Unreported Cases

INTRODUCTION

UNREPORTED CASES is a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. All unreported cases of a corporate nature that have not been published by a reporter system will be included. The court's opinions are printed in their entirety, exactly as received.

To expedite the attorney's research, all cases are headnoted according to the National Reporter key number classification system.* Indices are provided for case names, statutes construed, rules of court, and key numbers and classifications for this issue.

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AMERICAN GENERAL CORP. v. CONTINENTAL AIRLINES CORP.

No. 8390

Court of Chancery of the State of Delaware, New Castle

January 26, 1988

Plaintiffs filed this action seeking to enjoin a going-private merger between Texas Air and Continental. Plaintiffs alleged a breach of contractual rights, based on a loan agreement between itself and Continental and a breach of fiduciary duty by the directors of Texas Air. A motion for a preliminary injunction was denied and the merger was consummated. The plaintiffs moved for partial summary judgment and the defendants cross moved for summary judgment.

The court of chancery, per Chancellor Hartnett, granted in part plaintiffs' motion for partial summary judgment and granted in part defendants' cross-motion for summary judgment. The court held that the loan agreement provides that in the event of a merger, plaintiff is entitled to receive the same merger consideration as other stockholders of Continental receive. The option to purchase Texas Air stock granted to the stockholder-employees was an additional merger consideration. Plaintiff is entitled to summary judgment granting it the same option. There has been no breach of the anti-dilution option provision of the loan agreement and defendants are entitled to summary judgment as to that claim. Plaintiffs' claim that Texas Air breached an implied obligation of good faith and fair dealing in structuring the merger is barred by the waiver given by plaintiffs during Continental's bankruptcy proceedings. Defendants' cross-motion is also granted as to this issue. Plaintiffs have standing to assert breaches of fiduciary duty against Texas Air occurring after plaintiffs' purchase of Texas Air stock. Defendants' cross-motion is denied as to this issue.

1. Judgment ⟹ 181(2), 185(2)

The granting of summary judgment is appropriate when after examining the record in a light most favorable to the non-moving party, there are no genuine issues of material fact.

2. Contracts ⟹ 143(5)

Despite the existence of separate parts, a contract is to be considered as a whole and its meaning gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract.

3. Contracts ⟹ 143(5)

In order to determine the meaning of each part, the entire agreement must be considered.

4. Contracts ⟹ 153, 162

A meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.

5. Contracts ⟹ 143(1), 148

Where a provision does not, on its face, address a specific issue, an ambiguity is created and the court is compelled to examine other parts of the agreement and the extrinsic circumstances surrounding the merger in order to ascertain the true meaning.

6. Corporations ⟹ 584

This court, when examining a merger, must look beyond mere technical compliance with legal parameters.

7. Corporations ⟹ 585, 587

The fact a merger may have the effect of eliminating a class of corporate securities and thus legally mooting an unexercised power with respect to such stock securities is neither shocking nor novel.

8. Contracts ⟹ 168

In order to find an implied obligation, it must be clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of.

9. Contracts ⟹ 168

Express stipulations generally cannot be made inoperative or waived by implied promises.

E. Norman Veasey, Esquire, Jesse A. Finkelstein, Esquire, William W. Bowser, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Harry M. Reasoner, Esquire, David T. Harvin, Esquire, Ann Lents, Esquire, Allan VanFleet, Esquire, and Kathryn Tullos, Esquire, of Vinson & Elkins, Houston, Texas, of counsel, for plaintiffs.

Bruce M. Stargatt, Esquire, and Josy W. Ingersoll, Esquire, of Young, Conaway, Stargett & Taylor, Wilmington, Delaware, for defendants Continental Airlines, Inc., James L. McKenny, John E. Robson, Robert T. Sakowitz, Howard P. Swanson and Thomas G. Plaskett.

Paul P. Welsh, Esquire, and Palmer L. Whisenant, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendants Texas Air Corporation, Continental Airlines, Inc., Francisco A. Lorenzo, Philip J. Baker, Carl Pohlad, Esquire, and James W. Wilson.

HARTNETT, *Vice-Chancellor*

The plaintiffs, American General Corporation and American General Life Insurance Company (collectively referred to as "American General"), moved for partial summary judgment and the defendants cross moved for summary judgment. I find that American General is entitled to summary judgment that it has a contractual right to the same option to purchase shares of defendant, Texas Air Corporation ("Texas Air"), as the employee-stockholders of defendant Continental Airlines Corporation ("Continental") re-

ceived as part of the consideration in the going private merger whereby Continental was merged into Texas Air, its controlling stockholder. American General obtained its contractual rights pursuant to a loan agreement which I find provides that American General must receive the same option rights that the employee-stockholders received in the merger.

I further find that American General is not entitled to any other contractual rights or options to purchase Texas Air stock and that its motion for summary judgment must be denied as to its claim of breach of good faith and fair dealing by Texas Air in structuring the merger.

I also find that defendants' cross-motion for summary judgment must be granted as to the issue of whether the merger violated American General's contractual rights pursuant to an anti-dilution option contained in the loan agreement, but that defendants' cross-motion for summary judgment must be denied as to the claim that American General has no standing to bring a claim of breach of fiduciary duty against Texas Air.

I

The competing motions for summary judgment are but the latest chapter in a complex litigation involving four lawsuits.

On February 20, 1986, American General filed this action (C.A. 8390) seeking to enjoin a proposed going-private merger between Texas Air and Continental. In addition to an allegation of breach of contractual rights, American General asserted that the directors of Texas Air breached fiduciary duties to it as a shareholder on the grounds that the merger was unfair and the price was inadequate. This action, however, was not brought as a stockholder derivative or class action. On March 5, 1986, Morris Kronfeld ("Kronfeld"), a shareholder of Continental, filed a purported class action on behalf of the Continental minority stockholders which also sought to enjoin the merger (C.A. 8406). On September 29, 1986, Mutual Shares Corporation ("Mutual Shares") likewise filed a purported class action seeking to enjoin the merger (C.A. 8650). On January 16, 1987, another purported class action was filed by James J. Baltz and another ("Baltz' suit"). The claims of Kronfeld, Mutual Shares, and Baltz were based solely on alleged breaches of fiduciary duty.

American General was not included as a member of any plaintiff class nor was its suit consolidated with the other suits. Discovery,

however, was conducted as if all the suits had been consolidated. By Memorandum Opinion I denied a preliminary injunction requested by each plaintiff, including American General. *American General v. Texas Air*, Del. Ch., C.A. 8390, 8406, 8650 and 8805, Hartnett, V.C. (Feb. 5, 1987).

On February 6, 1987, Texas Air consummated the going-private merger with Continental. In March 1987, the Kronfeld, Mutual Shares and Baltz suits were consolidated as C.A. No. 8650 and settled. There was no objection to the settlement and it was approved by me.

American General's suit, however, remains active. Its motion for partial summary judgment is directed solely to the claims arising out of an alleged breach of contractual rights. American General has not sought summary judgment with respect to its breach of fiduciary duty claims.

II

[1] The granting of summary judgment is appropriate when the Court, after examining the record in a light most favorable to the non-moving party, determines there are no genuine issues of material fact. *Moore v. Sizemore*, Del. Supr., 405 A.2d 679 (1979). Both parties concede this dispute is ripe for summary judgment on the issues raised and neither asserted that there were any genuine issues of material fact.

III

This dispute has its antecedents on June 10, 1983, when American General and Continental entered into an agreement ("the Loan Agreement") designed to save the then financially ailing Continental. Pursuant to the Loan Agreement, American General loaned $40 million to a Continental subsidiary in exchange for $40 million in 11% Senior Notes of the subsidiary due in 1998, secured by a separate written guaranty by Continental. This Loan Agreement also provided American General with warrants enabling it to acquire, within five years, 5 million shares of Continental common stock at $8.50 per share and an anti-dilution option provision which gave American General the right to acquire, during a ten-year period, 25% of any future stock issue of Continental. In the event of a merger or reorganization of Continental, Section 3.8 of the warrants and Section 10 of the option provision described, somewhat ambiguously, certain rights of American General which would sur-

vive any merger. One of these is the right to receive the same consideration in a merger as do other stockholders of Continental.

A few months later, on September 24, 1983, Continental sought Chapter 11 bankruptcy protection. In 1985, while Continental was in the Chapter 11 proceeding, Texas Air, holder of 72% of Continental common stock, first proposed an unconsummated going-private merger. After this proposal, American General purchased common shares of Texas Air. The terms of the Merger Agreement eventually entered into by Continental and Texas Air were agreed upon (after two prior attempts) in December of 1986—-months after American General's purchase of shares in Texas Air.

The terms of the December 1986 Merger Agreement provided that the minority shareholders of Continental would be cashed-out and receive $16.50 per share in exchange for their Continental stock, leaving Continental a privately owned subsidiary of Texas Air.

Shortly before that time, as part of Continental's Bankruptcy Reorganization Plan, American General had agreed to waive a veto right as to any merger which had been granted to it in the Loan Agreement. With the announcement of the merger, American General faced the prospect that its warrants and anti-dilution option to purchase Continental shares would become worthless after Continental's merger into Texas Air, just when Continental appeared likely to become profitable because of its emergence from bankruptcy with very low costs of operation.

As previously indicated, American General and others sought a preliminary injunction enjoining the proposed merger. On February 6, 1987, one day following my denial of the preliminary injunction, Texas Air, through Mergerco, a wholly-owned subsidiary formed for the purpose of merging with Continental, completed a going-private merger with Continental. Pursuant to this merger all the minority shareholders of Continental received $16.50 per share in exchange for their Continental stock. As a result of that transaction, Continental no longer had any public shares outstanding.

Although not set out in the Merger Agreement, Texas Air had publicly announced a related proposal that Continental employees who were also stockholders of Continental would be given the opportunity to exchange their shares of common stock of Continental for Texas Air common stock at a ratio of .8 to 1 in addition to receiving the $16.50 merger consideration.

The primary beneficiaries of this largesse would have been the officers of Continental who are, not surprisingly, also the officers of Texas Air. The principal beneficiary would have been defendant, Francisco A. Lorenzo ("Lorenzo"). At the time of merger, Lorenzo was Chairman of the Board of Directors at both Texas Air and Continental. Lorenzo, through the employee-stockholder option, would have obtained the right to acquire over 273,000 shares of Texas Air. By Lorenzo's admission, he stood to obtain a benefit worth approximately $4 million under the proposed transaction.

Apparently realizing the discriminatory effect of the employee-stockholder option, Texas Air withdrew this announced benefit and separately granted to qualified Continental stockholder-employees an option to purchase for $16.50 in August of 1988 8/10ths of a share of Texas Air for each share of Continental they held from October 31, 1985 to February 6, 1987 provided they continued to be employed by Texas Air. In addition, the employee-stockholders would receive the $16.50 per share cash-out price which the other minority shareholders of Continental received.

On March 13, 1987 the minority stockholders (other than American General) settled their class action suits under a settlement which resulted in $3.75 extra per share being paid to the minority stockholders. Under the settlement agreement, however, the stockholder-employees of Continental cannot receive the extra $3.75 per share if they exercise their option to purchase Texas Air stock at the .8 to 1 ratio. The actual cost to the employee-stockholders of Continental of a .8 share of Texas Air will therefore be $20.25.

American General, in moving for partial summary judgment, in effect, seeks a declaration that upon its exercise of the warrants it holds, pursuant to Section 3.8 of the warrants provision in the Loan Agreement between it and Continental, it will be entitled to receive in lieu of Continental common stock, $16.50 cash plus the option to purchase .8 of a share of Texas Air stock at the same option price provided in the employee-stockholders' option. It urges that this is the same consideration which the employee-stockholders of Continental received as a consideration for their stock in the merger and that the warrants confer on American General a contractual right to receive that same consideration. It further asserts that its contractual rights pursuant to its ten-year anti-dilution option have been breached because the Merger Agreement mooted the option. American General also claims that defendants breached an implied obligation of good faith and fair dealing by withholding from it the fact that defendants did not intend to have Continental

remain a publicly held corporation. American General's additional claim of a breach of fiduciary duty because of the unfairness of the tender offer is not raised in its motion for partial summary judgment.

IV

The June 10, 1983 Loan Agreement between Continental and American General is composed of five separate parts: (1) the notes, (2) a note purchase agreement, (3) a guaranty on the loans, (4) warrants given to American General to permit it to purchase 5,000,000 shares of Continental and (5) an anti-dilution option given to American General enabling it to purchase 25% of any future issue of Continental stock.

[2-4] Despite the existence of separate parts, a contract is to be considered as a whole and its meaning gathered from the entire context, and not from particular words, phrases or clauses, or from detached or isolated portions of the contract. *E. I. duPont de Nemours and Co., Inc. v. Shell Oil Co.*, Del. Supr., 498 A.2d 1108 (1985); *Mundy v. Holden*, Del. Supr., 204 A.2d 83 (1964); 17 AM.JUR.2d *Contracts* § 258. In order to determine the meaning of each part, the entire agreement must be considered. *State v. Dabson*, Del. Supr., 217 A.2d 497 (1966). Thus, a "meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *E. I. duPont de Nemours*, supra, 498 A.2d at 1113.

I will, therefore, construe the five parts of the June 10, 1983 Loan Agreement as a whole.

V

[5] American General's primary argument in support of its motion for partial summary judgment is that the merger of Continental and Mergerco breached Section 3.8 of the warrant provision. American General claims that under the warrant provision it is now entitled to receive the same consideration in the merger that any other stockholder of Continental is entitled to receive. It, therefore, claims that it has the right to exercise the same option for Texas Air stock as was granted to the Continental employee-stockholders. Texas Air, however, strenuously contends that the employee option was not part of the merger consideration and it

points out that there is no mention of an employee option in the Merger Agreement.

I find that Section 3.8 of the warrant provision in the Loan Agreement between American General and Continental provides that after a merger a warrant holder will receive the same consideration as the other stockholders receive, whether stock, securities or property, in lieu of the shares the warrant holder could have purchased immediately prior to the merger. In relevant part, Section 3.8 states:

> "3.8 *Reorganization, Merger, etc.* If, after the date hereof, any capital reorganization or reclassification of the capital stock of the Company (except as provided in Section 3.5), or consolidation or merger of the Company with another corporation . . . or the sale or conveyance of all or substantially all of its assets to another corporation shall be effected, then, *as a condition of such* reorganization, reclassification, consolidation, *merger*, sale or conveyance, lawful and adequate provision shall be made whereby the [warrant] holder hereof shall thereafter have the right to purchase and receive upon the basis and upon the terms and conditions specified in this Warrant and *in lieu of the shares* of the Common Stock of the Company *immediately theretofore purchasable* and receivable upon the exercise of the rights represented hereby, *such shares of stock, securities or property as may be issued or payable with respect to or in exchange for a number of outstanding shares* of such Common Stock equal to the number of shares of such Common Stock purchasable and receivable upon the exercise of the rights represented hereby immediately prior to such reorganization, reclassification, consolidation, merger, sale or conveyance . . .". (Emphasis added.)

While defendants depreciate the language as being "boilerplate", the language appears in the Loan Agreement and cannot be disregarded.

The language is clear and unambiguous that a warrant holder shall have the right to receive such property as may be issued or payable in exchange for the shares which the warrant holder has a right to purchase. It is not clear, however, whether the option given to the stockholder-employees of Continental to purchase Texas Air stock is in "lieu of the shares" previously held by the stockholder-employees and is in "exchange for a number of outstanding

shares." Because Section 3.8 of the warrant provision does not, on its face, address this issue, an ambiguity is created and I am compelled to examine other parts of the agreement and the extrinsic circumstances surrounding the merger in order to ascertain the true meaning. *Klair v. Reese*, Del. Supr., 531 A.2d 219 (1987).

VI

Initially it must be noted that when the Loan Agreement between American General and Continental is read as a whole and the surrounding facts and circumstances are considered, it is clear that the parties intended that American General would have a long term ownership in Continental and that American General would not have loaned an essentially bankrupt airline $40 million without such an assurance. It is not disputed that American General flatly rejected advancing any funds to Continental without it receiving long term equity in Continental.

The intention for a long term relationship is further indicated by the existence of the ten-year anti-dilution option provision. This option provision allowed American General to purchase an amount of shares in Continental equal to 25% of each new issue of shares so long as American General maintained a 15% interest in Continental. Section 10 of this anti-dilution option provision imposed the respective rights and obligations of Continental upon its successor. Although, as will be seen, I find that the anti-dilution option provision was not breached by the merger, its existence strongly indicates that the parties intended that American General would maintain, even after a merger, a substantial stock ownership in Continental or any surviving entity.

The note guaranty provision in the Loan Agreement granted American General a right to veto any merger of Continental. In Continental's Chapter 11 proceeding, however, American General waived its right of veto. The existence of the right to veto a merger in the Loan Agreement, however, also indicates that the parties intended that American General would have a long-term investment in Continental.

It is therefore clear that the parties intended that the Loan Agreement would provide that American General would have a long term ownership in Continental or any surviving entity.

VII

[6] As defendants correctly assert, however, the Merger Agreement between Continental and Texas Air does not mention the

stockholder-employee option plan. Defendants argue, therefore, that absent such an expression in the Merger Agreement, American General is not entitled, pursuant to the terms of its warrants, to the same benefit given to the stockholder-employees of Continental.

It is clear, however, that the stockholder-employee option plan was part of the merger consideration. In an October 22, 1985 letter to the American Stock Exchange, Texas Air's counsel stated:

> In addition, *Texas Air's Merger proposal provides* that Texas Air will adopt a plan *in connection with the Merger* under which employees of Continental who receive Texas Air Notes in the Merger will have the right to exchange such Notes for Texas Air common stock. *Texas Air believes that this plan is an important part of the Merger proposal,* since a substantial number of Continental employees own Continental common stock, and Texas Air believes that such equity ownership has been an important element of Continental's recent success. However, under Delaware law (the jurisdiction of Continental's incorporation), it is not possible to issue different consideration in the Merger in exchange for Continental common stock based upon whether a stockholder is a Continental employee or not. Accordingly, in order to permit Continental employees to continue to have an equity participation in their employer after the Merger, the Merger Agreement contemplates that employees will be granted this right to exchange Texas Air Notes for Texas Air common stock under a new Texas Air stock option plan.
>
> *Under the Merger proposal,* the new Texas Air options would be granted to persons who were employees of Continental on October 31, 1985. (Emphasis added.)

In a June 9, 1986 memorandum, Texas Air's general counsel stated, "In connection with Texas Air's prospective acquisition of the outstanding minority interest in Continental Airlines, the employees will be given an option to exchange all Continental stock they owned as of October 31, 1985 for Texas Air common stock at a rate of 8/10th of a share for each Continental share owned." Even on the day the merger was consummated, Texas Air characterized the employee option as being part of the merger consideration:

> "Under the agreement, Continental common stock is exchangeable for $16.50 cash per share. Employees of Con-

> tinental or its subsidiaries, who owned Continental common stock on October 31, 1985, and still own it today, will receive in addition to the $16.50 per share an option to purchase eight-tenths of a share of Texas Air common stock for each share of Continental common stock."

This Court, when examining a merger, must look beyond mere technical compliance with legal parameters. See *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701 (1983); *Smith v. SPNV Holdings*, Del. Ch., C.A. #8395, Hartnett, V.C. (Oct. 28, 1987).

The structuring of the merger transaction as a two-step transaction does not change its basic nature, nor does Texas Air's belated changing of the effective date of the option granted to the stockholder-employees of Continental from three months to one year and then to eighteen months disguise what was done.

Texas Air's own statements, therefore, undisputedly show that the employee option was in "connection with" or "in addition to" the $16.50 cash per share which the other minority shareholders would receive and therefore the terms of Section 3.8 of the warrants provision is triggered. I therefore find that the option rights given to the employee-stockholders of Continental to acquire shares of Texas Air was part of the merger consideration.

VIII

Defendants assert a number of reasons why they claim American General, despite the provisions of the Loan Agreement, is not entitled to receive the same option to acquire Texas Air stock as the employee-stockholders of Continental have received. None are persuasive.

Defendants first argue that Section 3.8 of the warrant provision of the Loan Agreement mandates that the warrants for common stock of Continental are exercisable only for the common stock of Continental. Section 3.8 of the warrants, however, expressly provides that the consideration in a merger be paid in stock, securities, or property, not solely common stock. An option is property.

Second, Texas Air argues that the employee options were granted by it—not Continental, the party to the Loan Agreement. This conveniently ignores Texas Air's control of Continental and Section 3.8 of the warrant provision in the Loan Agreement which provides that its terms survive a merger. The real issue, however, is the amount and type of the consideration given in the Continental-Texas Air merger. By granting an option to some of the stockholders

of Continental, Texas Air, under the terms of the warrant provision, must offer the same consideration to American General.

Third, Texas Air asserts that the employee option was merely granted to encourage the employees of Continental to stay with Texas Air for eighteen months after the merger. Texas Air's own documents, however, indicate that there was a postponement of the time for the exercise of the option from three months to one year to eighteen months in order to preclude the claims now asserted by American General. Rewarding the loyal employees, while noble, was obviously much less a concern than American General's claim for equal consideration.

Texas Air lastly argues that the period of eighteen months between the merger and the time for the exercise of the stockholder-employee option precludes a conclusion that the option was part of the merger consideration and that the costs of extending the option to American General should somehow preclude this Court from finding in favor of American General. Both the timing and cost of consideration, however, are not relevant—once the option was given to some shareholders, Texas Air, as successor to the obligations of Continental, by virtue of Section 3.8 of the warrants, was contractually bound to grant the same option to American General.

I therefore find that American General is entitled to the same merger consideration as the stockholder-employees of Continental received; $16.50 cash plus an option to purchase Texas Air stock.

IX

[7] American General also argues that the going-private merger between Texas Air and Continental breached the ten-year anti-dilution option provision contained in the June 10, 1983 Loan Agreement. Under this anti-dilution option American General was given the right to purchase up to 25% of any new issue of Continental stock as long as American General maintained a 15% interest in Continental. American General argues that the going-private merger foreclosed any possibility of American General retaining 15% of the common stock of Continental and thus, made the performance of the option impossible. It claims that this breach is another reason that it should receive an option to purchase Texas Air shares.

The going-private merger did not, however, breach the anti-dilution option. This Court has recognized that "the fact a merger

may have the effect of eliminating a class of corporate securities and thus legally mooting an unexercised power with respect to such stock securities is neither shocking nor novel." *Shields v. Shields*, Del. Ch., 498 A.2d 161, 168 (1985), citing *Orzeck v. Englehart*, Del. Ch., 192 A.2d 36, *aff'd*, Del. Supr., 195 A.2d 375 (1963).

Although the anti-dilution option rights held by American General are rendered less valuable by the merger, they are not necessarily mooted. However improbable, American General might still acquire a 15% interest in Continental if Texas Air decides to have Continental issue new stock. More importantly, the option, by its terms, is merely an anti-dilution provision allowing American General to acquire a percentage of any newly issued shares. No new stock is being issued as part of the merger and American General has only such rights as provided in the anti-dilution option provision. The Merger Transaction therefore does not violate any preemptive rights of American General as set forth in the June 10, 1983 Loan Agreement. Defendants are therefore entitled to summary judgment as to this issue.

X

[8] American General's final argument in support of its motion for partial summary judgment is that defendants breached an implied obligation of good faith and fair dealing by failing to disclose to American General that defendants did not intend to maintain Continental as a separate, publicly owned entity and structured the merger so that American General's warrants or anti-dilution option would be virtually worthless.

As previously noted I have found that American General will be entitled to enforce its contractual rights by receiving an option to purchase Texas Air stock pursuant to its warrant agreement and there has been no breach of the anti-dilution option. More importantly, however, in order to find an implied obligation, it must be "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of . . ." *Katz v. Oak Industries*, Del. Ch., 508 A.2d 873, 880 (1986).

[9] This Court cannot enforce an implied right when the complaining party has waived an express provision granting the same right. The June 10, 1983 Loan Agreement gave American General a right to veto any merger of Continental. During the bankruptcy proceedings, American General waived its right of veto. Express

stipulations generally cannot be made inoperative or waived by implied promises. *Gluckman v. Holzman*, Del. Ch., 53 A.2d 246 (1947); 17A C.J.S. *Contracts* § 328. The bankruptcy stipulation cannot now be ignored in order to resurrect an implied promise. American General's motion for summary judgment as to this issue must therefore be denied.

XI

Defendant Texas Air has cross-moved for summary judgment on the issue of whether American General has standing to raise claims against it for breach of fiduciary duty. In essence, Texas Air contends that because American General did not purchase its shares in Texas Air until after the aborted first merger proposal, American General lacks standing to now raise any breach of fiduciary duty claims against Texas Air.

Assuming, arguendo, that there is any legal basis for Texas Air's assertion, any consideration of it is precluded by the undisputed facts. The disputed merger occurred on February 6, 1987 and its terms were agreed upon in December 1986. American General first purchased Texas Air shares months before the terms of this merger had been agreed upon and the alleged breaches of fiduciary duty therefore necessarily occurred after the purchase of shares. American General was therefore a stockholder at the time of the alleged violations and there is no merit to Texas Air's assertion.

Defendants' cross-motion for summary judgment will, therefore, be denied as to the issue of American General's standing to maintain this action.

XII

In summary, American General is entitled to enforce the contractual rights it obtained in the June 10, 1983 Loan Agreement between it and Continental, but is not entitled to any rights or benefits not set forth in the agreement. The Loan Agreement, when read as a whole, shows that the parties contemplated a long-term continuing investment by American General in Continental. Section 3.8 of the Warrants provision of the Loan Agreement provides that in the event of a merger of Continental, American General is entitled to receive the same merger consideration as other stockholders of Continental receive. The facts and circumstances indisputably show that the option to purchase Texas Air stock granted to the stock-

holder employees of Continental was an additional merger consideration. American General therefore is entitled to summary judgment granting it the same option to purchase shares of Texas Air stock as the stockholder-employees of Continental received.

I have found, however, that there has been no breach of the anti-dilution option provision of the Loan Agreement and therefore defendants are entitled to summary judgment on that part of American General's claim.

American General's claim that Texas Air breached an implied obligation of good faith and fair dealing in structuring the merger is barred by the waiver given by American General during the Continental Bankruptcy proceedings and therefore defendants' cross-motion for summary judgment is also granted as to this issue.

I further find that American General has standing to assert breaches of fiduciary duty against Texas Air occurring after its purchase of Texas Air stock and therefore defendants' cross-motion for summary judgment is denied as to this issue.

The plaintiffs, after conferring with defendants, may submit a proposed order.

ATLANTIS PLASTICS CORP. v. SAMMONS

No. 930

Court of Chancery of the State of Delaware, Kent

March 30, 1988

Plaintiff, a Delaware corporation, seeks to challenge certain conveyances made before the former majority shareholder and chief executive officer transferred his interest in the corporation to his former wife in satisfaction of a $400,000 judgment entered by the Superior Court of the State of Delaware. The plaintiff alleges that, prior to the transfer, the former majority shareholder with the consent of the former directors, the individual defendants in the present suit, fraudulently conveyed the corporate assets to the former majority shareholder and a newly formed corporation owned by the former majority shareholder's new wife and other family members.

The challenged acts are: (1) the conveyance to the newly formed corporation of the exclusive right to manufacture a product which belonged to the plaintiff corporation; (2) a $60,000 unsecured loan made to the former majority shareholder while the former was bankrupt; (3) the conveyance of substantially all the assets of the plaintiff corporation; (4) the sale of a certain real estate interest of the former majority shareholder, with the eventual option of lease-back; and (5) the granting of an employment contract to the former majority shareholder giving him a commission on all products sold.

The individual defendants, the former directors, moved for summary judgment because all the corporation's stock is now owned by persons who were not stockholders at the time of the challenged acts. The court of chancery, per Vice-Chancellor Hartnett, entered summary judgment in favor of the individual defendants on the basis that the plaintiff may not bring a suit for breach of fiduciary duty by the directors of the corporation when the challenged acts occurred before the transfer of stock holdings.

1. Judgment ⟹ 182, 185(2)

Summary judgment will be granted only when a court is satisfied, after a thorough review of the record with all inferences in favor of the non-moving party, that there is no genuine issue as to any material fact.

2. Corporations ⟹ 207

A corporation cannot bring an action against its former directors for their breach of fiduciary duty as directors when the challenged acts occurred before the current stockholders acquired their interest.

3. Corporations ⟹ 207

A new majority shareholder or the corporation itself does not have standing to sue the former owners and directors because the then stockholder did not suffer any injury from the alleged wrong because it was not a stockholder of the corporation at the time of the wrong.

4. Corporations ⟹ 207

Although the individual defendants were directors of the plaintiff corporation at the time of the alleged misconduct, at the present time the present stockholders of the plaintiff corporation did not own any shares in the corporation and therefore neither they nor the corporation can bring an action for breach of fiduciary duty against the former directors.

5. Fraud ⟹ 41

In order to award relief based on claims on fraud, allegations of fraud in the complaint must be pleaded with particularity. DEL. CH. CT. R. 9(b).

Patrick Scanlon, Esquire, of Barros, McNamara & Scanlon, Dover, Delaware, for plaintiff.

Eric C. Howard, Esquire, of Morris, Nichols, Arsht & Tunnell, Georgetown, Delaware, for individual defendants, the former directors.

Peter J. Walsh, Esquire, of Bayard, Handelman, & Murdoch, P.A., Wilmington, Delaware, for defendant, Plastic Specialties, Inc.

HARTNETT, *Vice-Chancellor*

Pursuant to Chancery Rule 56, the individual defendants moved for summary judgment as to them. The corporate defendant, Atlantis Industries, Inc. ("Atlantis Industries"), did not join in the motion. The only claims for relief asserted against the individual defendants are based on the assertion that they, while directors, breached a fiduciary duty to the only plaintiff, Atlantis Plastics Corp. The corporation, however, cannot maintain an action for breach of fiduciary duty against its former directors, the individual defendants, because all the corporation's stock is now owned by persons who were not stockholders at the time of the challenged acts. Because there is no genuine issue of material fact, the individual defendants' motion for summary judgment must be granted.

I

The plaintiff, Atlantis Plastics Corporation, a Delaware corporation, seeks to challenge several conveyances made by it while Alfred Eisele was its majority stockholder and chief executive officer. The conveyances were to Alfred Eisele and to other corporations in which he has an interest, allegedly in an effort to divest Atlantis Plastics of its assets because of pending claims by Aida Eisele against Alfred Eisele.

On April 8, 1983, Aida Eisele obtained a $400,000 judgment in the Superior Court against Alfred Eisele. Aida is the former wife of Alfred. Pursuant to this judgment, in September of 1983, Aida had issued a Writ of Attachment against Alfred Eisele's stock in Atlantis Plastics and eventually sought a sheriff's sale of the stock. On March 20, 1984, Alfred Eisele filed a bankruptcy petition and the automatic stay blocked the proposed sheriff's sale. On April 6, 1984, the bankruptcy court lifted the automatic stay to allow Aida to proceed with the sheriff's sale. Just prior to the consummation of the sheriff's sale, however, Alfred Eisele agreed to transfer all of his stock in Atlantis Plastics to Aida. It was agreed that the value of the stock, as would be subsequently determined, would be a credit on the $400,000 judgment. As a result of this transfer, Aida became the majority stockholder of Atlantis Plastics.

Prior to this transfer, Alfred Eisele, his current wife Ursula Eisele, and defendant Franklin Wyatt owned all of the Atlantis Plastics stock and the individual defendants, along with Alfred Eisele, constituted Atlantis Plastics' Board of Directors.

Atlantis Plastics Corp., the plaintiff, alleges that, prior to the transfer by Alfred Eisele of his stock holdings in Atlantis Plastics to Aida, he and the individual defendants fraudulently conveyed assets of Atlantis Plastics to corporate defendant Atlantis Industries, to Alfred Eisele himself, and to Plastic Specialties, Inc. ("Plastic Specialties"), a Delaware corporation owned by Ursula and other Eisele family members. Neither Alfred Eisele nor Plastic Specialties are parties to this lawsuit, however.

The challenged acts are: (1) the conveyance to Plastic Specialties of an exclusive right to manufacture a product which belonged to plaintiff Atlantis Plastics Corp.; (2) a $60,000 unsecured loan made to Alfred Eisele by plaintiff while Alfred was bankrupt; (3) the conveyance to defendant Atlantis Industries of substantially all the assets of Atlantis Plastics; (4) the sale of Alfred Eisele's interest in certain real estate located in Dewey Beach, Delaware, with the

eventual lease-back of the property to Alfred Eisele; and (5) the granting of an employment contract to Alfred Eisele giving him a sales commission on all products sold.

The plaintiff also alleges that the individual defendants, as its directors at the time of the conveyances, deferred to the wishes of Alfred Eisele and approved the conveyances thereby breaching their fiduciary duties as directors to it.

The complaint was filed on October 23, 1986. It contains three counts: Count I alleges that the individual defendants, while they were officers or directors of Atlantis Plastics prior to Aida becoming a stockholder, permitted the then majority stockholder of Atlantis Plastics, Alfred Eisele, to usurp a corporate opportunity of Atlantis Plastics for the benefit of Plastic Specialties, a corporation owned by Alfred Eisele's wife, Ursula, and her relatives. Plaintiff asserts that the individual defendants thereby breached a fiduciary duty owed to it. In Count II, plaintiff alleges that the individual defendants caused it to make an unsecured loan of $60,000 to Alfred Eisele and that the approval of the loan constituted a breach of the fiduciary duty owed to it by the individual defendants. Count III seeks no relief against the individual defendants, but alleges the existence of a fraudulent scheme between Alfred Eisele and defendant Atlantis Industries.

All of the disputed transactions occurred before Aida was a stockholder of Atlantis Plastics.

II

[1] Summary judgment will be granted only when a court is satisfied, after a thorough review of the record with all inferences in favor of the non-moving party, that there is no genuine issue as to any material fact. *Moore v. Sizemore*, Del. Supr., 405 A.2d 679 (1979); *Nash v. Connell*, Del. Ch., 99 A.2d 242 (1953).

III

[2] While the actions of Alfred Eisele, if true, would seem to constitute a fraud upon Aida, that is not the basis for the allegations in the complaint. Nor is Aida named as a plaintiff. This suit was brought only by Atlantis Plastics Corp. against its former directors, perhaps because Aida realized she could not bring a claim for a breach of fiduciary duty by the directors of the corporation which occurred before she became a stockholder. *Lewis v. Anderson*, Del.

Supr., 477 A.2d 1040 (1984); *Schreiber v. Bryan*, Del. Ch., 396 A.2d 512 (1978).

Plaintiff, in essence, claims that it can bring an action against its former directors for their breach of fiduciary duty as directors to it, even if its present stockholders cannot. Unfortunately, this is not the law.

IV

[3] In *Bangor Punta Operators, Inc. v. Bangor & Aroostock Railroad Co.*, 417 U.S. 703 (1974), the United States Supreme Court addressed a situation similar to the one presently posed. In that case, a corporation, at the behest of its shareholder who owned 99% of its stock, brought an action challenging acts of mismanagement allegedly committed when the corporation was controlled by a former owner and former directors. The 99% shareholder had purchased its shares from the former owner and directors. The United States Supreme Court held that the new majority shareholder or the corporation itself had no standing to sue the former owners and directors because the then stockholder did not suffer any injury from the alleged wrong because it was not a stockholder of the corporation at the time of the wrong.

In so holding, the Supreme Court ruled upon a rationale set out over 80 years ago by Roscoe Pound in *Home Fire Insurance Co. v. Barber*, Neb. Supr., 93 N.W. 1024, 1031 (1903):

> "Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. (citations omitted) It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application."

This Court applied the *Bangor Punta* and *Home Fire Insurance* rationales in *Courtland Manor, Inc. v. Leeds*, Del. Ch., 347 A.2d 144 (1975), and in *Council of South Bethany v. Sandpiper Development Corporation, Inc.*, Del. Ch., C.A. No. 935-S, Jacobs, V.C. (September 4, 1986), slip op. at 13, see also *Lewis v. Anderson*, supra, 477 A.2d at 1050.

[4] The present case clearly falls within these precedents. The individual defendants were directors of Atlantis Plastics at the time of the alleged misconduct but at that time the present stockholders of Atlantis Plastics did not own any shares of the corporation and therefore neither they nor the corporation can bring an action for breach of fiduciary duty against the former directors of the corporation, based on acts which occurred before the present stockholders acquired their shares.

V

Plaintiff, however, asserts that this Court should look beyond the claim of breach of fiduciary duty and award relief based upon claims of fraud.

Plaintiff obviously has set forth, in general terms, allegations which, if true, appear to constitute inequitable conduct. "Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *U.S. v. Bausch & Lomb Co.*, 321 U.S. 707 (1944). As one noted jurist has stated, "No man should profit from his own inequity or take advantage of his own wrong." CARDOZO, *The Nature of The Judicial Process*, p. 41 (1921). As even counsel for the individual defendants acknowledged at oral argument, the claims of fraud, if true, appear meritious. See *Stephenson v. Capano*, Del. Supr., 462 A.2d 1069 (1983); 6 *Del. C.* § 1309.

[5] Lawsuits, however, must be based on viable theories of recovery. See *Gabelli & Co., Etc. v. Liggett Group, Inc.*, Del. Ch., 444 A.2d 261, 265 (1982), *aff'd*, Del. Supr., 479 A.2d 276 (1984). The only allegations of fraud in the complaint appear in Count III and plaintiff does not seek any relief against the individual defendants based on Count III, nor is the alleged fraud plead with particularity. Chancery Rule 9(b).

If the factual allegations against Alfred Eisele are true, it seems likely that Aida has a valid claim of fraud against him and all who acted in concert with him. At this point, however, no colorable claim has been plead against the individual defendants.

VI

In summary, the individual defendants' motion for summary judgment will be granted. Any effort of plaintiff to amend the complaint shall be filed within 30 days or be barred. IT IS SO ORDERED.

BARSKY v. FLAHERTY

No. 9132

Court of Chancery of the State of Delaware, New Castle

December 30, 1987

Action seeking a preliminary injunction and summary judgment following failure of defendants' motion to dismiss for failure to state a claim upon which relief could be granted. Plaintiff is the founder and a major shareholder of Horsehead Industries, a defendant in this action. Plaintiff brought suit to enforce the provisions of an agreement entered into with the corporation and its board of directors which was intended to insure his continued investment in the enterprise in exchange for certain assurances regarding the handling of a stock offering by the corporation. This action sought to enjoin that stock offering until the corporation complied with certain provisions of the agreement. The chancery court, per Vice-Chancellor Jacobs, denied plaintiff's motions, finding that there was insufficient information in the record before the court to allow it to render a decision.

1. Injunction ⟹ 136, 151

To succeed on a motion for preliminary injunctive relief, the plaintiffs must demonstrate a reasonable probability that they will succeed on the merits of their claims, that they will suffer imminent irreparable harm if preliminary injunctive relief is denied, and that the harm to plaintiffs if relief is denied outweighs the harm to the defendants if relief is granted.

2. Judgment ⟹ 185(2)

The standard on a motion for summary judgment is whether, after consideration of all the evidence, there is a dispute as to any possible issue of fact material to any valid legal theory advanced by the moving party, and whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law.

3. Judgment ⟹ 181(1), 185(2)

On a motion for summary judgment, the moving party has the burden of establishing the absence of a material fact dispute, and any doubts must be resolved against granting summary judgment.

4. Contracts ⟹ 147(2)

The recitals of a contract do not create any rights beyond those arising from the operative terms of the document.

5. Contracts ⟹ 169, 176(2)

Intent may be determined from the plain language of a contract that is unambiguous.

6. Contracts ⟹ 154, 169

A court must give due consideration to the circumstances surrounding the execution of an ambiguous contract which requires interpretation, and to the parties' purposes in making the agreement.

Thomas J. Allingham, II, Esquire, David J. Margules, Esquire, and Randall S. Thomas-Peterhans, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware; and Robert E. Zimet, Esquire, of Skadden, Arps, Slate, Meagher & Flom, New York, New York, for plaintiff.

David A. Drexler, Esquire, and Paul P. Welsh, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Jay Topkis,

Esquire, Gerard E. Harper, Esquire, and Jon D. Kaplan, Esquire, of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, for defendants.

JACOBS, *Vice-Chancellor*

On July 24, 1987, the plaintiff, Ira Barsky ("Barsky") a shareholder of Horsehead Industries, Inc. ("Horsehead"), and its affiliate, Pony Industries, Inc. ("Pony"), filed this action for declaratory and injunctive relief against Horsehead, Pony, and their officers and directors. In this action the plaintiff seeks to enforce certain provisions of a settlement agreement that he entered into with the defendants on December 11, 1987 (the "December settlement agreement").

Horsehead has proposed an initial public offering of one-third of the outstanding shares of a wholly owned subsidiary, Horsehead Resources Development, Inc. ("HRD" and the "HRD offering"). In his complaint, Barsky contends that the December settlement agreement prohibits Horsehead from conducting the HRD offering unless Horsehead has first "spun off" its stock holdings in HRD to its (Horsehead's) stockholders (the "HRD spin-off"). Because no such spin-off is contemplated, Barsky seeks (i) a declaratory judgment that any public offering of HRD must be preceded by the HRD spin-off, (ii) an injunction against the proposed HRD offering, and (iii) a declaratory judgment that if the HRD offering is allowed to proceed, it will not trigger the period during which Barsky must exercise his option under the December settlement agreement to sell to Horsehead up to $4 million of his Horsehead stock (the "put option").

On September 9, 1987, this Court issued an Opinion denying the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. *Barsky v. Flaherty, et al.*, Del. Ch., Civil Action No. 9132, Jacobs, V.C. (September 9, 1987). Barsky then moved to enjoin the HRD offering and for summary judgment declaring that the HRD offering will not trigger the contractual exercise period under the put option. Following extensive discovery, a hearing on the two motions took place on December 2, 1987. This is the decision of the Court on Barsky's motions for a preliminary injunction and for summary judgment.[1]

1. Barsky also seeks a preliminary injunction against the maintenance of

I.

Horsehead is a privately held Delaware corporation, with 37 stockholders. It manages thirteen diversified businesses that generate almost $1 billion in revenues. Defendant William E. Flaherty ("Flaherty") is Horsehead's President, defendant Tinkham Veale, II ("Veale") is Chairman of the Board, and defendant David Judelson ("Judelson") is Chairman of Horsehead's Executive Committee. Until his termination in November, 1986, Barsky was Horsehead's Executive Vice President in charge of financial, legal, and administrative affairs.

Barsky and Flaherty founded Horsehead in 1981. Fifty percent of Horsehead's stock is owned by outside investors who were recruited by Veale. Horsehead's original management group owns the remaining fifty percent. Barsky and Flaherty each own 13% of Horsehead's common stock, and are its largest stockholders.

Although Horsehead struggled through some difficult early years, by 1985 it had begun to grow and prosper. Management then began exploring ways to pay down Horsehead's large debt and to make the shareholders' investment more liquid and, hence, more valuable. Management developed a reorganization plan, the central features of which involved organizing certain of Horsehead's businesses, including HRD, into separate corporations and offering stock in the new corporations to the public. In addition, the stock of the newly created corporations would be "spun-off" to Horsehead's stockholders.[2] As part of the plan, Flaherty and others in-

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a lawsuit brought against him by nine Horsehead stockholders in an Ohio state court. However, Barsky has failed to establish that this Court has jurisdiction over the Ohio plaintiffs and that an injunction is needed to prevent irreparable harm. Of the nine plaintiffs in the Ohio action, four are not parties to this lawsuit. The five Ohio plaintiffs who are parties appear before this Court only in their capacity as directors, but have filed the Ohio action in their individual capacities. Moreover, it appears that Barsky would be entitled to raise defensively (or by a motion to stay) in the Ohio action, the same contentions that he raises in support of his injunction motion in this action. Barsky therefore has an adequate remedy at law. *Manor Healthcare Corp. v. Tolbert*, Del. Ch., Civil Action No. 8425, Jacobs, V.C. (May 13, 1986). For those reasons Barsky's motion to enjoin the Ohio action is denied.

2. The parties dispute the centrality of the spin-offs to the reorganization. Barsky claims that the spin-offs were integral to the concept, while the defendants contend that the spin-offs would take place only if they could be accomplished on a tax free basis. Defendants contend that they always intended to proceed with the public offerings even if, for any reason, they decided not to proceed with the spin-offs.

tended to create a service company that would manage the newly spun-off subsidiaries.

The reorganization began in August, 1986, when HRD was formed as a wholly owned Horsehead subsidiary and acquired the assets of Horsehead's resource development division (the "HRD acquisition"). The purchase price was $40 million. Since the acquired assets were valued on Horsehead's books at $8 million, the HRD acquisition resulted in a $32 million gain to Horsehead. Because HRD was a wholly owned subsidiary, the acquisition qualified as an "intercompany transfer". As a consequence, the $32 million gain was not recognized on Horsehead's consolidated books, nor would it be so recognized or become subject to taxation, unless and until Horsehead and HRD became "deconsolidated." That would occur only if 20% or more of Horsehead's HRD stock were transferred to other persons or entities. Such a transfer of HRD stock (whether by a public offering or spin-off) would increase Horsehead's book value by $32 million, but would also impose upon Horsehead a tax of up to $12 million.

As part of the HRD acquisition, Horsehead's management had planned to spin-off HRD, and thereafter, to conduct a public offering of HRD stock. Indeed, the HRD acquisition was planned with those transactions in mind.[3] An important consideration, however, was whether the spin-off/public offering would be tax free to Horsehead's stockholders. In early 1986, Horsehead's tax counsel advised Barsky and Flaherty that Horsehead could obtain a ruling from the Internal Revenue Service ("IRS") that the spin-offs would be tax free to shareholders. Later, however, tax counsel advised that there was some risk that, wholly apart from the tax on Horsehead resulting from the $32 million gain, the proposed spin-off might not qualify as a tax-free transaction. In that case, separate additional taxes would be imposed on Horsehead and its shareholders. Given that risk, tax counsel advised Horsehead to obtain an advance ruling from the IRS.[4] Because of the time that obtaining

3. HRD paid $40 million for $8 million of Horsehead assets, because underwriters had valued those assets at $120 million and Horsehead planned to offer a third of HRD to the public. Horsehead structured its sale of assets to HRD in anticipation of receiving $40 million in proceeds from the public offering, which would be used to pay the tax on the $32 million gain and to "pay down" Horsehead's debt.

4. The record indicates that tax counsel advised that there was a 30-35% risk that a spin-off might be taxable to shareholders. Whether the defendants

such a tax ruling would require, tax counsel was requested (and apparently agreed) to supply his firm's opinion that a spin-off of HRD would be tax free to shareholders. At a meeting of Horsehead's Board in October, 1986, the Board decided to proceed with the spin-off on the basis of tax counsel's opinion.

During that same period, certain parallel but unrelated, developments were also taking place. Most notably, serious strains had developed between the two key founders, Barsky and Flaherty. By the fall of 1986, their relationship had deteriorated to the point that Barsky would no longer make any further investment in Horsehead or its affiliates. In October, 1986, Barsky refused to participate in the "Pony acquisition," which was a purchase of nine new businesses that would be operated by a new entity, Pony Industries, Inc. The stock of Pony was to be offered *pro rata* to Horsehead's stockholders. Horsehead's management became concerned that its banks would withdraw financing for the Pony acquisition if Barsky, a senior manager, refused to participate.

To induce Barsky to invest and to resolve his underlying concerns, Judelson (acting on behalf of Horsehead) negotiated an agreement with Barsky that was approved by Horsehead's Board on October 14, 1986 (the "October employment agreement"). That agreement provided that Barsky would remain as Horsehead's Executive Vice President, with specified responsibilities, through February, 1988, and that Flaherty would have primary responsibility for day-to-day operations.

The October employment agreement also contained two provisions that were critical from Barsky's perspective. First, Horsehead agreed to secure Barsky's investment in Pony by committing itself to buy back Barsky's Pony stock if he left Horsehead when the October employment agreement expired on February 15, 1988. Second, Horsehead agreed that when that agreement expired, Horsehead would purchase, at Barsky's option, up to $4 million of his Horsehead stock at a price equal to Horsehead's net book value as of December 31, 1987. (That provision became the progenitor of the "put option.") In return, Barsky agreed to, and did, subscribe to his *pro rata* share of stock in Pony.

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were told of that risk or whether Barsky alone knew of it, is disputed. Defendants contend that in early 1986, only Barsky knew of the risk, and that he withheld that information from the defendants. Barsky hotly disputes that charge. That dispute, while noted, need not be resolved here.

The rapprochement under the October employment agreement lasted little more than five weeks. On November 19, 1986, it was determined that Barsky should resign as an officer of Horsehead. Barsky contends that the defendants summarily fired him; the defendants dispute that characterization of what happened. In any event, Judelson told Barsky that Horsehead would enter into a new written contract that would guarantee Barsky the benefits of the October employment agreement. On November 21, 1986, the Horsehead Board ratified Judelson's commitment, subject to its being reduced to a new written agreement.

By late November, 1986, it had become clear that the HRD offering would not take place until some time during 1987. Barsky became alarmed that the HRD spin-off and public offering would be delayed beyond 1987. If the delay went beyond February 1988—the end of the period during which he was contractually permitted to exercise his put option—then he would lose credit for both the enhancement in book value that would result from a public offering of HRD, as well as the value of his *pro rata* share of the spun-off HRD stock. Stated differently, if Barsky was required to exercise his put option before the HRD spin-off and offering occurred, he would have to "put" many more shares to Horsehead (thereby paying a higher price) in order to exercise the total $4 million put option. Moreover, he would not be able to participate in the HRD spin-off. Barsky expressed those concerns to Judelson, who assured him that the HRD spin-off and offering "is going to get done. . .every stockholder who gets stock wants [the HRD underwriting], so don't worry, we all want it as fast as possible. . . ."[5]

Nonetheless, Barsky attempted to negotiate language in the new agreement that would enable him to exercise his put option after the HRD spin-off and offering took place. Apparently believing that Horsehead was refusing to negotiate fairly on that issue, Barsky filed actions in the New York Supreme Court, claiming that Horsehead had fired him in breach of the October employment agreement. Shortly afterwards the parties resumed negotiations leading to the contract which ultimately became the December settlement agreement.

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5. Barsky interprets Judelson's remarks as an assurance, and as evidence of the parties' implicit understanding, that any public offering of HRD would be preceded by a spin-off of HRD shares. Judelson denies that his remarks were intended to, or did, constitute an assurance that any public offering of HRD would be linked invariably to a spin-off of HRD stock.

The December settlement agreement was negotiated by Barsky and his attorney, Daniel Hirsch, Esquire, on the one hand, and by Judelson and Horsehead's outside counsel, Jane Kober, Esquire, on the other. The negotiations took place "round the clock" in order to achieve a written agreement that the Horsehead Board could consider at its meeting scheduled for December 12, 1986.

During the negotiations, Barsky wanted to extend the exercise period of his put option to protect himself in the event that a public offering of HRD would not go forward in 1987. He also wanted assurance that he would receive credit for any net book value increase resulting from a public offering of HRD. Ultimately, the parties agreed (and the December settlement agreement provided) that Barsky's put option would be extended for five years, to February 15, 1993. They further agreed that if the put option was exercised, the exercise price (net book value as of December 31, 1987) would be adjusted by the amount of the net after-tax gain from the 1986 HRD acquisition.[6]

The negotiations and redrafting of what ultimately became the December settlement agreement continued almost up to the last minute. Even in the "final" form as approved by the Board on December 12, 1986, the agreement contained numerous handwritten changes and interlineations. Because of the pressure to produce a written agreement by the December 12th deadline, the final product was less than a model of clear draftsmanship. The contract failed to state clearly whether any public offering of HRD would have to be preceded by the HRD spin-off. In his affidavit and deposition testimony, Barsky assiduously maintains that the parties' intent, as expressed in the negotiations and in the December settlement agreement, was that a spin-off would precede any HRD public offering. Ms. Kober and Mr. Judelson testified flatly to the contrary. They maintain that: (i) all parties—including Barsky—understood that a spin-off might not precede a public offering and, in fact, might never occur, and (ii) the December settlement agreement was drafted so as explicitly to reflect the parties' understanding that Horsehead was not contractually binding itself to undertake either corporate transaction.

In any event, no one disputes that as of December 12, 1986, Horsehead intended to conduct both the HRD spin-off and public

6. The parties also agreed that the litigation would be dismissed and that Barsky would resign as a director of Horsehead.

offering. In early February, 1987, however, Horsehead's Board met directly with the company's tax counsel, who advised them that, in addition to the $12 million tax Horsehead would incur as a result of the proposed HRD spin-off, Horsehead and its shareholders would also be exposed to additional tax risks. Specifically, an HRD spin-off would create a risk that an additional $30 to $40 million tax might be imposed upon Horsehead's shareholders, and that an additional tax of up to $15 million might be imposed upon Horsehead.[7] Defendants claim that they learned of that risk for the first time at the February, 1987 Board meeting. Barsky contends that the defendants had known of that risk since the fall of 1986 and, in fact, had provided for that risk by agreeing to conduct the HRD spin-off in reliance upon the opinion of tax counsel. In any event, at their February meeting, the Horsehead Board, now proclaiming its unwillingness to incur those risks, voted to forego the spin-off unless and until the IRS issued a favorable tax ruling.

On March 2, 1987 Horsehead formally requested a revenue ruling from the IRS. In response, the IRS advised Horsehead on May 1, 1987, of its concern that Barsky's put option might constitute a "device" for the distribution of Horsehead's earnings and profits to Barsky, in which event, the tax-free status of the proposed spin-off would be imperiled. Horsehead took the position that the put option was not such a "device," and in support of that position, its counsel represented to the IRS in a May 14, 1987 letter, that the HRD offering could be conducted even without a prior spin-off. The IRS next advised Horsehead that its policy was to avoid making an *ad hoc* determination that the put option was a "device" and that it would not consider issuing a ruling so long as the put option remained in place. However, the IRS apparently did agree to consider Horsehead's request for a ruling, if Horsehead were to eliminate the put option.

At its June 3, 1987 meeting, Horsehead's Board was told of the IRS's position that Barsky's put option might prevent a favorable tax ruling. The Board reaffirmed its earlier resolution that absent such a ruling, the proposed HRD spin-off would not be in the stockholders' best interests. The Board also decided that if the IRS would not issue a ruling while the put option was in place, efforts would be made to "buy back" Barsky's put option. The

7. The estimate assumes that Horsehead shareholders would be taxed at the highest marginal rate.

Board directed Judelson to convey to Barsky a proposal that would, in essence have required Barsky either to waive his put option altogether or to exercise it before the expiration of the contractual exercise period. Book value would be adjusted for the net after-tax effect of the HRD spin-off/offering, but as a condition to the company's repurchasing his stock, Barsky would have to agree not to sue Horsehead or its officers and directors, or engage in a proxy fight, for seven years.[8]

Barsky rejected that proposal, because it would have required him to exercise his put option early, with no compensation for the financial loss resulting from its premature exercise. Barsky stated that he would not exercise his put option prematurely unless he were compensated for the loss of his HRD shares, for the loss of the book value increase caused by the spin-off, and for the loss of his *pro rata* share of profits realized by Horsehead up to the spin-off.[9]

The defendants rejected Barsky's counteroffer on June 16, 1987. On June 18, 1987, an additional effort to resolve the impasse met with no success, and both sides remained steadfast in their positions.

At its meeting on June 23, 1987, Horsehead's Board voted to go forward with a public offering of HRD without a prior spin-off of HRD. The defendants contend that the parties' inability to reach an agreement eliminating Barsky's put option meant that the put option continued to prevent a favorable tax ruling which (as the Board had previously determined) was a condition of any spin-off.

Barsky contends that the defendants' "tax ruling" rationale for abandoning the HRD spin-off is a sham. He asserts that the proposed HRD public offering is, in fact, the product of more base motivations. Specifically, Barsky argues that the defendants' plan to conduct the HRD public offering without a prior HRD spin-off is a stratagem to force him to exercise his put option under circumstances that would deprive him of all benefits to which he is

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8. Defendants contend that this covenant would have applied only to those matters on which a majority of the stockholders had agreed.

9. Barsky valued his counterproposal at $8 million—$4 million to exercise the put option, and $4 million for the loss of benefits caused by the premature exercise. Barsky also refused to sign any covenant not to sue or to engage in a proxy fight.

entitled under the December settlement agreement.[10] He further contends that the defendants are seeking to exact retribution for his successful opposition to a proposal advanced by Flaherty and other defendants, to create a management services company that would manage the proposed subsidiaries created by the spin-off.[11] Again, those disputes are noted but need not be resolved on these motions.

This litigation followed.

II.

[1] The standards governing a motion for preliminary injunctive relief are well established. The plaintiffs must demonstrate a reasonable probability that they will succeed on the merits of their claims, that they will suffer imminent irreparable harm if preliminary injunctive relief is denied, and that the harm to plaintiffs if relief is denied outweighs the harm to the defendants if relief is granted. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 502 A.2d 173, 179 (1986); *Gimbel v. Signal Companies*, Del. Ch., 316 A.2d 599, 602-03, *aff'd*, Del. Supr., 316 A.2d 619 (1974); *Sealy Mattress Co. of New Jersey v. Sealy, Inc.*, Del. Ch., 532 A.2d 1329, 1333 (1987).

[2-3] The standard on a motion for summary judgment is similarly well established. The test is whether, after consideration of all the evidence, there is a dispute as to any possible issue of fact material to any valid legal theory advanced by the moving party; and whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the absence of a material fact dispute, and any doubts must be resolved against granting summary judgment. *Brown v. Ocean Drilling & Exploration Co.*, Del.

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10. Defendants take the position that the HRD public offering triggers the 30 day period in which Barsky must exercise his put option. If defendants' position is correct, and if the HRD spin-off is not a precondition of a public offering, then the result would be to require Barsky to exercise his put option in advance of a spin-off of HRD, should a spin-off occur.

11. Barsky opposed this proposal as being a self-dealing scheme by Flaherty and certain other defendants to divert to themselves a significant portion of Horsehead's earnings without sharing those earnings with all shareholders. Barsky apparently persuaded at least one other director of that position, and threatened to wage a proxy fight to defeat the proposal. Ultimately the management services company proposal was withdrawn.

Supr., 403 A.2d 115 (1979); *Warshaw v. Calhoun*, Del. Ch., 213 A.2d 539, *aff'd*, Del. Supr., 221 A.2d 487 (1966); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, Del. Ch., C.A. No. 7177, Jacobs, V.C. (July 9, 1986), *reprinted in* 12 Del. J. Corp. L. 783, 800 (1986).

For the reasons next discussed, both motions must be denied. Material fact disputes preclude the Court from finding that Barsky has established a reasonable probability of success on the merits. Those disputed fact issues also preclude a grant of summary judgment. In short, both motions depend upon disputed issues of material fact that for their resolution will require a trial.

III.

Barsky's positions rests upon what he contends are two separate contractual obligations under the December settlement agreement. Barsky first contends that the defendants have an unconditional obligation to conduct the HRD spin-off and public offering. Second, he argues (alternatively) that even if the defendants are not affirmatively required to conduct a public offering of HRD, should they choose to do so, the December settlement agreement requires that any public offering must be preceded by the HRD spin-off.

A.

I first address Barsky's "unconditional obligation" theory. That argument must be rejected, because the December settlement agreement fails to support it, and because it depends upon propositions of fact that, on this record, are disputed.

Barsky claims that his first argument is supported by three sources: (i) the "recitals" in the December settlement agreement, (ii) deposition testimony which (Barsky contends) establishes as a matter of fact and law that the HRD spin-off was a fundamental premise of the December settlement agreement and (iii) the Horsehead Board resolution of October 14, 1987 authorizing the HRD spin-off. Barsky asserts that that resolution constitutes a contractually binding declaration of a dividend. None of these sources is sufficient to validate Barsky's claims.

The December settlement agreement contains no language that expressly obligates the defendants to conduct a spin-off or a public offering of HRD. The only provision that lends implicit support to Barsky's argument is the underscored language in the "recital" portion of the agreement, which states:

> In May, 1986, Horsehead formed Horsehead Resource Development Company, Inc., a Delaware corporation ("HRD"), for the purpose of acquiring (the "HRD Acquisition") certain assets and the businesses of the Horsehead Resource Recovery Division of Horsehead and the Industrial Products Division of Horsehead's subsidiary GLC. *HRD is preparing to offer a portion of its common stock to the public, and immediately prior to the offering or any initial public offering of HRD (the "Public Offering"), all of the stock of HRD now held by Horsehead will be distributed to the stockholders of Horsehead (the "Spinoff").* (Emphasis added.)

[4] Under New York law,[12] the recitals of a contract do not create any rights beyond those arising from the operative terms of the document. *Ross v. Ross*, N.Y. App. Div., 253 N.Y.S. 871, 882 (1st Dep't. 1931), *aff'd*, N.Y. Ct. App., 187 N.E. 65 (1933); *see also*, *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985). While the quoted language may constitute some evidence of the parties' underlying intent, no operative provision of the December settlement agreement expressly obligates the defendants to conduct a spin-off or public offering of HRD. Indeed, certain of the operative provisions suggest a contrary intent. Paragraph 8 of the agreement directs how "net book value" is to be computed in valuing Barsky's Horsehead stock for purposes of the put option. Paragraph 8(c) provides one formula in the case where "the Option is exercised after a Public Offering." Paragraph 8(d) provides a formula in the situation where "the Option is exercised and a public Offering has not occurred." And Paragraph 8(a) states that ". . .[i]n the event that a Public Offering does not occur prior to February 15, 1993, the Option shall terminate on February 15, 1993."

Those provisions clearly indicate that the parties did not intend that the defendants would be absolutely, unconditionally obligated to conduct a public offering of HRD before Barsky's put option expired in February, 1993. Thus, the parties chose to spell out what Barsky's rights under the put option would be in either circumstance, *i.e.*, if the HRD offering did—or did not—occur before the February, 1993 expiration date. Nor does the extrinsic evidence fill the gap in the written agreement; indeed, the deposition

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12. Both sides agree that the issues requiring interpretation of the December settlement agreement are governed by New York law.

and affidavit testimony is in hopeless conflict. The testimony of Messrs. Barsky and Hirsch supports Barsky's position. The contradictory testimony of Ms. Kober and Mr. Judelson is that the defendants did not intend to obligate Horsehead to conduct either a spin-off or a public offering of HRD, and that the underlying premise of the negotiations was that those decisions were to be left to the Board's business judgment.

Nor has the plaintiff shown a reasonable probability of success on his assertion that the October 14, 1986 resolution authorizing the HRD spin-off was a contractually enforceable dividend. The resolution did not declare a dividend. All it declared was "a distribution" of HRD stock to Horsehead shareholders of record as of the date that the HRD registration statement becomes effective. At that point that event had not (and still has not) occurred. The resolution has none of the characteristics of a dividend, nor could it have any contractually binding effect, because its conditions precedent have not yet been satisfied. Moreover, the Board appears to have rescinded the resolution by its later resolutions of February 2, June 3, and June 23, 1987, determining not to conduct the spin-off in the absence of an IRS ruling.

It therefore follows that if the defendants are contractually obligated to conduct a spin-off, that obligation must flow, if at all, from plaintiff's proposition that if the defendants choose to conduct a public offering of HRD, that offering must be preceded by the HRD spin-off. To that contention I now turn.

B.

Barsky's second argued-for obligation, like his first, finds no explicit expression within any of the operative provisions of the December settlement agreement. Barsky contends, nonetheless, that the parties understood that any public offering of HRD would be preceded by a spin-off, and that their understanding was a fundamental premise underlying the entire agreement. That premise is correct, Barsky says, because certain operating provisions of the agreement would not work unless the agreement is interpreted to reflect that understanding.

Certain provisions of the written agreement do support Barsky's position. Although the quoted recital does not express an affirmative contractual duty, its language does constitute some evidence that the contracting parties intended for a public offering of HRD to be preceded by a spin-off.

Paragraph 8(c) of the December settlement agreement also supports Barsky's position. That paragraph states that if the put option is exercised after a "public offering" (a defined term), net book value (the exercise price) is equal to:

> Horsehead's net book value at December 31, 1987, adjusted for the net after-tax effect of the gain realized by Horsehead and its consolidated subsidiaries in the HRD Acquisition, the financial recognition of which is deferred until the Spin-off.

Barsky argues that for this Paragraph to operate, a spin-off must already (that is, before the calculation is made) have occurred. Otherwise, it would be impossible to adjust the December 31, 1987 book value for the net after-tax effect of the gain recognized by "Horsehead and its consolidated subsidiaries" in the HRD acquisition. This is because under Paragraph 8(c), the gain cannot be recognized "until the spin-off," and for that to occur, the spin-off must precede the public offering.[13]

Barsky's position is also supported by an internal memorandum by Jane Kober dated May 4, 1987 (Kober Exhibit 16), and by the June 24, 1987 Supplement to Horsehead's June 8, 1987 Proxy Statement (Kober Exhibit 17). Kober's May 4 memorandum pertinently states:

> The reason why the public offering of (HRD) figures in the exercisability of the option is that Barsky negotiated for this provision in order to be able to receive his entire 13% of [HRD] in a spin-off prior to surrendering his stock for book value, since he believes that the market value of the spun-off [HRD] stock will be greater than the book value of [HRD].

Consistent with the Kober memorandum, the June 24th Supplement to the Horsehead's Proxy Statement represented:

> Footnote N (last paragraph) of the enclosed financial statements references a Settlement Agreement dated De-

13. Barsky points out that a public offering of a majority of HRD's outstanding stock would "deconsolidate" HRD and its subsidiaries, thereby triggering a recognition of the gain in the HRD Acquisition. Since Paragraph 8(c) explicitly links the recognition of that gain to the spin-off, Barsky concluded that the parties must necessarily have intended that a spin-off will precede the HRD offering.

> cember 11, 1986, with Mr. Barsky wherein the Company agreed to give Mr. Barsky the right to put up to $4 million of his Company Common Stock to the Company for payment by the Company of the book value of the shares tendered. Mr. Barsky negotiated for an exercise that would follow the proposed spinoff to the Horsehead Shareholders of the common stock of Horsehead Resource Development Company, Inc. ("HRD") so that he would have already received 100% of his prorated allocation of HRD stock based upon his total holdings of the Company's Common Stock. At that time he would have the right to put back to the Company the percentage of his Company Common Stock equal to the aggregate exercise price he elects to receive (up to $4 million) divided by the book value of the Company.

But, the foregoing evidence cannot be viewed in isolation. Arrayed against it are other provisions of the agreement that undercut Barsky's position, and Ms. Kober's and Mr. Judelson's testimony, that while the defendants intended to conduct a spin-off, they were not committing themselves contractually to do so, and that Barsky was fully aware of that fact. The defendants argue that the Kober memorandum and the Supplement to the proxy Statement must be understood as expressions of the corporation's intent at that particular point in time, and not as expressions of a binding contractual obligation.

The defendants also point to certain provisions in the December settlement agreement and also to documents which came into existence before the HRD spin-off became an issue between the parties. The recitals themselves state that

> "HRD is preparing to offer a portion of its common stock to the public, and immediately prior to the offering or any initial public offering of HRD (the "Public Offering"), all of the stock of HRD now held by Horsehead will be distributed to the stockholders of Horsehead (the "Spin-off")."

Ms. Kober testified that she intentionally defined "Public Offering" as a transaction separate and distinct from, and independent of, the HRD spin-off. Kober also testified that she drafted Paragraph 16(a) to make explicit the parties' understanding that the ultimate decision as to whether or not to conduct the HRD spin-off, or the

HRD offering, would remain with the Board. Paragraph 16(a) provides:

> (a) Nothing in this Agreement shall be construed as a covenant that Horsehead or Pony will or will cause any proposed corporate transaction referred to in the Recitals or in Section—to be effected, it being understood that the affairs of Pony and Horsehead shall be governed by their respective boards of directors and officers.

The defendants also rely upon a letter written to the IRS (Perris Affidavit, Exhibit 2), in which Horsehead's tax counsel argued that the put option was not a device that would cause a spin-off of HRD to be taxable to the shareholders. In his letter counsel represented that ". . .it was therefore agreed to delay exercise of the put until after the public offering—even if the public offering occurred and the [spin-off] did not." The defendants point to counsel's letter as a contemporaneous expression of their position. They further point out that Barsky—who received a copy of the letter but never disputed counsel's statement that the HRD public offering could occur without a prior spin-off—acquiesced in the company taking that position.[14]

In rejoinder, Barsky advances several arguments designed to persuade the Court to interpret those provisions of the December agreement cited by defendants, in a manner consistent with his position, and to disregard the defendants' contrary evidence. To treat each of Barsky's arguments separately would needlessly prolong this already lengthy Opinion. Two arguments, however, are addressed.

Barsky argues that paragraph 16(a) should be interpreted as a "fiduciary out," rather than a "no-covenant," provision, *i.e.*, as a clause that affirmatively requires the Board to conduct the HRD spin-off/offering, unless in a proper exercise of its business judgment, the Board determines that those transactions would not be in Horse-

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14. Defendants point to similar failures by Barsky to dispute their position as tacit admissions of the correctness of that position. Before the Board voted to authorize the HRD offering on June 23, 1987, Barsky wrote a letter to Horsehead's directors setting forth various reasons why the public offering should be preceded by a spin-off. (Kober Exhibit 28.) The defendants point out that Barsky's letter contains no argument that Horsehead was contractually obligated to precede the public offering with a spin-off—an argument that, if correct, would have been legally dispositive of the issue. However, page 4 of Barsky's letter (in the carryover paragraph) contains a statement that can be read as expressing, however obliquely, Barsky's present litigating position.

head's best interests. Barsky then goes on at great length to argue that the Board's determination to abandon the spin-off was not a good faith business judgment. But paragraph 16(a) is, at best, ambiguous. Certainly it cannot be interpreted, at least on this record and as a matter of law, as a "fiduciary out" provision.

But even if Barsky's interpretation of Paragraph 16(a) were accepted, he has still failed to establish a probability of ultimate success, because whether the Board's motivation for not conducting the spin-off was proper, is, in all events, a heavily disputed issue of material fact that cannot be resolved at this stage.

Moreover, in the recital portion of the agreement, "spin-off" and "the public offering" are defined as two separate and distinct transactions. Those definitions, if viewed in isolation, appear dispositively to support the defendants' position. Barsky argues, nonetheless, that as a matter of undisputed fact and law, the Court must interpret the December settlement agreement as requiring that a "public offering" must be preceded by a "spin-off." Nothing in the present record would justify reaching that conclusion as a matter of law. The recital definitions in the December settlement agreement do not support Barsky's argued-for interpretation, and other pertinent provisions of that agreement create, at best, an ambiguity on that point.

[5-6] Intent may be determined from the plain language of a contract that is unambiguous (*Teitelbaum Holdings, Ltd. v. Gold*, N.Y. Ct. App. 396 N.E.2d 1029, 1032 (1979); *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, N.Y.Ct.App. 255 N.E.2d 709, 711 (1969); *Bethlehem Steel Co. v. Turner Constr. Co.*, N.Y. Ct. App., 141 N.E.2d 590, 593 (1957)). Here, however, the contract is ambiguous and requires interpretation, and the Court must give due consideration to the circumstances surrounding its execution and to the parties' purposes in making the agreement. *Aron v. Gilman*, N.Y. Ct. App., 128 N.E.2d 284, 288 (1955); *Cromwell Towers Redevelopment Co. v. Yonkers*, N.Y.Ct.App., 359 N.E.2d 333, 337 (1976). In this case, the extrinsic circumstances bearing on the contracting parties' intent is in hopeless conflict. There is no way that this Court can resolve that conflict on the paper record before it.

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For the foregoing reasons, the plaintiff's motions for a preliminary injunction and for summary judgment must be denied.

IT IS SO ORDERED.