

The deal closed in September 1993. Under the Admission Agreement, US WEST acquired a 25.51% partnership interest in TWE in exchange for cash and a note together valued at $2.5 billion. US WEST was also granted rights under the agreement to co-manage TWE's cable systems as the parties had, in fact, contemplated from the outset. The parties, however, agreed that Time Warner would have the responsibility for management of the content *(i.e.*, filmed entertainment and programming) businesses, with US WEST receiving only limited management rights over content: representation on the TWE board of directors, right to veto extraordinary transactions, and rights to information concerning the content business.

E. Restructuring the Partnership. In November 1994, Time Warner began to reconsider its original strategy of consolidating its cable, content, and programming assets under separate equity ownership in TWE. Time Warner's senior management concluded that the partnership's content businesses and Time Warner's publishing and music businesses were converging faster than the content, programming and cable grouping in the partnership, and that the complex corporate and capital structure of TWI was having an adverse effect on the market price of Time Warner stock. Time Warner therefore initiated a "simplification" process involving possible restructuring of the partnership. In late 1994, pursuant to this attempt to simplify Time Warner's operating and capital structure, TWI discussed with both US WEST and the Original Limited Partners the possibility of exchanging their partnership interest for stock in Time Warner. The Original Limited Partners agreed to exchange their limited partnership stake for Time Warner convertible preferred stock.

With respect to US WEST, in early 1995, Time Warner expressed an interest in restructuring the partners' respective investments in the partnership to create a self-financing "cable only" telecommunications entity separate from the content and programming assets of the partnership. This is essentially what US WEST had originally sought. These discussions included the possibility of US WEST trading its "content" investment for a greater interest in a free standing cable entity. By the summer of 1995, the discussions were at an impasse caused by an inability to resolve ownership and management control issues as well as continuing differences on the intrinsic valuation of various partnership assets. In particular, Time Warner would not accede to US WEST's desire for control over TWE's cable assets unless US WEST agreed to pay a control premium. These discussions have not yielded agreement.

F. TWI's Planned Acquisition of TBS: In August 1995, TWI's CEO, Gerald Levin, met with TBS' CEO Ted Turner and introduced the subject of merging Time Warner and TBS. Mr. Turner was somewhat surprised by this turn of events, principally because Time Warner had recently considered "monetizing" its TBS asset by either selling that interest or exchanging it for TBS assets. Moreover, on several previous occasions in which he approached the management of Time, Inc. and later Time Warner about the possibility of a merger, Turner found little interest because of, in his view, their reluctance to accept his potential influence as large personal shareholder in the merged entity. Mr. Turner, however, has subsequently dropped his requirement that he be the CEO of a merged company.

Time Warner first informed US WEST of a proposed TWI merger with TBS on August 26, 1995. After several discussions between US WEST and Time Warner representatives concerning the merger and during which US WEST did not articulate an objection to the merger, US WEST formally advised Time Warner in writing on September 7, 1995 that, in its view, US WEST's consent was necessary before TWI could proceed with the proposed transaction. On September 22, 1995, Time Warner and TBS publicly announced their agreement to merge and US WEST filed this suit to enjoin the merger on that same day.

III.

Legal Principles

At their core the legal aspects of this dispute concern the effect of Section 5.5 of the 1991 TWE Partnership Agreement as amended by the 1993 Admission Agreement. These contracts were expertly and exhaustively negotiated and documented. The subject of the parties rights to engage in business activities that compete with the partnership's businesses or to own interests in ventures that compete with TWE was addressed in Section 5.5 in 1991 when the partnership was formed and in 1993 when US WEST made its large investment in TWE.[24] All that needs to be done to resolve the principal dispute in this suit is to distill the legal meaning of Section 5.5 as amended and apply that meaning to the facts presented. The task, thus stated, deceptively appears simple. In fact, determining the legal meaning of amended Section 5.5, insofar as it may apply to the planned TBS acquisition is not, in my opinion, a simple matter.

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[2-3] In construing the meaning of written contracts, the court's first obligation to the parties is to determine the nature and scope of the contractual rights and obligations they created and to enforce those rights and obligations in accordance with law.[25] Of course, the nature and scope of the rights and obligations created will often be the primary issue

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[24]*See* Admission Agreement § 11.

[25]The "in accordance with law" condition is meant to incorporate all of the law dealing with defenses and remedies that a court will be obligated to take into account in enforcing a contract.

to resolve. The court's ultimate guide in determining those legal entitlements is to attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted.[26] With this in mind, I apply the following principles or rules of contract construction that courts have traditionally employed in construing written contracts.

[4-6] The primary rule of construction is this: where the parties have created an unambiguous integrated written statement of their contract, the language of that contract (not as subjectively understood by either party but) as understood by a hypothetical reasonable third party will control.[27] In essence, this is an assessment of whether the reasonable expectations of the parties are convincingly established by the words of the contract standing alone—the language being so unequivocal that no reasonable person could have expectations inconsistent with such language. This first principle might be referred to as the clear meaning rule.[28] I apply this principle in Part A below.

[7-8] The foregoing first principle of contract interpretation will not resolve all cases, or indeed any of the most difficult cases, and it does not resolve this case. A second principle of the law of contract holds that where the language of a written integration is susceptible to more than one reasonable interpretation, the court will consider proffered admissible evidence bearing upon the objective circumstances relating to the background of the contract.[29] Such evidence may include statements

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[26]*See* CORBIN ON CONTRACTS § 1 (1960); *Bell Atlantic Meridian Systems v. Octel Communications Corp.*, Del.Ch., C.A. No. 14348, Allen, C. (Nov. 28, 1995); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (1981)("The objective of interpretation in the general law of contracts is to carry out the understanding of the parties . . . ."); WILLISTON ON CONTRACTS § 601 (1961) ("[The] primary function of the court is the ascertainment of the intention of the parties.").

[27]*See City Investing Co. v. Continental Cas. Co.*, Del.Supr., 624 A.2d 1191, 1198 (1993); *Rainbow Navigation, Inc. v. Yonge*, Del.Ch., C.A. No. 9432, Allen, C. (Apr. 24, 1989).

[28]The clear meaning rule helps deal with *the problem of unforeseen circumstances.* Since it applies without regard to actual subjective intent it makes unforeseen circumstances irrelevant. Moreover, it also creates incentives for the parties themselves to contract with respect to unforeseen future conditions. It will often be rational for contracting parties, mindful of their very imperfect information about the future, to draft broad procedural *or* substantive default terms designed to govern the parties relationship under unforeseen circumstances. When clearly set forth, such mechanisms are enforceable under the clear meaning rule.

[29]*See Klair v. Reese*, Del.Supr., 531 A.2d 219, 223 (1987); *Bell Atlantic Meridian Systems v. Octel Communications Corp.*, Del.Ch., C.A. No. 14348, Allen, C. (Nov. 28, 1995). In some cases, determining whether a contract is susceptible to more than one interpretation requires an understanding of the context and business circumstances under which the language was negotiated; seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiation and contracting occurred. A preliminary consideration of extrinsic evidence may be necessary to determine whether this sort of hidden or latent ambiguity exists. *See Bell Atlantic* at n.5; WILLISTON ON CONTRACTS § 601 (1961)

made during the course of the negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry. This second principle of contract interpretation is frequently called the parol evidence rule.

[9-10] These extrinsic sources of contextual information may permit a court to ascribe a single "correct" or single "objectively reasonable" meaning to a contract term that appears on its face capable of two or more inconsistent interpretations. That is, a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of this negotiation. Thus, for example, a hypothetical contract may be identical in material respects to a series of earlier contracts between the same parties in which performance of a particular type was tendered and accepted. If the operative language in all of those contracts was and is ambiguous, that prior history will demonstrate what an (objectively) reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be. It is that reasonable understanding that a court will enforce.

[11-14] The parole evidence rule guides a court with respect to the materials from which it will define the nature and scope of contractual obligations, but it does not specify in what way the court will use those materials in making such determinations. In the example above, the inference from the prior course of dealing is so powerful that the logical operation employed in determining what an hypothetical bargainer would understand the ambiguous words to mean receives little attention. But if, given the nature of the extrinsic evidence, such a is not quite so obvious (as of course will often be the case), what is the process through which a court determines the existence and scope of legal rights and duties where contract language is ambiguous?[30] The following third principle of contract law structures that inquiry: Only an objectively reasonable interpretation that is in fact held by one side of the negotiation and which the other side *knew or had reason to know that the first party held* can be enforced as a contractual duty.[31] This principle is capable of

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(observing that courts "frequently admit extrinsic evidence provisionally, not for the purpose of 'varying or contradicting' the writing, but to determine the fact that it is indeed ambiguous.").

[30]I mention "the *existence* of legal rights and duties . . . ." in order to leave open the possibility that parties have failed to create any contract rights and duties despite their parallel intentions to do so. *See* RESTATEMENT (SECOND) OF CONTRACTS 2d. § 201(3) & cmt. d (1981); CORBIN ON CONTRACTS § 538 (1960).

[31]*See* RESTATEMENT (SECOND) ON CONTRACTS § 201 (1981); CORBIN ON CONTRACTS § 537 (1960); *Bell Atlantic Meridian Systems v. Octel Communications Corp.*, Del.Ch., C.A.