procedures can do so only at the cost of giving up existing indemnification rights. Thus, realization of the apparent objects of the statute will be promoted by recognizing the priority of such claims.

VIII.

Other Disputed Matters: A Claims Assertion Date

The Claimants Trust includes a provision authorizing the trustee, after five years, to recommend and apply to this Court for the determination of a date after which the trust will not be authorized to pay any claims not asserted by that date.

Emerson Electric objects to the inclusion of any such provision calling it unauthorized by Sections 280 or 281. In the alternative, several Respondents urge that in no event should less than ten years of experience be had before any such date is considered.

[13] This provision appears to be an attempt to deal with the massive uncertainty created by the nature of the Company's product liability history and prospects and the limitations provision of Section 280(c). In my opinion, a provision of this type is permitted by Section 280(c) since its command is to fix "security which will be reasonably likely to be sufficient." There may come a time in the administration of the trust when it can responsibly be concluded that no further claims are likely to arise. At that point, termination of the trust will be appropriate. A Claims Assertion Date would present a helpful mechanism to give notice to the world of termination of the trust.

Given the claims history and prospects of the Company, however, in my opinion, in no event could such a termination occur here in as little as five years. *See, e.g.*, "RegO Products Claims (Occurrence Dates After 1/1/77) As of September 20, 1991," Guardian's App. Ex. E. When the directors purchased the Airco indemnity policy, they contracted for indemnity through the year 1998. Indeed, the record suggests that this trust may have to exist substantially longer than ten years. RegO suggests that nothing is lost by permitting the trustee to petition to terminate the trust in as little as five years. But this is not the case. An application to reconsider the matter of trust termination will not be without cost—to the trust, to the claimants, and to the public that underwrites the expense of these proceedings. To incur those expenses in as little as five years, on this record, seems wasteful. Given the experience that RegO has had, one can conclude that only a statute of the type reflected in

the Model Corporation Act would justify, on these facts, termination in less than ten years, if then, in my opinion.

A number of additional matters involving details of trust administration and the identity, powers and compensation of the trustee will be treated in a separate ruling to be issued contemporaneously with this already lengthy opinion.

For the foregoing reasons, the exceptions of the guardian *ad litem* to the Final Report are accepted to the extent set forth above. Therefore, I am required to decline to approve the proposed security arrangement but would approve, as sufficient in the circumstances, a trust that complied with the foregoing.

ROSS SYSTEMS CORP. v. ROSS

No. 10,378

Court of Chancery of the State of Delaware, New Castle

February 19, 1993

Plaintiffs in this action were an individual, a fifty percent stockholder and director of Ross Systems Corporation (Ross Systems), and a company, Ross Systems. Plaintiffs sought damages from the defendant, the other fifty percent stockholder and director of Ross Systems, and a decree removing him as a director of Ross Systems. The plaintiffs asserted that (1) they had been defrauded by the defendant, (2) the defendant converted the company's property to his own use and refused to return such property, and (3) they were entitled to a court decree removing the defendant as a director of the plaintiff company.

The court of chancery, per Vice-Chancellor Jacobs, held that (1) stockholder plaintiff was entitled to damages as a result of the fraud committed by the defendant; (2) plaintiff, Ross Systems, was entitled to recover money damages from the defendant for conversion; (3) the plaintiffs' request to have the defendant removed as a director of the corporation was denied; and (4) the defendant's counterclaims were without merit. The court reserved judgment as to the amount

of damages that the plaintiff was entitled to recover until such time as supplemental briefs were filed.

1. Fraud ⟸ 9

Under Florida law, in order to make out a case of common law fraud, there must be an intentional material misrepresentation to which the other party relies to his detriment, and the plaintiff must establish (1) a false statement concerning a material fact, (2) knowledge by the person making the statement that the representation is false, (3) the intent by the person making the statement that the representation will induce another to act on it, and (4) reliance on the representation to the injury of the other party.

2. Fraud ⟸ 9

The required elements for a claim of common law fraud in Florida are substantively identical to those necessary to state such a claim in Delaware.

3. Fraud ⟸ 18

A fact is material in a fraud claim if, but for the alleged misrepresentation, the complaining party would not have entered into the transaction.

4. Fraud ⟸ 9

The element of scienter for actionable fraud may be established by showing intent to misrepresent, and motivation for making such representation need not be shown.

5. Fraud ⟸ 50

In claim for consequential damages resulting from fraud, plaintiff has burden to establish that the claimed damages were foreseeable or proximately caused by the fraud.

6. Fraud ⟸ 3

In a claim of fraud under Florida law, all of the elements making up fraud must be clearly proven and the actual damages and measure thereof must be established.

7. Fraud ⟸ 50

Plaintiff must make reasoned effort to demonstrate link between fraud and alleged damages to establish a claim of actionable fraud.

8. Trover and Conversion ⟸ 7

Under Florida law, conversion is an unauthorized act that deprives another of his identifiable property permanently or for an indefinite time.

9. Contracts ⟸ 50

Agreement to modify prior agreement, resulting in receipt of materials at half-price rather than free of charge, which was agreed to in order to make it easier for corporation to go public, which, in turn, promised material benefits to the corporation's stockholders (including the defendant) by creating a public market for their stock, constituted consideration under Florida law.

10. Corporations ⟸ 294

The only persons empowered to remove a director are the corporation's shareholders. DEL. CODE ANN. tit. 8, § 141(k) (1991).

11. Corporations ⟸ 552, 621(1)

Court of chancery is empowered to appoint a trustee or receiver for a corporation. DEL. CODE ANN. tit. 8, §§ 279, 291 (1991).

12. Contracts ⟸ 265

Rescission of a transaction will not be granted unless the court can restore the parties substantially to the position they occupied before making the contract.

13. Contracts ⟸ 265

Remedy of rescission will be denied where party requesting rescission is unwilling to restore opposing party to its pre-contract position even where it can be established that the other party's conduct amounted to constructive fraud.

14. Process ⟸ 168

Under Delaware law, the tort of abuse of process requires (1) an ulterior purpose and (2) a wilful act in the use of the process not proper in the regular conduct of the proceedings.

15. Process ⟸ 168

Merely carrying out the litigation process to its authorized conclusion, even with bad subjective intentions, will not result in liability for abuse of process; for what must be shown is some form of coercion to obtain a collateral advantage not properly involved in the proceeding itself.

16. Corporations ⟸ 310(1)

Corporations may expend such amounts as their managers in their business judgment deem appropriate to promote products to carry on their business.

17. Damages ⟸ 20

Where an injury is too remote from the wrongdoing, a court as a matter of policy cannot award a recovery for it.

18. Damages ⟸ 20

Recovery may be barred where recklessness by plaintiff is established as an independent, intervening cause that broke the chain of causation between defendant's fraud and plaintiff's injury.

David A. Jenkins, Esquire, and Sherri L. Schaeffer, Esquire, of Smith, Katzenstein & Furlow, Wilmington, Delaware, for plaintiffs.

Christopher J. Battaglia, Esquire, and Jeffrey S. Marlin, Esquire, of Biggs & Battaglia, Wilmington, Delaware, for defendant.

JACOBS, *Vice-Chancellor*

Presently pending are the merits of this action after trial and post-trial briefing.

I. PROCEDURAL HISTORY

This case is a byproduct of a falling-out between the two principal stockholders and directors of Ross Systems Corporation ("Ross Systems" or "the company"), a Delaware corporation based in Florida. Until it ceased operations on March 31, 1990, Ross Systems manufactured and marketed a dental implant system that was developed by the defendant, Dr. Stanley R. Ross ("Dr. Ross"), a director and the secretary of the company and owner of fifty percent of its voting stock. The other director and fifty percent stockholder is Mr. Lewis M. Sang ("Sang"), the company's president and chief executive officer. Mr. Sang and Ross Systems are the plaintiffs in this case.

The plaintiffs filed this action on October 19, 1988, charging Dr. Ross with breaches of his fiduciary duties to the company and seeking injunctive relief and damages. Dr. Ross filed his answer and counterclaim on November 21, 1988, charging Mr. Sang with breaches of fiduciary duty, conversion of corporate assets, and tortious interference with trade relations with customers.

On October 23, 1989, the plaintiffs filed an amended and supplemental complaint. In response, Dr. Ross amended his counterclaim on July 26, 1990, adding allegations of constructive fraud and a claim to rescind the transaction by which Mr. Sang originally obtained his stock in Ross Systems. On May 6, 1991, Dr. Ross again amended his answer to add new counterclaims, including abuse of process, legal malpractice,[1] and other breaches of fiduciary duty.

After extensive discovery, the plaintiffs moved for an order setting a trial date. The Court granted that motion over the defendant's opposition.[2] The trial took place during June 10-17, 1991.

During the course of post-trial briefing, the defendant filed two separate briefs. The first was in response to the plaintiffs' affirmative

---

1. The Court subsequently ordered that the legal malpractice claim would be held in abeyance and severed from this proceeding pending the determination of the other claims in the case.

2. That motion was opposed, because the defendant, Dr. Ross, had previously moved for partial summary judgment on his rescission claim. The ground of that motion was that because Mr. Sang was acting as Dr. Ross' attorney at the same time that he was dealing with Dr. Ross at arm's length to negotiate his (Mr. Sang's) 50% interest in the company, Mr. Sang had the burden of proving the entire fairness of the transaction, which (it was argued) Mr. Sang had not done. That motion was briefed and argued during the spring of 1991, and was denied on the ground that it presented clear disputes of fact requiring a trial.

claims; the second was an opening brief in support of the defendants' counterclaims. The plaintiffs then filed a reply brief, charging that the defendant's briefs contained numerous factual assertions without support in the record. After oral argument (which took place on March 3, 1992), the Court afforded the defendant an opportunity to file supplemental materials that would either rebut the attacks on the integrity of the defendant's briefs or cure any infirmities. On June 15, 1992, the defendant filed an amended combined post-trial opening and answering brief, and the plaintiffs thereafter filed an amended reply brief.

By this tortious path this bitterly contested litigation finally became *sub judice*. This is the decision of the Court, after trial, on the merits of the parties' respective claims.

II. FACTS

Although on some issues the facts are heavily disputed, in many areas they are not. What follows are the critical facts as found by the Court. Other pertinent facts are discussed elsewhere in this Opinion.

A. Background of the Relationship between Mr. Sang and Dr. Ross

Mr. Sang is an attorney licensed to practice law in Illinois and Florida. After practicing law in Chicago, Illinois, Mr. Sang moved to Florida and commenced private practice there. In Florida, he met Dr. Ross, who was Mr. Sang's wife's periodontist. Dr. Ross was then, and is now, an internationally known periodontist with practices in Boca Raton and Delray Beach, Florida. Beginning in 1981, Mr. Sang acted as Dr. Ross' attorney on both personal matters and in connection with Dr. Ross' dental practice.

What started as a purely professional relationship later evolved into a business relationship concerning Dr. Ross' newly invented system for implanting teeth in a patient's jawbone.[3] Dental implant systems generally involve the placement of an implant, or "anchor,"

---

3. The parties dispute when precisely Mr. Sang ceased to represent Dr. Ross on professional and business matters. Mr. Sang contends that his representation ceased shortly before he and Dr. Ross formally entered into their business relationship on approximately October 1, 1986. Dr. Ross argues that Sang continued to represent him personally beyond October 1. It is undisputed, however, that after October 1, 1986, Mr. Sang represented Dr. Ross from time to time without charge when requested to do so.

in the jawbone to serve as the foundation for a superstructure on which a replacement tooth is then built. Initially, Dr. Ross used several other dental implant systems on his patients, but for various reasons he became dissatisfied with those systems and created his own.

The system developed by Dr. Ross worked as follows: A "ribbed" anchor would be passively placed (i.e., not screwed or hammered) into a cylindrical hole drilled in the jawbone by a specially designed surgical drill bit called a trephine. A titanium implant would then be placed in the hole and would remain there until it "integrated" with the jawbone. Once the implant became solidly embedded and fixed in the jawbone, a titanium pillar would be screwed into the implant. A patented process would then be applied to the pillar, and an artificial tooth or bridge would be mounted on it.

Dr. Ross told Mr. Sang that his new system had certain advantages over existing implant systems. First, because it was passively placed, his "ribbed" anchor would cause less trauma to the jawbone than threaded models that had to be screwed into the jawbone (such as "Core-Vent" or "Branemark" implants) or anchors that were hammered into the jawbone (such as "IMZ" or "Blade" implants). Second, the innovative pillar would enable restorative dentists to "sculpt" the top of the implant to make the artificial tooth look more like a natural tooth.

There is evidence that in developing his implant system, Dr. Ross did not employ animal studies or laboratory experiments to determine if his ribbed implant would successfully integrate with the jawbone. Dr. Ross' experimentation involved using implant prototypes developed by his associate, Mr. Frederick Bruce, and then determining subjectively whether those implants worked for his patients.

Dr. Ross knew that human histological studies (i.e., examining human materials under a microscope) were an important way to determine whether an implant has integrated with the jawbone. Dr. Ross caused to be published an article describing a histology that he performed using one of his implants. That article, published in Volume 8, No. 2, 1986 of *Periodontal Case Reports*, and co-authored by Dr. Ross and others, was entitled "Ross Osteounification Standard-Tooth Replacement System: A Clinical Report Including SEM Evidence of Healing to a Titanium Anchor with a 60-Day Human Block Section" (hereinafter the "Article") (PTX 27). As elsewhere discussed, the Article would later come to play a significant role in this controversy.

In connection with his development of his implant system, Dr. Ross asked Mr. Sang to handle certain specific matters, including locating both a patent attorney and an attorney with expertise in regulatory matters before the U.S. Food and Drug Administration. Dr. Ross also asked Mr. Sang to locate a manufacturer for the new implant system and to form a corporation to serve as the vehicle to exploit Dr. Ross' invention. Mr. Sang successfully carried out those assignments.

B. Mr. Sang's Decision to Invest in the Invention

At that time, Mr. Sang was looking for investment opportunities in Florida. In July 1986, Dr. Ross suggested to Mr. Sang that he might want to invest in his dental implant system. They discussed the subject throughout the summer, and ultimately Dr. Ross persuaded Mr. Sang of the clinical virtues of his invention and of his own marketing prowess.

Dr. Ross was excited about his system. He described it as representing a "breakthrough" in the dental implant field. Dr. Ross told Mr. Sang that his invention was more humane and clinically and aesthetically superior to the already-existing products. To support these claims, Dr. Ross showed Mr. Sang slides, x-rays, and scanning electron microscopy ("SEM") photographs[4] of what he described as prototypes of his implant system.

Specifically, Dr. Ross showed Mr. Sang SEM photographs of a sixty-day "human block section"[5] that (Dr. Ross claimed) depicted one of Dr. Ross' prototype implants. Dr. Ross told Mr. Sang that those photographs showed that bone had grown to and "knitted" with the prototype implant, thereby making the implant immobile. Such "osteointegration" was critical; otherwise the implant would "spin" or rotate in the jawbone and fail. Dr. Ross stressed the importance of these SEM photographs as evidencing that his implant

---

4. Scanning electron microscopy is a technique that involves sending an electron beam down a column that lies under a vacuum. The electron beam strikes the surface of the material being studied, interacts with that surface, and gives off a variety of signals that are "scanned" by a detector. The electron beam is scanned in a square pattern across the surface, with the signal coming from the beam giving a contrast on a television screen. A camera is attached to a second television screen through which a photograph can be taken of what is being shown on the first television screen.

5. A "human block section" is a block of bone taken from a human, with an implant inside of it.

system worked in humans. Finally, Dr. Ross told Mr. Sang that a large market existed for his implant, and that because of his national and international contacts he (Dr. Ross) could interest many people in his implant system.

Mr. Sang had no reason to disbelieve those representations and was highly impressed by what he had been shown and told. The discussions between these two gentlemen led directly to Mr. Sang investing in Dr. Ross' dental implant system and to their entering into a business relationship.

In their depositions (portions of which were admitted into evidence as trial exhibits) both parties testified, and I find, that Dr. Ross offered to Mr. Sang "half of this company, half of the invention" in return for Mr. Sang's investment. (Ross Dep. 11/28/88, p. 181; Tr. I, 57-58.) At trial, Dr. Ross attempted to deny his deposition testimony by claiming that it was "absolutely not" the truth because plaintiffs' counsel had "badgered me into it over those days" and had "driven me that crazy after 181 pages." (Tr. VI, 143-45.) However, Dr. Ross' deposition testimony, which I credit, shows otherwise.[6]

---

6. When responding to an unrelated question at his deposition, Dr. Ross himself brought up the subject of precisely what he had offered Mr. Sang:

Q. Did you ever agree to become a director?

A. To the best of my knowledge, we never even discussed it. This whole agreement was set up when I offered Mr. Sang half of this company, half of the invention, with him doing the job, and the faith that I had in him that he could do everything from anything that had to be done with the FDA, anything that would have to be done with the patents, drawing up all the legal documents. Mr. Sang is an attorney, I'm a periodontist.

Q. You said that you offered Mr. Sang half of the inventions, patented inventions?

A. Yes. I offered Mr. Sang half of what we were doing, at that moment. And if you want to use the word plural —

* * *

THE WITNESS: From what I had, Mr. Jenkins, that night when Mr. Sang sat across the desk from me and he agreed that what I had was an interesting thing and should go on with it. I said I'll go on with it. I'll give you half of it. And I gave him half of it. And we went on with it. (Ross Dep. 11/28/88, pp. 181-82.)

Q. There was one statement you made a short while ago, Dr. Ross, that I'd like to follow up on. You stated that you gave Mr. Sang one-half of the interest in your invention for zero dollars. Is that correct?

A. That's absolutely true, Mr. Jenkins.

Q. I take it, then, that it is your belief that Mr. Sang never paid you any money whatsoever for any of the inventions, patent applications, et

Based on Dr. Ross' representations, including the SEM photographs, Mr. Sang decided to invest in the new implant system. In making that decision, Mr. Sang relied on Dr. Ross' expertise in dentistry and implantology, as Mr. Sang was not knowledgeable about those areas. Mr. Sang testified that he never would have invested in the implant system had he known that Dr. Ross' critical SEM research was not performed using a Ross prototype. That testimony stands uncontroverted and I find it credible.

C. The Agreement and Business Relationship between Mr. Sang and Dr. Ross

Mr. Sang and Dr. Ross entered into a formal agreement effective as of October 1, 1986. That agreement had several provisions of which the following are the most pertinent:

1. Dr. Ross would, either directly or indirectly, contribute to Ross Systems (a to-be-formed corporation which would serve as the vehicle to own and exploit the invention) his interest in the existing and to-be-filed patent applications relating to the implant system;
2. Mr. Sang would pay $3,000 to fund half of the costs for the first two patent applications;
3. Thereafter, both Dr. Ross and Mr. Sang would contribute equal amounts of capital to the venture (which included covering the costs of the remaining patent applications);
4. Both Dr. Ross and Mr. Sang would obtain a fifty percent interest in the venture;
5. Dr. Ross would take from the venture the remaining out-of-pocket expenses he incurred in developing his invention;
6. Dr. Ross would obtain for free all implants and related materials that he wished to use in his practice; and

---

cetera?

A. No. Mr. Jenkins. I'm sure you realize I did not say that or believe that. I said very specifically to you I worked on something, I invented something.

I explained very slowly to you this morning. I showed this to Mr. Sang. He thought it had a great deal of potential. I knew I certainly didn't have the ability or time to run a business end of it. I offered him half of this for nothing.

(Ross Dep. 11/29/88, pp. 342-45.) (At the same deposition, Dr. Ross eventually conceded that Mr. Sang did contribute half of the start-up capital of Ross Systems. (*Id.* at 346-47.))

7. Mr. Sang would run the day-to-day operations of the venture, while Dr. Ross would concentrate on research and marketing, his areas of expertise.

Every critical point of the parties' agreement was documented. For example, Dr. Ross assigned, either to Mr. Sang directly or to Ross Systems, the seven patent applications relating to his invention; Mr. Sang delivered to Dr. Ross two checks totalling $3,000, covering one-half of the patent application costs; checks and bank transfers documented the monies put into the company by both parties; Dr. Ross and Mr. Sang each signed the memorandum of sale by which they purchased stock from Ross Systems; checks were issued to Dr. Ross for his preincorporation expenses related to his invention; and Dr. Ross himself prepared a list of implants that he received from the company for free or for half-price.

D. The Formation and Operation of Ross Systems Corporation

The parties initially intended to raise capital for the company's operations and expansion by a public offering. To facilitate such an offering, the Chicago firm of Bell, Boyd & Lloyd, which was Dr. Ross' and Mr. Sang's corporate counsel, suggested that Ross Systems be incorporated in Delaware, as a successor to an earlier-formed Florida corporation. Ross Systems was incorporated on October 1, 1986. Its initial directors were Dr. Ross and Mr. Sang, who are the company's present directors.[7] As earlier noted, Mr. Sang became the company's president and chief executive officer, Dr. Ross became the secretary, and Dr. Henry Crossetti, Dr. Ross' friend and co-author, became the vice president. Those same persons hold these positions today. Two classes of stock were issued: nonvoting Class A and voting Class B. Dr. Ross and Mr. Sang were each issued, and personally own, fifty percent of the voting (Class B) stock. They are also substantial owners of the nonvoting (Class A) stock, although other persons also own nonvoting stock, including members of Dr. Ross' and Mr. Sang's families.

The public offering never took place. As a consequence, the company's working capital appears to have been supplied entirely

7. For a brief period during 1987, there were three other directors of Ross Systems—Cameron Avery, the corporate partner at Bell, Boyd & Lloyd; William Jakobsen, the president of Lourdes Services; and John Dover, a banker. When the contemplated public offering fell through, these gentlemen resigned in late 1987, leaving Mr. Sang and Dr. Ross as the corporation's sole directors.

by Dr. Ross and Mr. Sang. Between 1987 and March 1990, Mr. Sang loaned over $550,000 to the company under circumstances that are not explained in the briefs.

1. The Publication of Dr. Ross' Article

Even before Mr. Sang had agreed to invest and before Ross Systems was incorporated, Dr. Ross sought to publicize his implant system by publishing the SEM photographs and related research that he had earlier shown to Mr. Sang. In late May 1986, Dr. Ross wrote to Dr. Alan A. Winter, the editor of *Periodontal Case Reports*, seeking to have an article published which "of course would be a tremendous exposure to me." (PTX 10.) Dr. Ross specifically asked that the Article be published in the next available issue and it "be done in color and also to be the lead-off article" to increase its visibility to the audience. (Winter Dep. pp. 7-10, 12-13; PTX 10.)

What resulted from this inquiry was the Article, which (to reiterate) was co-authored by Drs. Ross and Crossetti and Drs. Anthony Gargiulo and Walter Watson and the Article was ultimately published in early 1987 in *Periodontal Case Reports*. Dr. Ross ordered reprints of the Article and distributed them, particularly during lectures at which he introduced his system to potential customers.

2. Retaining Lourdes Services to Manufacture the Implant System

After failing to find a suitable manufacturer for the implant system in southern Florida, Mr. Sang, on behalf of Ross Systems, retained Lourdes Services, of Hauppauge, New York. Lourdes Services was a company specially formed for this project by the principals of Lourdes Industries, a sophisticated manufacturer of high-quality metal parts in the aerospace and related industries.[8]

8. Lourdes was a principal subcontractor for Grumman Aerospace, General Dynamics, B.F. Goodrich, Westinghouse, Raytheon, Bell Aerospace, and Fairchild Republic. Mr. Sang believed that using Lourdes Services would be advantageous to Ross Systems. Because of its relationship to its corporate parent, Lourdes Services could draw upon the pool of knowledge obtained from its parent's experience in manufacturing commercially pure titanium. Moreover, with its experience in defense subcontracting, Lourdes could easily comply with the substantial record-keeping requirements of the United States Food and Drug Administration, which regulated dental implants. Lourdes was also willing to absorb the substantial development costs, which would lower Ross Systems' up-front expense.

The relationship between Ross Systems and Lourdes was generally quite good. Although some minor problems occurred with certain of the manufactured components, they were not considered serious. Dr. Ross specifically approved the use of Lourdes as the implant manufacturer, and at no time before this litigation was commenced did he ever suggest that Ross Systems should change manufacturers.

3. Modification of the October 1986 Agreement

Under the October 1986 agreement, Dr. Ross was entitled to receive free implants from Ross Systems for use in his private practice. During 1987, the company's accountants advised that it would facilitate the contemplated public offering, and would be better for the company, if Dr. Ross paid the company half the cost of the implants he used. Accordingly, Dr. Ross consented to modify the October 1986 agreement in that respect. The invoices to Dr. Ross changed effective May 1, 1987, with the new invoices (unlike the old) setting forth the amounts owed by Dr. Ross. However, Dr. Ross refused to pay these invoices. He contends that he never agreed to any modification of the October 1986 agreement.[9]

---

9. However, Dr. Ross contemporaneously acknowledged the contractual modification. In an August 25, 1987 letter to Dr. Pierre Disler, a "good friend," Dr. Ross said:

> Enclosed are the pillars and one dental stone analog. Please realize the analogs correspond to the implant diameter. The address of the corporation is on the package itself which is the same as the following:
>
> Ross Systems Corporation
> 3896 Westroads Drive
> West Palm Beach, FL 33407
>
> This is even where I must purchase my supplies. If you call and give the necessary financial information which could include your American Express or Visa card numbers, I am sure that Mr. Sang would Federal Express to you whatever analogs, et cetera, that you may need.

(PTX 35.)

When confronted with that letter at his deposition, Dr. Ross first stated that Mr. Sang "coached me exactly on what I should put in it." (Ross Dep., 12/13/88, p. 328.) When asked whether he protested when told to tell his "good friend" something that supposedly was not true, Dr. Ross stated that his statement to Dr. Disler was "absolutely a lie." (*Id.* at 328-29.)

At trial, Dr. Ross attempted to explain his testimony, but ended up contradicting himself further. He first testified that he had not lied to Dr. Disler and "[i]f I did, I would certainly like to retract it." (Tr. VI, 129.) When confronted with his deposition, however, he then stated that his deposition testimony "is absolutely not a lie" and then testified that the answer he gave at the deposition was the truth. (Tr. VI, 132-33.)

E. Problems Encountered with the Implant

Not long after Ross Systems was formed, serious problems with the implant began to surface. Within months of the implant's first sales to the public in March 1987, Dr. Ross received numerous complaints from periodontists that the implant was "spinning" in their patients' jawbones. Dr. Ross' close friend and co-author, Dr. Henry Crossetti, passed on to him the complaints he had received concerning "rotation" problems with the implant. Dr. Crossetti concluded that a change in the implant was necessary for the continued viability of the company.

Other prominent periodontists expressed similar concerns over the performance of the Ross implant. Dr. Gerald A. Isenberg, Dr. Ross' friend and former partner, and a major user of Ross Systems implants, had a "very poor" success rate with Dr. Ross' system. (Isenberg Dep., p. 23.) Although not an expert in this area, Dr. Isenberg believed that the failures resulted from a "design problem" with the implant, because "the amount or the square surface area of titanium that was in contact with bone was significantly less than many of the other implants due to the ribbing and the design and the holes and the vents and so forth." (*Id.* at 25-27.)

Another prominent periodontist who experienced design problems with the new implant system (and who later abandoned it) was Dr. Alan Winter, the editor of *Periodontal Case Reports*. Dr. Winter had only a forty percent success rate with his Ross System implants, as opposed to a ninety percent success rate with Branemark. Dr. Winter also believed that the reason for his low success rate with the Ross Systems implant was "that there was an imprecise fit of the implant to the socket that was created and that there was a looseness to it." (Winter Dep., pp. 19-20.)

Dr. Ross attempted to solve this rotation problem by modifying the implant. For example, he placed a vertical groove down the side of the implant in an effort to increase the bone growth into the implant. He also developed a new implant design with "sintered beads" attached to the outside. However, these measures did not work. As late as February 1990, Fred Bruce, Dr. Ross' assistant who constructed all of his prototypes, was still trying to solve the implant rotation problem.

At trial the plaintiffs attempted to demonstrate that these rotation problems were caused by a design defect. The plaintiffs' expert witness on this subject, John B. Brunski, Ph.D., a professor in the Department of Biomedical Engineering at Rensselaer Polytechnic

Institute, opined that "there is a relatively loose fit of the implant in its prepared site." (Tr. IV, 57-58.) That looseness, Dr. Brunski testified, could "disrupt the bone healing," leading to the formation of fibrous tissue (rather than bone) around the implant, which would result in the implant's failure to osseointegrate. (Tr. IV, 67, 68.) Thus, Dr. Brunski concluded, the Ross implant would be more likely than its competitors to fail to integrate with the jawbone.[10]

F. Controversy Over the Article Develops

During the spring of 1988, Dr. Gerald A. Niznick, the president of Core-Vent Corporation, one of Ross Systems' major competitors, visited Dr. Vincent Iacono, then-editor of *Periodontal Case Reports*, in Stony Brook, New York. During that visit Dr. Niznick was shown a copy of the Article. Later, Dr. Niznick looked at the Article and

> realized that this was not a Ross implant but a Core- Vent implant. And I called [Dr. Iacono] immediately, specifically from the pay phone of the gas station, and I said, "You're not going to believe this. That's not a Ross implant. That's a Core-Vent implant." And he kept saying, "I don't believe it. It's hard to believe he'd do that."

(Niznick Dep., pp. 18-19.)

On May 17, 1988, Dr. Niznick sent a letter to Dr. Ross, with a carbon copy to the co-authors, attaching a letter that Dr. Niznick proposed to send to Dr. Iacono for publication in *Periodontal Case Reports*. The cover letter stated, "The article, at the worst, represents some type of intentional misrepresentation perpetrated in a scientific journal, and at best, some type of gross negligence." (PTX 40.) Equally blunt was the letter intended for publication:

> [I]t is Core-Vent's unequivocal opinion that: (1) the implant evaluated by SEM pictures in the article is not a "new titanium prototype" with "no external threads" but is the widely used Core-Vent Implant design with external threads; (2) the specimen is not a Ross Osteounification Implant but a Niznick [Core-Vent] Osseointegrated Implant. Unless

---

10. In Dr. Brunski's opinion, the looseness and resulting rotation problem could have been detected at the outset by "straightforward" laboratory tests similar to those he performed, or by tests on animals. There is no evidence that Dr. Ross was aware of a design problem in 1986, or that he subjectively knew or believed that his implant invention would not work.

> Dr. Ross manufactured an implant that exactly duplicates Core-Vent's patented hollow vented screw design, the implant in the pictures is manufactured by Core-Vent Corporation of titanium alloy.

(PTX 40.) Dr. Niznick's letter was eventually published. (PTX 57, p. 5.) Dr. Ross' published response to that letter stated that the implant in the SEM photographs was "not of Core-Vent origin." (PTX 57, p. 6.)

When Mr. Sang learned of the Niznick letter, he became concerned and spoke to Dr. Ross about it. So did Dr. Ross' co- authors. Dr. Ross flatly denied any impropriety, claiming that "Dr. Niznick is just a jealous competitor and it is just smoke." (Tr. II, 99-100.) At that point, Mr. Sang concluded that he had no reason to disbelieve Dr. Ross, and he did not pursue the matter.

Sometime during this period, Dr. Ross' interest in Ross Systems began to diminish. He refused to match the substantial amounts that Mr. Sang had recently invested in the company, and continued refusing to pay half-price for the implants he was receiving, although he had agreed to do so the year before. He also threatened to start his own dental laboratory and to buy a titanium casting machine that could cast pillar reconstructions. Finally, Dr. Ross began insisting that Ross Systems be shut down.

Concerned with Dr. Ross' altered behavior, Mr. Sang admonished Dr. Ross not to purchase the titanium casting machine or start up a dental laboratory, because such actions would compete improperly with Ross Systems. Mr. Sang also asked Dr. Ross to pay his outstanding bill to the company, which by then totalled about $60,000. Dr. Ross ignored those requests. Finally, in August 1988, at Mr. Sang's direction, Ross Systems refused to provide further implants to Dr. Ross unless his outstanding bill was paid.

G. The Parties Institute Litigation

On October 4, 1988, Dr. Ross filed an action in Florida seeking to dissolve Ross Systems and force it to be sold as a going concern at private sale. That suit was later dismissed.

On October 19, 1988, the plaintiffs filed this action. Being unaware of the facts upon which they now base their present claim of fraud, the plaintiffs sought at that time only an injunction and damages, based upon their claim that Dr. Ross was violating his fiduciary duties by improperly competing with the company and

disparaging it. By 1989, the focus of this litigation significantly changed.

H. The Discovery of New Facts Relating to the Article

At the October 1988 meeting of the American Academy of Periodontology in San Diego, California, a panel of physicians discussed dental implants. Among the panelists were Dr. Crossetti on behalf of Ross Systems and Dr. Niznick on behalf of Core-Vent. The 450 person audience included many customers or prospective customers of Ross Systems. During the discussion the panel's moderator asked Dr. Crossetti if any human histologic material had been examined before Dr. Ross introduced his implant system to the profession. Dr. Crossetti responded that he had no specific knowledge about the extent of any human histologic material. Dr. Niznick then interjected:

> Well, just one comment. I did read a very interesting article by Drs. Ross and Crossetti in *Periodontal Case Reports*, 1986, introducing this new implant. They showed a beautiful histology, SEM pictures, growth specimens of this new, pure titanium implant without any threads. The unfortunate thing was, though, that it was actually histology of a Core-Vent implant. And the letter to the editor will be published in February in that journal, because I just became aware of it, so I would say if they have that much confidence in the Core-Vent implant to use our implant histology in their articles I'd suggest they just go back to using Core-Vent.

(PTX 50A.)

Mr. Sang became quite upset by that comment, but he still did not believe Dr. Niznick's charges. Later, during the spring of 1989, Mr. Sang had a telephone conversation with Dr. Niznick, who insisted that he was certain that Dr. Ross had used a Core-Vent implant in the SEM photographs depicted in the Article. (Tr. II, 142.) Eventually Dr. Niznick's deposition was taken in December 1989. In his deposition Dr. Niznick carefully explained in technical terms, why the implant depicted in the Article was a Core-Vent, not a Ross Systems prototype.

That deposition testimony caused Mr. Sang to retain an independent technical expert to advise him whether or not the implant in the Article was a Ross Systems or a Core-Vent implant. The expert, Jeremy L. Gilbert, a professor in the Department of Biological

Materials at Northwestern University with substantial experience in scanning electron microscopy, took SEM photographs of the Ross implant, PX 56(h) (PTX 2A), and a Core-Vent implant, PX 49 (PTX 5).[11] He compared those photographs to the SEM photographs in the Article. Based upon his examination, Dr. Gilbert sent a draft report to Mr. Sang in April 1990, in which he concluded:

> 1. In [my] opinion . . ., there is clear and irrefutable evidence that several of the scanning electron micrographs presented in the article in question, namely Figs. A, A-1, B and C-1 do not correspond in design to the implant identified as Plaintiffs' exhibit 56(h).
>
> 2. Several of the micrographs and one photograph (Figs. A, A-1, B, C-1 and 7 respectively) presented in the article appear, in the opinion of the author, to be of a design that is identical to that of a Core-Vent implant identified as Plaintiffs' exhibit 49. Not all implants on the market were investigated, hence there may be another implant, not known to the author, which is very similar to Core-Vent's which these micrographs might represent. This possibility, however, is very remote.

(PTX 61.)

Dr. Gilbert reaffirmed that conclusion (and its underlying basis) at trial, where he testified as the plaintiffs' expert witness.

I. Shutting Down Ross Systems

After receiving Dr. Gilbert's report, Mr. Sang concluded that Ross Systems could no longer in good conscience sell its implant system. Mr. Sang concluded that Ross Systems today has no continuing viability, "[b]ecause the research upon which the system was based was phony." (Tr. II, 147.) Accordingly, Mr. Sang, as president of Ross Systems, shut down the company effective March 31, 1990, and sent notices to its customers and stockholders informing them of that action.

At present the corporation has no assets other than its interest in the invention and its claims against Dr. Ross. The company also

---

11. At his deposition Dr. Ross identified PX 56(h) (PTX 2A) as the type of implant that was depicted in the SEM photographs and Figure 7 in the Article; in his depositions, Dr. Niznick identified PX 49 (PTX 5) as a Core-Vent implant.

has significant unpaid debts owed to outside creditors (including Lourdes Systems) and to Mr. Sang and Dr. Ross.

III. THE CONTENTIONS

The plaintiffs presently assert three affirmative claims. Their first, and primary claim, is that they were defrauded by Dr. Ross. The alleged fraud consisted of Dr. Ross' intentional misrepresentations to Mr. Sang (a) that his research was performed using a prototype of Dr. Ross' implants, (b) that the SEM photographs depicted the results of that research (which were later published in the Article) and (c) that Dr. Ross' implant invention worked in human beings. Due to these misrepresentations, plaintiffs argue, Mr. Sang made sizeable investments in Ross Systems Corporation, in the form of his initial capital contribution and his subsequent loans to the company; as Ross Systems' president he also caused the company to expend funds to promote and develop Dr. Ross' implant system. Both Mr. Sang and Ross Systems claim that that fraud caused them to suffer significant financial losses.

The plaintiffs' second claim is that Dr. Ross converted the company's property (specifically $51,000 worth of slides, models, and surgical tools) to his own use, and refused to return those items to the company after Mr. Sang demanded that he do so. The company seeks also to recover approximately $60,000 for the implants and related materials it supplied to Dr. Ross, for which he agreed to pay half price.[12]

Third, the plaintiffs seek a decree removing Dr. Ross as a director of Ross Systems. The asserted basis for such relief is that Dr. Ross, while a director of the corporation, defrauded the company, and that since Dr. Ross and Mr. Sang each control fifty percent of its voting stock, Dr. Ross' removal can only be accomplished judicially.

The defendant, Dr. Ross, vigorously disputes these charges, particularly the accusation that he made false claims to Mr. Sang about his research. Dr. Ross has also interposed counterclaims for rescission and damages. First, Dr. Ross seeks to rescind the 1986

12. This damage claim is in lieu of, not in addition to, the damages sought by the company for fraud. That is, if Ross Systems recovers the full amount of damages it seeks on its fraud claim, no damages should be awarded for conversion; on the other hand, if the company is awarded damages for conversion, the damages it seeks on account of its fraud claim would be reduced accordingly.

transaction whereby Mr. Sang became an investor in the company, on the ground that Mr. Sang abused his fiduciary position as Dr. Ross' attorney by exerting undue influence upon his client to transfer a fifty percent interest in the implant invention, and in the company, to Mr. Sang. Alternatively, if rescission is not awarded, Dr. Ross seeks money damages equal to the value of what was taken from him in that transaction.

Dr. Ross also claims that (2) the charges leveled by Mr. Sang against him in this action constitute an abuse of process and an ultra vires act for which Sang is liable to Dr. Ross; (3) Mr. Sang intentionally caused the company to breach its contract with Dr. Ross, for which the company is liable; (4) Mr. Sang attempted to enrich himself at Ross Systems' expense, a waste of corporate assets for which Sang is liable to the company; and (5) Mr. Sang violated his fiduciary duties to the company by selecting Lourdes Services Inc. to manufacture the implant system without investigating whether there were lower cost manufacturers.

I now turn to the parties' respective claims. The plaintiffs' fraud claim is addressed in Part IV, *infra*, of this Opinion, and their remaining claims are treated in Part V. The defendant's counterclaims are addressed in Part VI. Finally, the appropriate remedy is determined in Part VII.

IV. THE PLAINTIFFS' FRAUD CLAIMS

Of the many charges that the parties have leveled at each other, the fraud claims are the most heavily controverted and consumed the bulk of the trial and the post-trial briefs. Hence, the treatment of the fraud issue must be somewhat extended.

The acts underlying the fraud claims took place in Florida and occurred before Ross Systems was incorporated. No other state has any identifiable (let alone a significant) relationship to the alleged fraud. All parties, therefore, agree that the common law fraud claims are governed by Florida substantive law. *Travelers Indem. Co. v. Lake*, Del. Supr., 594 A.2d 38, 47 (1991).

[1-2] Under Florida law, to make out a case of common law fraud, the plaintiff must establish (1) a false statement concerning a material fact, (2) knowledge by the person making the statement that the representation is false, (3) the intent by the person making the statement that the representation will induce another to act on it, and (4) reliance on the representation to the injury of the other party. In other words, there must be an intentional material mis-

representation on which the other party relies to his detriment. *Lance v. Wade*, Fla. Supr., 457 So. 2d 1008, 1011 (1984). Delaware law is substantively identical. *Stephenson v. Capano Dev., Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983).

Although Dr. Ross contests the showing made as to each of these elements, his primary defense is that he made no false statement of material fact. That is, the crux of Dr. Ross' case is that he spoke truthfully when he told Mr. Sang that a prototype of his implant was used in his research and in the Article, and that his implant worked in human beings. The key factual issue is what implant Dr. Ross used in his experiments described in the Article—a Ross Systems prototype or a Core-Vent product?

A. Material Misrepresentation of Fact

1.

[3] Although the defendant disputes the veracity of Dr. Ross' representations to Mr. Sang, he does not question their materiality. A fact is material if but for the alleged misrepresentation the complaining party would not have entered into the transaction. *See Hauben v. Harmon*, 5th Cir., 605 F.2d 920, 924 (1979) (applying Florida law); *Morris v. Ingraffia*, Fla. Supr., 18 So. 2d 1, 3 (1944).

Under discussion at the time those representations were made was a proposed venture to develop and market a new implant product, based upon a novel concept never before tried in the marketplace. Such a venture would require a significant risk of time and money. It cannot be supposed that a prudent investor would invest in such an untried concept had he been told that the predictions for its success were based upon misrepresented research. Mr. Sang testified (and I have found) that he would not have invested or become involved in the venture had he known that the device used in the experiments described in the Article was not a Ross prototype, but, rather, a competitor's product. A critical component of Dr. Ross' representations were the SEM photographs that were later published in the Article. Dr. Ross emphasized the importance of those photographs as evidence that the system worked in humans. Mr. Sang testified that those representations concerning the SEM photographs were a principal reason underlying his decision to invest in Dr. Ross' implant system. That testimony stands unrebutted.

The materiality of the representation having been established, I next address whether the representation was truthful.

2.

Dr. Ross represented to Mr. Sang that the SEM photographs depicted a prototype of his implant invention which he had used in his research. Plaintiffs claim that that representation was false. They rest that claim upon the trial testimony of Dr. Gilbert, who concluded that the dental implant shown in the article "did not correspond in design" to the Ross System prototype and appeared "to be of a design that is identical to that of a Core-Vent implant." (PTX 61.) Regarding that identification, Dr. Gilbert testified that he was "within scientific reason, certain that it is true" (Tr. III, 114), and he supported that conclusion by a detailed, clear analysis, based upon his investigation into the subject. I find Dr. Gilbert's testimony lucid, logical, and highly persuasive.

At trial, Dr. Ross offered no expert testimony to rebut Dr. Gilbert. Rather, his defense consisted of (1) Dr. Ross' own testimony and that of his assistant, Fred Bruce, that the implant used in his experiments and in the SEM photographs was Dr. Ross' own prototype, and (2) a series of arguments made in the defendants' post-trial answering brief, whose thrust was that Dr. Gilbert's testimony was technically flawed and not worthy of belief.[13]

Insofar as Dr. Ross' defense rests upon his own testimony, the defense fails because it presupposes that that testimony is credible. I conclude otherwise. The Court had ample opportunity to observe Dr. Ross' demeanor at trial. The Court also considered the documented instances where Dr. Ross attempted to repudiate or explain away earlier testimony or out-of-court admissions that were harmful to his position. On the foregoing basis, I cannot help but conclude that Dr. Ross' testimony was relentlessly discursive, persistently nonresponsive, frequently implausible, and on factually disputed points, fundamentally unpersuasive.

Nor is Mr. Bruce's testimony sufficient to overcome the force of Dr. Gilbert's. Mr. Bruce is no expert in scanning electronic

---

13. Dr. Ross also attempted to rely on the trial testimony of his other associate, Ingrid Schultz. Ms. Schultz, admitted, however, that she had no first-hand knowledge of the identity of the implant. (Tr. IV, 132-40.)

In his Answering Brief, Dr. Ross also suggests that Drs. Anthony Gargiulo and Patrick Totto had also identified the SEM photographs as depicting a Ross dental implant prototype. (Def. Ans. Br., 31.) However, neither of these gentlemen testified at trial, and when deposed, Dr. Gargiulo disclaimed any knowledge of whether the implant in the Article was (or was not) a Core-Vent. (Gargiulo Dep., pp. 32-33.)

microscopy: he had never previously taken or analyzed an SEM photograph. (Tr. III, 43-44.) To credit Mr. Bruce's testimony, one would have to accept his nonexpert assertion that the implant used in the Article was a prototype he had manufactured. For the following reasons I cannot.

As a long-time associate of Dr. Ross, Mr. Bruce was neither disinterested nor independent. Moreover, Mr. Bruce based his identification of the implant shown in the Article upon his claim that the photograph in Figure C-1 of the Article depicted triangular shaped "annular rings," rather than the "buttress thread" of a Core-Vent. However, in a memorandum to defendant's counsel dated four months before the trial Mr. Bruce stated that Figure C-1 showed "a photo of the *threaded* portion of the implant." (Tr. III, 45-47 (emphasis added).) Confronted with that memorandum, Mr. Bruce attempted (unconvincingly) to show that it was not inconsistent with his trial testimony. (Tr. III, 54-55.) Mr. Bruce also testified that he had machined the implant shown in the Article. (Tr. III, 52-53.) If that were true, then machining scratches would have been evident in the SEM photographs, but none were. Such scratches were evident on Dr. Ross' prototype, but none were evident on the Core-Vent implant shown in Dr. Gilbert's report. (Tr. III, 114-15.) Finally (and quite telling), Dr. Ross does not base any contention or argument in his amended answering brief upon Mr. Bruce's implant identification testimony.

Therefore, Dr. Ross' defense necessarily must rest upon his arguments that Dr. Gilbert's testimony was flawed in various technical respects and is, therefore, unworthy of acceptance; and that technically it is not possible to identify the implant shown in the Article as either a Ross prototype or a Core-Vent. For the reasons next discussed, those arguments must be rejected.

3.

The defendant argues that Dr. Gilbert's conclusions should not be accepted because Dr. Gilbert (1) was not technically qualified to render his opinion; (2) was given only one prototype to examine, which misled him into reaching an incorrect conclusion; and (3) manipulated the Core-Vent and Ross prototypes he examined in order to make them appear more different under the SEM than they really were. These arguments are without merit.

First, Dr. Gilbert was fully qualified to render an expert opinion in this subject area. He holds a doctorate in metallurgical engineering

and materials science and biomedical engineering. He had logged between 1,000 and 2,000 hours at the SEM, and had "extensive one-on-one education in the interpretation of scanning electronic micrographs." (Tr. III, 130.) He also taught a course in scanning electron microscopy at Northwestern University's dental school and supervised the SEM laboratory there.

Nor can I credit the assertion that the plaintiffs "blinded their own expert by not informing him of the existence of a thread-like prototype" that (Dr. Ross now claims) he had previously developed. (Def. Br., 33.) The defendant argues that by showing Dr. Gilbert only the Ross prototype identified as PX 56(h) (PTX 2A), the plaintiffs misled him into not considering another Ross prototype that closely resembled a threaded Core-Vent. That argument appears for the first time in the defendant's brief and was not a subject of any cross-examination of Dr. Gilbert. It also ignores Dr. Ross' own uncontradicted, and never-repudiated deposition identification of PX 56(h) as the type of implant shown in the SEM photographs in the Article. Given Dr. Ross' identification, plaintiffs' counsel properly instructed Dr. Gilbert to assume that PX 56(h) was the correct Ross prototype to examine. Nor is there any independent evidentiary support for the newly minted contention that there existed another prototype, identical to the Core-Vent, that was concealed from Dr. Gilbert. (Tr. III, 87, 90.)

The defendant's third argument—that Dr. Gilbert manipulated the implants he was examining in order to exaggerate their differences—also appears for the first time in his brief and is based on "facts" that have no record support. The only evidence on this subject is Dr. Gilbert's testimony that he oriented the two implants he was analyzing to make them approximate the orientation of the implants in the Article. (Tr. III, 135-36.) In his brief the defendant asserts that the SEM analytical procedures utilized by Dr. Gilbert "[do] not yield scientifically compelling evidence" (Def. Br., 37); however, the defendant never cross-examined Dr. Gilbert or called an expert in this field to testify on that subject. To assert a proposition is one thing; to prove it is quite another.

Finally, the defendant asserts that the plaintiffs failed to carry their burden of proof because it is impossible to tell from the published SEM photographs whether the implant shown in the Article is a Ross implant or a Core-Vent implant. The defendant's position rests on assertions of technical "fact" in his brief. Those assertions are followed by record citations that do not support the "facts" for which they are cited. Dr. Gilbert, the only expert who testified, concluded

to the contrary. (PTX 61, 5; Tr. III, 111.) Having failed to make a satisfactory record at trial, the defendant cannot be permitted to do so in his brief.

B. Scienter

The plaintiffs have also established the element of scienter. Dr. Ross was a leading expert in dental implantology. He had used every major implant system, including Core-Vent. Given Dr. Ross' expertise and his intense interest and personal involvement in the writing and publication of the Article, it is highly probable that any misrepresentation as to what implant Dr. Ross used would, by its very nature, have been purposeful.

[4] Dr. Ross responds that it would have been illogical for him to risk his professional reputation and his personal funds to perpetrate a fraud that he knew would be discovered as the first implants placed in patients began to fail. In a different context, that argument would have persuasive force (*see infra* Section III.D), but not here. Though one might speculate why Dr. Ross would take such a risk, it has been proven that he did. Once that is established, his motivation for acting need not be shown. *See Lance*, 457 So. 2d at 1011.[14]

C. Intent to Induce Reliance and Detrimental Reliance

Lastly, I conclude that Dr. Ross intended for Mr. Sang to rely upon his misrepresentations, and that Mr. Sang did, in fact, rely to his detriment. Dr. Ross made critical representations to Mr. Sang to induce him to invest in the new dental implant system and to participate in the venture that would be formed to exploit the invention. Though it is disputed whether and to what extent Mr. Sang was financially injured, the evidence does establish that Mr. Sang relied detrimentally on those representations by initially investing over $200,000 in the company.

* * *

I, therefore, conclude that the plaintiffs have established that Dr. Ross committed actionable fraud upon Mr. Sang.

---

14. The plaintiffs speculate that Dr. Ross used a Core-Vent in the SEM photographs, because he had previously committed himself to a tight deadline for submitting the Article and knew the deadline would expire before he would have access to a fully osseounified Ross prototype. Therefore, Dr. Ross substituted a Core-Vent, thinking that no one would detect the difference. But whatever may have been Dr. Ross' actual motive, I am not required to, and therefore do not, speculate about it.

D. The Company's Fraud Claim

The plaintiffs contend that Dr. Ross also defrauded the company. This claim is far more subtle, and its merits far more problematic, than Mr. Sang's individual fraud claim. To begin with, Dr. Ross' misrepresentations concerning the SEM photographs that caused Mr. Sang initially to invest, could not have "defrauded" the company, as Ross Systems did not then exist. Recognizing that problem, the plaintiffs have attempted to recharacterize the alleged fraud to create some cognizable connection between the wrongful act and the relief they seek on the company's behalf, *viz.*, recovery of all the monies the company presently owes to its creditors, including Mr. Sang and Dr. Ross.

While it is not altogether clear from the briefs, it appears that the company's fraud argument is as follows: Dr. Ross' misstatements relating to the SEM photographs were part of a broader misrepresentation that the new implant system was, and had been demonstrated to be workable in human beings. That misrepresentation was made to Mr. Sang both individually and as president of Ross Systems, and it was false, because from the outset the Ross implant system encountered widespread osseounification problems in actual clinical practice. Those problems (it is claimed) were the result of an inherently faulty design that greatly increased the likelihood of failure. That design defect would have been immediately detectable had proper experimentation techniques been utilized at the outset. Dr. Ross knew that but concealed it from Mr. Sang, thereby inducing him, as president of Ross Systems, to expend the corporation's funds to develop the implant.

This claim is highly problematic, both on its merits and in its theory of recoverable damages. That Dr. Ross may have misrepresented the research described in the Article to induce Mr. Sang to invest does not necessarily establish that Dr. Ross knew or believed his implant was unworkable or worthless. To be sure, Dr. Brunski's testimony and the actual clinical experience with the Ross implant do support the plaintiff's position that the implant had design problems. But neither that fact nor the other evidence establishes that (i) Dr. Ross believed from the outset that his invention was not viable or that (ii) he purposefully set out to develop and market to his colleagues a worthless product that he knew would fail. Absent persuasive evidence, the Court cannot suppose that Dr. Ross would risk his reputation, time, and money, and the capital of a company

of which he was a half owner, to promote a product that he knew would fail.

Equally problematic is the plaintiffs' theory that they are entitled to recover from Dr. Ross the monies that the company expended to develop and market the Ross implant. On the one hand the plaintiffs say that they are not seeking rescission; on the other hand, they argue that the company must be restored to its original position and must, therefore, recover damages equivalent to its indebtedness at the time Mr. Sang shut it down ($449,111.59). The only authority they cite for the latter proposition is *Gregg v. U.S. Industries*, 11th Cir., 887 F.2d 1462, 1467 (1989) (applying Florida law), upholding a damage award under the "out-of-pocket" theory, *viz.*, the difference in value between what the plaintiff gave to the defendant and what the plaintiff received in return. That theory does not fit these facts, and the plaintiffs make no reasoned effort to show that it does.

The "out-of-pocket" damages theory is typically utilized in cases such as *Gregg*, where a person exchanges property for other property the value of which was misrepresented. 37 Am. Jur. 2d *Fraud and Deceit*, § 355, at 479-82 (1968). That theory minimizes speculation and conjecture in determining damages by focusing the inquiry upon the value of the property actually received. *Id.* at 482-83. Here, however, no contention is made that the company was defrauded into buying or selling specific property for less than its represented value. Nor is it claimed that the company was defrauded into entering into some other specific transaction that resulted in the company overpaying for what it received in exchange. Rather, the claim appears to be that the company was defrauded into entering (or, perhaps, into continuing) an entire line of business that involved incurring, over a lengthy period, ordinary business obligations that were incident to the development of the implant invention and which because of the invention's defects, the company became unable to repay.

[5-6] That claim is more properly characterized as one for consequential damages resulting from a fraud. In that context the plaintiff has the burden to establish that the claimed damages were foreseeable or proximately caused by the fraud. *Tew v. Chase Manhattan Bank, N.A.*, S.D. Fla., 728 F. Supp. 1551, 1568, *amended*, 741 F. Supp. 220 (1990); *Tampa Union Terminal Co. v. Richards*, Fla. Supr., 146 So. 591, 596 (1933). Under Florida law, all of the elements making up fraud must be clearly proven, *Biscayne Boulevard Properties, Inc. v. Graham*, Fla. Supr., 65 So. 2d 858, 859 (1953), and the actual damages and the measure thereof must be established. *National Equip. Rental,*

Ltd. v. Little Italy Restaurant & Delicatessen, Fla. Dist. Ct. App., 362 So. 2d 338, 339 (1978).

That the plaintiffs have not done. They merely *assert* that after the alleged fraud occurred, the company borrowed money and/or incurred still-outstanding trade obligations (mostly to third parties), that must be recovered if the company is to be restored to its former position. That measure of damages is *asserted* to equal the size of the outstanding debt, but nowhere is that equation convincingly established or even analyzed. In my view, the connection plaintiffs seek to establish between the alleged damages and the antecedent fraud is far from self-evident.

It is not claimed here that Dr. Ross fraudulently induced specific creditors to loan monies or to provide goods and services to the company. That claim, if made, would have some nexus to the damages being sought here, and it could be brought by the defrauded creditors. That claim, if valid, might also result in the imposition of liability directly upon the corporate officer or director who made the false representation. 3A Fletcher, *Cyclopedia of the Law of Private Corporations* § 1146 (perm. rev. ed. 1986) [hereinafter Fletcher, *Cyclopedia*]. Or, if the creditors successfully established that claim against the corporation based on a fraud committed by one of its officers or directors, then the corporation might be entitled to indemnity from that officer or director. But neither case is presented here. No creditors (other than Mr. Sang) have sued the company or Dr. Ross for fraud, the company does not seek indemnity against Dr. Ross for liability asserted against it by third parties on account of his acts, and the company does not argue that it is entitled under some other theory to assert the claims of creditors who are not before this Court. [7] For the company to prevail, the Court would have to hold that the loss of all monies presently owed by the company, regardless of when or under what circumstances the indebtedness was incurred, was a foreseeable, proximate consequence of Dr. Ross' misrepresentations. Such a holding would credit a perilously open- ended measure of damages. Under Florida law the plaintiffs have the burden of establishing that the result is legally justified. Because the plaintiffs have made no reasoned effort to demonstrate the link between the fraud and the alleged damages to the company, the company's claim must fail.

* * *

Accordingly, I conclude that the plaintiffs have failed to establish that Dr. Ross committed actionable fraud against the company.

V. THE PLAINTIFFS' REMAINING CLAIMS

The plaintiffs assert two other claims: for conversion and for an order removing Dr. Ross as a director. Only the first claim is well-founded.

A. The Conversion Claim

[8] The plaintiffs' conversion claim is asserted by Ross Systems in the event the Court rejects its fraud claim. Under Florida law, conversion is an unauthorized act that deprives another of his identifiable property permanently or for an indefinite time. *Rosenthal Toyota, Inc. v. Thorpe*, 11th Cir., 824 F.2d 897, 902 (1987). The company claims entitlement to the $51,227.30 value of the slides, surgical tools, models, and similar equipment it supplied to Dr. Ross for his work on behalf of Ross Systems. Dr. Ross has retained this equipment, despite the company's demand for its return. The company also seeks recovery of the $59,570.17 value of the implants and related materials that Dr. Ross obtained from Ross Systems and agreed to pay for.

Dr. Ross does not dispute the first ($51,227.30) component of this claim. He does dispute the second ($59,570.17) component, arguing that he never agreed to modify the initial agreement (under which the implants would be supplied free of charge) to provide that he would pay half-price for these materials. Alternatively, he argues any modification that did occur was without consideration.

[9] The evidence supports neither argument. Beginning May 1, 1987, long before the parties' dispute arose, the invoices were modified to reflect the new agreement. No contemporaneous document shows that Dr. Ross ever disputed that change. Indeed, Dr. Ross' own August 25, 1987 letter to his friend, Dr. Pierre Disler, stated that Ross Systems was "even where I must purchase my supplies." (PTX 35.) Mr. Sang's testimony, which I credit, was that the October 1986 agreement was modified on the advice of the company's accountants in anticipation of a preliminary prospectus to be issued in connection with a contemplated public offering. That modification was agreed to in order to make it easier for Ross Systems to go public, which, in turn, would promise material benefits to the stockholders (including Dr. Ross) by creating a public market for their stock. That possibility represents a benefit that would constitute consideration under Florida law. *See Mangus v. Present*, Fla. Supr., 135 So. 2d 417, 418 (1961).

The company is, therefore, entitled to recover $110,797.47 on its conversion claims.

B. The Claim to Remove Dr. Ross as a Director

Finally, the plaintiffs ask this Court to remove Dr. Ross as a director of the corporation. They cite no authority recognizing any power of this Court to grant such relief. The plaintiffs argue that because Dr. Ross defrauded the company, he is no longer fit to serve as a director, and that since Mr. Sang and Dr. Ross each control fifty percent of the company's voting stock, only a judicial decree will accomplish Dr. Ross' removal. No supporting authority is cited for that argument either.

[10-11] This claim is without merit. The only persons empowered to remove a director are the corporation's shareholders. *See* 8 *Del. C.* § 141(k); *Bruch v. National Guarantee Credit Corp.*, Del. Ch., 116 A. 738, 741-42 (1922) (affirming the stockholders' inherent power to remove directors for cause). The Court is empowered to appoint a trustee or receiver for a corporation. *See, e.g.*, 8 *Del. C.* § 279 (authorizing the appointment of a trustee or receiver for a dissolved corporation); 8 *Del. C.* § 291 (authorizing appointment of a receiver for an insolvent corporation); *Hall v. John S. Isaacs & Sons Farms, Inc.*, Del. Supr., 163 A.2d 288 (1960) (recognizing inherent power of the Court to appoint a liquidating receiver for a solvent corporation under specified circumstances). Such statutorily authorized action would have the incidental effect of displacing the *entire* board of directors. But the plaintiffs here do not ask the Court to appoint a receiver or trustee, and they are unable to point to any statute or other source of law that would empower this Court to remove a particular member of the corporation's board of directors.

The Court lacks the power to grant the relief being requested; therefore, this claim must be dismissed.

VI. THE DEFENDANT'S COUNTERCLAIMS

Although Dr. Ross pleaded seventeen separate counterclaims against the plaintiffs in his Second Amended Answer, he addressed only eight of them in his post-trial brief. Accordingly, I deem the undiscussed counterclaims abandoned, and consider here only those counterclaims briefed by Dr. Ross.

A. Constructive Fraud

Dr. Ross' primary counterclaim is to rescind the October 1986 transaction in which he and Mr. Sang became shareholders of Ross

Systems. That claim rests on the theory that Mr. Sang acted as Dr. Ross' attorney in that transaction, and, as such, had a fiduciary duty to treat Dr. Ross with scrupulous fairness. Dr. Ross charges that Mr. Sang violated that duty by overreaching and by failing to protect his interests in several respects, including not obtaining separate counsel for Dr. Ross and not informing him that the transaction would involve parting with a fifty percent interest in his invention. That conduct is said to have constituted a constructive fraud warranting rescission of the entire October 1986 transaction.

Mr. Sang hotly disputes this claim. It is, however, unnecessary to discuss the claim's multitudinous aspects, because for two basic reasons it is fatally flawed. First, even if the claim otherwise had merit, the rescission remedy that Dr. Ross seeks is unavailable in these circumstances. Second, the claim is without merit. It rests upon "facts" contrary to those found by this Court, and Mr. Sang has demonstrated that the transaction was fair to Dr. Ross in all material respects.

[12-13] The rescission remedy Dr. Ross seeks here—to undo the transaction he entered into with Mr. Sang in October 1986—is not available. As discussed in Part VII, *infra*, limited rescission is an appropriate ingredient of the relief that is ultimately granted here. However, rescission of the kind Dr. Ross seeks is not; that remedy will not be granted unless the Court can restore the parties substantially to the position they occupied before making the contract. *Craft v. Bariglio*, Del. Ch., C.A. No. 6050, Brown, C., mem. op. at 28-29 (Mar. 1, 1984); *Hessler, Inc. v. Ellis*, Del. Ch., 167 A.2d 848, 851 (1961). That Dr. Ross is unwilling to do. He opposes repaying the monies Mr. Sang invested in the company, or repaying Ross Systems' third-party creditors the monies that the company owes to them. Therefore, Dr. Ross is manifestly not entitled to the rescissionary relief he requests, even if it were assumed that Mr. Sang's conduct amounted to a constructive fraud. *Hessler, Inc.*, 167 A.2d at 851.

Moreover, the argument overlooks one critical fact: it was Dr. Ross, not Mr. Sang, who committed fraud. There is no persuasive evidence that Mr. Sang treated him improperly in any respect during the negotiations leading up to and including the October 1986 agreement that formalized their business relationship as shareholders, co-directors, and officers of Ross Systems.

The parties vigorously dispute whether during this period Mr. Sang acted as Dr. Ross' attorney in negotiating the October 1986 transaction. As the record is unclear on that point, I assume, without

deciding, that Mr. Sang had not completely severed the attorney-client relationship between himself and Dr. Ross, and that he remained subject to the duties Florida law imposed upon an attorney who enters into a business relationship with a client. The question then becomes whether Mr. Sang violated any of those duties.[15] I find that he did not.

Dr. Ross first argues that Mr. Sang failed to document the terms of the October 1, 1986 agreement. But the evidence shows that every critical point of that agreement was documented and that the most important documents were signed by Dr. Ross. (*See supra* p. 9.) Although at trial Dr. Ross testified that he did not read those documents, I do not credit that testimony. But even if the testimony were believed, it is not a valid legal foundation upon which to ground a charge of constructive fraud. *See Allied Van Lines, Inc. v. Bratton*, Fla. Supr., 351 So. 2d 344, 347 (1977).

Dr. Ross next argues that he never intended to give Mr. Sang a fifty percent interest in the invention, that the legal documents embodying the parties' arrangement are inconsistent with his true intent, and that insofar as his testimony relating to contractual intent conflicts with that of Mr. Sang, the testimony of the client (Dr. Ross) must prevail over that of the attorney (Mr. Sang). This argument is without basis. Dr. Ross' deposition testimony is consistent with, and no contemporaneous document of any kind is inconsistent with, the closing documents, including the October 1, 1986 agreement. The only inconsistency is that which Dr. Ross himself attempted to create at trial, by repudiating or otherwise attempting to explain away his deposition testimony. No authority is cited, from Florida or elsewhere, that would compel this Court as a matter of law to accept Dr. Ross' testimony, no matter how lacking in credibility, over that of Mr. Sang.

The defendant next argues that Mr. Sang did not disclose to him the interest that he (Mr. Sang) would obtain in the transaction.

---

15. This issue would not have arisen had Mr. Sang insisted that Dr. Ross obtain separate counsel to represent him in the negotiation and drafting of the October 1, 1986 agreement. It is understandable why that was not done. Clearly, Dr. Ross knew what the transaction would involve, at least as to its essential points. On matters about which Dr. Ross would know less (prosecuting the patent application and forming Ross Systems) separate counsel had been retained. Nonetheless, hindsight has shown, in this and other cases, that an attorney who deals with his own client, even in the best of faith, subjects himself to the risk of later having to prove the fairness of his dealings with that client, including the negative proposition that the attorney did nothing improper. In this case Mr. Sang has met that burden.

This contention ignores the fact that Dr. Ross himself offered the fifty percent interest to Mr. Sang. I am satisfied that Dr. Ross knew precisely what interest Mr. Sang would be receiving in the transaction. The record further establishes that the contract was intended to, and did, evidence that result, and the parties' post-agreement conduct was consistent with that understanding. No contemporaneous document evidences Dr. Ross' present litigation posture that Mr. Sang abused his role as attorney by extracting a greater interest in the invention than Dr. Ross intended or agreed to.

Finally, there is no evidence that Mr. Sang obtained any improper financial advantage. *See Harrell v. Branson*, Fla. Dist. Ct. App., 344 So. 2d 604, *cert. denied*, Fla. Supr., 353 So. 2d 675 (1977). What the record does show is that between 1986 and 1990, Mr. Sang contributed equity capital and loans aggregating $824,234. While not all of that amount may be recoverable (*see infra* Part VII), it does exceed Dr. Ross' investment, including the demonstrated value of the invention that he contributed to the venture.[16] Dr. Ross contributed $255,500 in cash (PTX 65), but he was entitled to be repaid the out-of-pocket expenses he incurred in developing the invention ($49,520.14). He also obtained for free (or later for half price) implants and related materials for use in his practice ($59,570.17). Net of these reimbursements and subsidized goods, Dr. Ross' cash contribution was $146,470.

B. Abuse of Process

[14-15] Dr. Ross next claims that the allegations leveled against him in the plaintiffs' complaints constituted an abuse of process. Under Delaware law (upon which both sides rely on this issue), the tort of abuse of process requires (1) an ulterior purpose and (2) a wilful act in the use of the process not proper in the regular conduct of the proceedings. *Unit, Inc. v. Kentucky Fried Chicken Corp.*, Del. Super., 304 A.2d 320, 331 (1973) (citing William L. Prosser, *The Law of Torts* § 121 (4th ed. 1971)). Merely carrying out the litigation

16. The Court is unable to determine the value of Dr. Ross' invention, because the "valuation" evidence submitted by the defendant is legally insufficient and factually unpersuasive. The only evidence of the invention's value is testimony of Dr. Francis Tannian that the value of the time Dr. Ross spent in developing the invention can be valued at $310,780. However, Dr. Tannian conceded that that figure does not represent the fair market value of the invention, i.e., what a willing buyer would pay for it. Thus, the defendant failed to adduce competent evidence of the value of his invention.

process to its authorized conclusion, even with bad subjective intentions, does not result in liability. What must be shown is some form of coercion to obtain a collateral advantage not properly involved in the proceeding itself. *Id.*

The defendant established neither element of this tort. Dr. Ross contends that Mr. Sang had the ulterior purposes of seeking "his entrenchment in control" of Ross Systems and "to protect his reputation and investments in the venture through separate loan transactions." (Def. Br., 53-54.) Mr. Sang concedes that his purposes include seeking control of Ross Systems and recovering his loans to the company. Those purposes, however, are not "ulterior"; they describe relief specifically sought in this lawsuit.

Nor has the defendant established any "wilful act in the use of the process not proper in the regular conduct of the proceedings." *Id.* Although the defendant's argument is less than clear, it appears to rest upon the plaintiffs' decision not to pursue their claim for an injunction prohibiting Dr. Ross from competing with the company by using his new dental laboratory and titanium casting machine. That claim was not pursued because Dr. Ross agreed not to engage in the activities alleged to be improperly competitive. In those circumstances, an injunction appeared unnecessary and, thus, was properly not pursued.

C. The Defendant's Remaining Counterclaims

1. For Breach of Contract and Tortious Interference With the Contract

These claims rest upon Dr. Ross' contention that the parties' initial agreement, which entitled Dr. Ross to receive implants for free, was not modified. Alternatively, Dr. Ross argues that there was no consideration for any modification. Because the Court has previously rejected both contentions (*see supra* Part V), any claims dependent upon them must be rejected as well.

2. For Breach of Fiduciary Duty and Waste

Finally, Dr. Ross contends that Mr. Sang breached his fiduciary duty to Ross Systems: (i) by causing the company to sue Dr. Ross at the corporation's expense, an act said to be ultra vires and a waste of corporate assets; (ii) by seeking to entrench himself through giving sets of trephine boring instruments to customers, thus com-

mitting waste; and (iii) by causing Ross Systems to enter into the implant manufacturing agreement with Lourdes Services, an act characterized as gross negligence. These claims are likewise without merit.

The defendant's first argument is hard to fathom. The company's claims against Dr. Ross are for damages and for Dr. Ross' removal as a director, based upon Dr. Ross' alleged fraud upon, and breaches of fiduciary duty owed to, Ross Systems. Since damages, if awarded, would benefit the company directly and substantially, it was in the company's interest to pursue the litigation. Although the company's damage claim on the ground of fraud has been denied, its claim based on conversion has been validated. The defendant has not shown that the company's claim had no colorable merit when filed, or that Mr. Sang intentionally caused the company to file a claim that he believed had no colorable merit.[17] Thus, no basis is shown for contending that the company's prosecution of this action was ultra vires or a waste of corporate assets.

[16] Similarly problematic is the defendant's claim that Mr. Sang committed corporate waste by sending trephines to Ross Systems customers free of charge. Mr. Sang obtained no personal benefit from this practice. His purpose in sending these free samples to the company's good customers was that the customers "might order additional implants, which they did." (Tr. III, 79.) In other words, this routine practice was simply a form of marketing. That a corporation may promote its products to carry on its business, and for that purpose may expend such amounts as its managers in their business judgment deem appropriate, is beyond dispute. *See* 6 Fletcher, *Cyclopedia*, *supra* p. 31, § 2508. Under the company's bylaws, Mr. Sang, as president and chief executive officer, was empowered to manage the company's business and affairs,[18] and thus was authorized to make a routine business decision of this kind without obtaining Dr. Ross' prior approval.

Lastly, Dr. Ross argues that Mr. Sang breached his fiduciary duty to Ross Systems by contracting with Lourdes Services to man-

---

17. The plaintiffs' claim for an order removing Dr. Ross as a director is more troublesome. No legal basis was offered to support it. However, the defendant has not proved any out-of-pocket loss to himself as a consequence of having had to defend against that claim, or to the corporation for having brought it. The claim was purely legal, it was not the subject of any distinctive evidence or of any significant trial effort by counsel, and the defendant did not even respond to the claim in his brief.

18. (PTX 6 [Ross Systems By-Laws] art. V, sec. 7.)

ufacture the dental implants and related devices. Defendant claims that instead Ross Systems should have chosen a Florida company, Magnum Machine, which would have manufactured the implants for a lower price.

As previously noted (*see supra* p. 11), Mr. Sang selected Lourdes Services after a careful search, based upon significant perceived advantages that a relationship with Lourdes promised to confer. That decision involved business judgment, and Mr. Sang gained nothing personally from it.

It would, moreover, have been impossible for Mr. Sang to have chosen Magnum Machine in 1986 when Ross Systems was looking for a manufacturer, because at that time that firm did not exist.[19] Moreover, Magnum Machine could not offer the same advantages to Ross Systems (e.g., knowledge of FDA requirements and quality control) as Lourdes, and the prices quoted by Magnum Machine were not directly comparable to those quoted by Lourdes. Accordingly, the defendant has not persuaded me that an arrangement with Magnum Machine would have been better or cheaper for the company. In short, Mr. Sang committed no breach of duty in choosing Lourdes.

VII. THE APPROPRIATE REMEDY

To summarize: the Court has determined that (1) Mr. Sang has established his claim for damages as a consequence of Dr. Ross' fraud, (2) the company has not established any entitlement to relief on its claims, except for money damages for conversion, and (3) Dr. Ross has not established any entitlement to relief on his counterclaims. Therefore, what remains to be decided are the amount of damages to which Mr. Sang is entitled, whether prejudgment interest should be awarded, and the conditions that must attach for any money damage award to be equitable.

A. Mr. Sang's Recoverable Damages

Mr. Sang claims that he is entitled to recover money damages totalling $824,234, broken down as follows:

---

19. Magnum Machine did not come into existence until 1988, two years after Mr. Sang contracted with Lourdes. There is no evidence that Dr. Ross ever suggested to Mr. Sang at any time before this litigation that Ross Systems should change manufacturers.

Initial Capital Contribution October 1986	$ 13,000
Loans to Corporation December 24, 1986 to June 6, 1991	$556,734
Discharge of Guarantee of Credit Line Began February 23, 1988; Satisfied, August, 1990	$254,500

(*See* PTX 63, 64; App. C to Pls.' Op. Post-trial Br.)

The defendant argues that except for Mr. Sang's initial $13,000 contribution in October 1986, and possibly his $190,000 loan to the company on December 24, 1986, none of Mr. Sang's other loans (including the guarantee-of-credit-line discharge) are recoverable, because none were induced by any misrepresentation by Dr. Ross. That is, Dr. Ross appears to suggest that if there was a fraud, at most $203,000 of the claimed $824,234 of damages could be a proximate result of it.[20] The balance, he contends, were loans made at times remote from the misrepresentations upon which the fraud claim is predicated. Moreover, none of the subsequent loans were negotiated with Dr. Ross or transacted with his knowledge. Rather (Dr. Ross argues), they were self-dealing transactions, negotiated between Mr. Sang individually and Mr. Sang as president of the company, and each loan transaction was entered into for business reasons unrelated to the fraudulent conduct. Finally, Dr. Ross argues that Mr. Sang cannot recover damages incurred from and after the time he was on notice of the alleged fraud, which (he contends) was in May 1988 when Dr. Niznick made his first accusations that photographs of a Core-Vent implant were used in the Article.

In reply, Mr. Sang argues that he loaned significant sums of money to the company on a recurring basis, and that he extended that credit in reliance upon Dr. Ross' representations concerning the bona fides of his research, as well as Dr. Ross' denials of Dr. Niznick's accusations. Plaintiffs urge that given Dr. Ross' repeated false representations, Mr. Sang cannot fairly be charged with notice of any fraud until he received Dr. Gilbert's April 1990 draft report confirming that a fraud had occurred.

---

20. That is not to suggest that Dr. Ross concedes even that amount. To the contrary, he argues that Mr. Sang's loss was not the result of any wrongdoing, but flowed (*inter alia*) from Mr. Sang's decision to shut down the company, thereby eliminating any possible future cash flow.

I cannot accept the contentions of either side. To begin, given Dr. Ross' repeated (and false) denials of Dr. Niznick's accusations, one would have to blink at reality to find that those accusations constituted notice of Dr. Ross' fraud that was legally sufficient to make further reliance upon Dr. Ross' representations unjustifiable.

But the Court cannot accept Mr. Sang's position either. To do so it would have to conclude that all of Mr. Sang's losses in the form of unpaid loans made after December 1986 resulted directly from the adjudicated fraud. *Tampa Union*, 146 So. at 596. Given the many possible factors that could have led to Mr. Sang's losses, in particular the hostile relationship between these parties beginning in the summer of 1988, that argument strains credulity.

As of August 1988, the relationship between these two men had deteriorated to the point that Dr. Ross was threatening to start his own dental laboratory and to compete with Ross Systems, and Mr. Sang was refusing to provide further implants to Dr. Ross until Dr. Ross paid the agreed-upon (half) price for them. By October 4, 1988, Dr. Ross had filed his Florida action to dissolve the corporation, and by October 19, 1988, Mr. Sang and the company had filed this action against Dr. Ross. Even if no fraud had occurred, these circumstances alone created a significant risk that should have deterred any prudent lender, especially one who constituted half of the corporation's board of directors and owned half of its voting stock. The litigation was an unmistakable red flag to any potential investor that corporate planning would likely be stymied and that the company's fortunes now depended upon a person (Dr. Ross) who had become disaffected.

Yet, despite those disturbing realities, Mr. Sang continued to loan the company significant sums of money. Why he chose to do so is nowhere explained. The plaintiffs' briefs are largely devoid of explanatory damage-related facts. They supply no information as to the circumstances under which the loans (or the line of credit guarantee) were made. What does the trial record show was the parties' understanding as to when and why Mr. Sang would make loans to the company? What events triggered the making of the loans, and what was the parties' understanding as to when Mr. Sang would be repaid? What was Dr. Ross' role in these loan transactions, whether viewed individually or collectively? On these critical points the briefs are silent.

Rather, Mr. Sang attempts in his briefs to describe his investment decisions solely in terms of a purely legalistic "fraud" model, arguing that he made the loans solely on the strength of Dr. Ross'

professional integrity and that he would not have done so had he been told the truth. That is, Mr. Sang portrays his investment behavior as if he had been operating in a vacuum, subject to no risks other than those flowing from Dr. Ross' later-discovered dishonesty. While that argument may be proper doctrinally, it is unacceptable as an explanation of the real world in which Mr. Sang was functioning. It ignores, or at least relegates to the deep background, the other factual circumstances that made the loans both risky and highly problematic. The absence of any explanation that at least takes those risks into account precludes acceptance of Mr. Sang's theoretical proposition that his continued loans were the direct result of Dr. Ross' earlier fraud. To so conclude would require a more thorough factual presentation than has yet been made. *See National Equip. Rental*, 362 So. 2d at 339; *MacDonald v. American Oil Co.*, Fla. Dist. Ct. App., 248 So. 2d 231, 232 (1971).

[17] Thus, I am presently unable to determine whether Mr. Sang is entitled to recover damages above the $203,000 he had invested by December 1986.[21] Because the asserted damage theory is not adequately supported by specific facts, Mr. Sang has not established that his post-December 1986 losses were reasonably foreseeable at the time Dr. Ross falsely represented the nature of his research, or at the times he falsely denied Dr. Niznick's accusations. No evidence has yet been brought to my attention that permits the conclusion that Dr. Ross knew or should have known that his misrepresentations would lead Mr. Sang to make the loans to the company. Where an injury is too remote from the wrongdoing, a court as a matter of policy cannot award a recovery for it. *Department of Trans. v. Anglin*, Fla. Supr., 502 So. 2d 896, 899 (1987); *Tampa Union*, 146 So. at 596; *Barati v. Aero Indus.*, Fla. Dist. Ct. App., 579 So. 2d 176, 178, *review denied*, Fla. Supr., 591 So. 2d 180 (1991). In its present posture, the plaintiffs' damage presentation is subject to that inference.

[18] Similarly, Mr. Sang's *ipse dixit* damages argument is also subject to the counter interpretation that at some point during 1988 it became reckless for him to make these loans, and that that recklessness was an independent, intervening cause that broke the chain

---

21. I combine Mr. Sang's $13,000 equity investment with his initial loan of $190,000 because the two transactions occurred only weeks apart and antedated by almost two years the parties' later disputes. To say it differently, the $190,000 loan, because of its proximity to the initial $13,000 equity investment, more closely resembles an additional installment of Mr. Sang's original equity investment.

of causation between Dr. Ross' fraud and Mr. Sang's injury. Were such a break in the chain of causation established, that also would bar a recovery. *Anglin*, 502 So. 2d at 898-900 (1987); *National Airlines, Inc. v. Edwards*, Fla. Supr., 336 So. 2d 545, 547 (1976).

Having said this, I have decided (albeit with reluctance) not to rule definitively on the question of whether Mr. Sang has carried his burden of proof. To so rule without affording Mr. Sang an opportunity for further briefing would risk a miscarriage of justice. Mr. Sang has been found to be a victim of fraud, and justice requires that the evidence of his damages be fairly considered. In this case that task was hindered by the inadequate briefing of the subject. Although that may be because no other evidence exists in the record, it is also plausible that evidence does exist but was not adequately presented because the parties became distracted by the many side issues and procedural sideshows that have made this case so difficult.

In these peculiar circumstances, the better part of discretion tips in favor of affording the parties an opportunity to submit supplemental briefs addressed solely to the issue of Mr. Sang's fraud damages, based upon the present trial records. Thereafter, the Court will determine the extent of Mr. Sang's compensable damages and the matter of prejudgment interest.

B. Conditions of Relief

Although the precise amount of Mr. Sang's recoverable damages cannot be presently determined, the nature of the relief he seeks can be, and, for reasons now explained, that relief is problematic.

Mr. Sang is seeking to recover every cent he invested in the company, both as an equity holder and as a creditor. If Mr. Sang were suing only as a creditor that would not be remarkable, as any creditor is entitled to sue the debtor for repayment of overdue amounts owed. But Mr. Sang also wishes to recover his equity risk capital, which is tantamount to a request for rescission of his agreement to invest in the company.

The problem is that Mr. Sang also wishes to retain his stock in the corporation. If his damage recovery were awarded against the company, that result would be impermissible. Mr. Sang's stock represents his equity investment; to retain the stock and at the same time recover the equity investment would create a windfall. This case differs from that hypothetical only in that here the investor's recovery is against a director/stockholder, not the corporation. But that distinction does not change the rescissory nature of the relief

requested. As mentioned earlier, a condition of rescission is that the plaintiff must offer to restore the defendant to the status quo. *See Hessler, Inc.*, 167 A.2d at 851. If Dr. Ross is compelled to "buy out" Mr. Sang by paying him his original equity investment, as a condition to receiving that payment Mr. Sang must surrender his stock to Dr Ross at the time payment is made. Equity requires no less.

That condition, which is a logical consequence of the rescissory relief to be awarded, also suggests a corollary. As a consequence of requiring Mr. Sang to transfer his stock to Dr. Ross, Dr. Ross would obtain voting control of the company and would, therefore, be in a position to control the company's monies. The Court has found that the company is entitled to recover a money judgment of $110,797.47 against Dr. Ross. Those monies would be available to satisfy the legitimate claims of *all* of the company's creditors, including the claims of Dr. Ross and Mr. Sang *qua* creditors. To avoid any possibility that those corporate assets might be diverted for unrelated purposes any final decree will provide, in appropriate language, that those monies shall be set aside and held in a separate account to satisfy the legitimate claims of all of the company's creditors.

* * *

Counsel shall confer with the Court to discuss a supplemental briefing schedule and further proceedings consistent with the rulings made herein.

IN RE APPRAISAL OF SHELL OIL CO.

No. 8080 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

October 30, 1992

Royal Dutch Petroleum Company, which owned approximately seventy percent of Shell Oil Company, commenced a tender offer for the minority shares of Shell at a price of $58 per share. Through various actions challenging the tender offer, the price was eventually increased to $62.25 per share. Representing those shareholders who

elected not to accept the tender offer, petitioners brought a judicial appraisal action where this court awarded $71.20 per share plus interest at ten percent per annum for a total of $121.27 per share. Petitioners then commenced an action for attorneys' fees and expenses arising from the trial which established the appraisal value of the Shell stock.

The court of chancery, per Vice-Chancellor Hartnett, held that the primary factor to be considered in the discretionary award of attorney fees is the value of the benefit achieved through the litigation. The court further stated that the benefit in an appraisal action is measured by the difference between the amount of the appraisal award ($71.25 per share) and the amount that a shareholder would have received had he accepted the merger ($62.25 per share). In addition, the court determined that petitioners' attorneys produced an interest benefit with a value of twenty-five percent of the total amount of interest awarded, or $12.52 per share. Because the appraisal class consisted of 1,005,081 shares, the total cash benefit produced by petitioners' attorneys was approximately $21.6 million. The court concluded that because the litigation resulted in a judgment only after a protracted trial with exhaustive pretrial preparation, petitioners were entitled to twenty-five percent of the benefit for a total of $5,400,000 for attorneys' fees and expenses.

1. Corporations ⟸ 584
   Costs ⟸ 194.22

An examination of the law governing an award of attorneys' fees in appraisal actions must begin with the appraisal statute. DEL. CODE ANN. tit. 8, § 262(j) (1992).

2. Corporations ⟸ 214
   Costs ⟸ 194.16

The equitable fund doctrine, an exception to the general rule that each litigant must defray the costs of his own counsel, allows a successful litigant in a shareholder action to recover his expenses from other shareholders because equity demands that those who share in the benefit created by a common fund must share in the burden of the prosecution.

3. Corporations ⟸ 214

A prerequisite for the applicability of the equitable fund doctrine is the creation of a benefit for a class.

4. Corporations ⟸ 214
Costs ⟸ 194.26

For the equitable fund doctrine to apply to a class appraisal action, the litigation must create a benefit in order for the person litigating the suit to be entitled to the recovery of his attorneys' fees, *pro rata*, from all those who receive the litigation benefit.

5. Corporations ⟸ 214
Costs ⟸ 194.12

The amount of attorneys' fees to be awarded is a matter of discretion.

6. Corporations ⟸ 214, 320(12)
Costs ⟸ 194.18

Relevant factors in determining the amount of attorneys' fees that may be awarded in shareholder litigation include the benefit achieved in the litigation, the difficulty of the litigation, the contingent nature of the fee, the standing and ability of counsel, and the time and effort of counsel.

7. Corporations ⟸ 214

The primary factor to be considered in the discretionary award of attorneys' fees is the value of the benefit achieved through the litigation.

8. Corporations ⟸ 214, 584

In arriving at the appropriate measure of the benefit produced in an appraisal action for the purpose of awarding counsel fees, courts should focus on the difference between what the shareholder received as a result of the appraisal action and what he would have

received had he accepted the merger consideration and not sought an appraisal.

9. Corporations ⇐ 584
Equity ⇐ 56

Although not technically a part of the merger consideration, a settlement sum will be considered as being a part of the sum that a non-dissenting shareholder has received because a court of equity will not permit form to be exalted over substance.

10. Costs ⇐ 194.18

Counsel who helped shareholders receive award in earlier action and who have been rewarded for the benefit of earlier revelation will not be awarded the same benefit twice.

11. Interest ⇐ 31, 39(2)
Corporations ⇐ 584

A court is likely to award a fair rate of interest in an appraisal action unless it is brought in bad faith.

12. Corporations ⇐ 214
Interest ⇐ 31

The court must attempt to ascribe an estimated value of the benefit, if any, that accrues from the award of interest on a case-by-case basis.

13. Corporations ⇐ 214
Costs ⇐ 194.18

The percentage of the benefit to be awarded for attorneys' fees is discretionary and dependent upon the value of the benefit, the stage when the litigation was concluded, and the amount of work necessary to obtain the benefit.

14. Corporations ⇐ 214, 320(12)
Costs ⇐ 194.18

When the litigation results in a judgment after a protracted trial with exhaustive pretrial preparation rather than a quick settlement,

twenty-five percent of the value of the benefit is appropriate for attorneys' fees and expenses.

Clark W. Furlow, Esquire, of Smith, Katzenstein & Furlow, Wilmington, Delaware; H. Lee Godfrey, Esquire, and Kenneth E. McNeil, Esquire, of Susman, Godfrey, Houston, Texas, of counsel, for petitioners William E. Sommer, Billie J. Sommer, Beecher Smith II, Cede & Co., Michael O'Bannon, and Roger L. Bloomquist.

Thomas P. Preston, Esquire, and John L. Olson, Esquire, of Duane, Morris & Heckscher, Wilmington, Delaware; and Edward M. Selfe, Esquire, of Bradley, Arant, Ross & White, Birmingham, Alabama, of counsel, for other petitioners.

Lawrence C. Ashby, Esquire, and Stephen E. Jenkins, Esquire, of Ashby & Geddes, Wilmington, Delaware, for objectors First City Texas.

Richard L. Sutton, Esquire, William O. LaMotte, III, Esquire, Thomas C. Grimm, Esquire, and Robert J. Valihura, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for Shell Oil Company.

HARTNETT, *Vice-Chancellor*

Petitioners seek this Court's approval of attorneys' fees and expenses arising from the trial that established the appraisal value of Shell Oil Company stock. Although the litigation produced a substantial benefit to the class that sought an appraisal, the amount of the benefit is not as large as that claimed by petitioners and, therefore, the award of attorneys' fees is less than that sought.

I

This application for attorneys' fees has its roots in other litigation which began over eight years ago that challenged the attempt by Royal Dutch Petroleum Company ("Royal Dutch") to acquire the shares of Shell Oil Company ("Shell") owned by minority shareholders. The facts appear in greater detail in the various opinions involving this matter.

On January 24, 1984, Royal Dutch, which owned approximately 70% of Shell, announced a proposal to merge Shell into an acquisition

vehicle, SPNV Holdings, Inc. ("Holdings"), by cashing out Shell's minority shareholders for $55 per share. After this proposal was rejected by an independent committee of Shell's Board of Directors, Royal Dutch commenced a tender offer for the minority shares at that price, but the tender offer price was subsequently increased to $58 per share. The tender offer and proposed post- tender offer cash-out merger were challenged and the merger was enjoined in *Joseph v. Shell Oil Co.*, Del. Ch., 482 A.2d 335 (1984), because the Court found that plaintiffs met the burden of showing a reasonable probability that Royal Dutch and Shell had not made full and complete disclosure of all pertinent facts with complete candor. *Id.* at 340-43. Accordingly, this Court granted a preliminary injunction enjoining completion of the tender offer and ordered that shareholders who had tendered their shares be given the right to withdraw their shares after supplemental disclosures were made. *Id.* at 345. Supplemental disclosures were made and the tender offer discontinued, as did the suits challenging the merger.

After completion of the tender offer, the suits challenging the merger were settled, with the approval of this Court, prior to trial. *Joseph v. Shell Oil Co.*, Del. Ch., C.A. Nos. 7450 (Consolidated) & 7699-NC, Hartnett, V.C. (Apr. 19, 1985), *aff'd sub nom. Selfe v. Joseph*, Del. Supr., 501 A.2d 409 (1985). The attorneys for the plaintiff class in those suits were not the attorneys who are now seeking attorneys' fees.

Pursuant to the settlement, Royal Dutch, through Holdings, proceeded with a short-form cash-out merger under 8 *Del. C.* §253 at the tender offer price of $58 per share. As part of that settlement, each minority shareholder was entitled to receive an additional $2 per share over and above the $58 per share tender offer price provided that he waived his right to seek an appraisal in response to the short-form merger authorized by the settlement within twenty days of the announcement of the effective date of the short-form merger.

In conjunction with the short-form merger, Holdings distributed several documents to Shell's minority shareholders. Certain of Shell's minority shareholders then commenced *Smith v. Shell Petroleum, Inc.*, Del. Ch., C.A. No. 8395-NC, Hartnett, V.C. (June 12, 1990) (Smith action) through the same attorneys as are now seeking attorneys' fees in this action (C.A. No. 8080-NC).

It was alleged in Count II of the *Smith* action that the merger disclosure documents contained a material misdisclosure ("the Disclosure count"). After trial and post-trial hearings on the Disclosure count, the minority shareholders who did not seek an appraisal were

awarded an additional $2 per share plus pre- and post-judgment interest on that claim. *Smith v. Shell Petroleum, Inc.*, Del. Ch., C.A. No. 8395-NC, Hartnett, V.C. (June 12, 1990), revised judgment order dated June 25, 1991, *sub nom. Smith v. SPNV Holdings, Inc.*, Del. Ch., C.A. No. 8395-NC, Hartnett, V.C., *aff'd sub nom. Shell Petroleum, Inc. v. Smith*, Del. Supr., 606 A.2d 112 (1992). Attorney fees arising from that judgment benefit have already been awarded.

It was alleged in Count I of the *Smith* complaint that Holdings improperly timed the short-form merger with Shell so that all of Shell's minority shareholders would not receive Shell's final quarterly dividend ("the Dividend claim"). The parties agreed upon a settlement of that claim for $0.25 per share plus interest payable to all the minority shareholders of Shell regardless of whether they sought an appraisal. That settlement has been approved by the Court and attorney fees arising from that settlement have been awarded. Order *Smith v. Shell Petroleum, Inc.*; Del. Ch., C.A. No. 8395-NC (Oct. 15, 1992).

Therefore, a Shell shareholder who accepted the short-form merger and did not seek an appraisal has received $62.25 per share (disregarding interest and attorney fees), consisting of the $58 per share short-form merger price, the $2 per share *Joseph* settlement, the $2 per share award on the *Smith* Disclosure claim (Count II of C.A. No. 8395-NC) and the $0.25 per share settlement in the *Smith* Dividend claim (Count I of C.A. No. 8395-NC).

Shareholders representing over one million shares of stock in Shell elected not to accept the $60 per share available to them as a result of the settlement of the *Joseph* litigation and, instead, elected to have the fair value of their shares determined by a judicial appraisal pursuant to 8 *Del. C.* §262. Those appraisal claims were brought in this action (C.A. No. 8080-NC).

As a result of the appraisal proceeding, the shareholders who were members of the certified appraisal class and were still class members at the conclusion of the trial were awarded $71.20 per share plus simple interest at the rate of 10% per annum, payable from the date of the merger to the date of payment. *In re Appraisal of Shell Oil Co.*, C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (Dec. 11, 1990), *aff'd*, Del. Supr., 607 A.2d 1213 (1992). As stated, the shares for which an appraisal was sought in this action have also received the *Smith* Dividend claim benefit of $0.25 per share and attorney fees have already been awarded for that benefit. Petitioners and their counsel now request that this Court award them $8,050,000 in counsel fees and expenses to be paid from the appraisal award

in this action. Pursuant to 8 *Del. C.* §262(j), the attorney fees will be assessed *pro rata* from all the shares entitled to share in the appraisal award.

The amount sought is opposed by First City Texas Bank which acts as fund manager for the Shell Oil Company Provident Fund, the holder of a large block of Shell stock for which an appraisal was sought. It, however, does not dispute that substantial attorneys' fees have been earned by petitioners' counsel, but only challenges the amount sought.

Numerous other members of the class, through written communications to the Court, expressed their objection to an award of any attorneys' fees or an award of the amount requested. Many of those letters reflect that the authors do not understand the nature of the appraisal process and the necessity for the massive effort expended by petitioners' counsel.

II

[1] An examination of the law governing an award of attorneys' fees in appraisal actions must begin with the appraisal statute. The statute provides in relevant part:

> Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal. 8 *Del. C.* §262(j).

[2] There is little authority, however, addressing the amount of attorneys' fees to be awarded in an appraisal action. The underlying principle that allows a successful litigant in a shareholder action to recover his expenses from other shareholders, as one of the exceptions to the general rule that each litigant must defray the costs of his own counsel, is the equitable fund doctrine. *Maurer v. International ReInsurance Corp.*, Del. Ch., 95 A.2d 827 (1953); *Tandycrafts, Inc. v. Initio Partners*, Del. Supr., 562 A.2d 1162 (1989). Under the equitable fund doctrine, when a litigant creates or preserves a common fund for the benefit of a class, equity demands that those who share in the benefit share in the burden of the prosecution. *Id.* at 830.

The equitable fund doctrine initially was held to be inapplicable to appraisal actions. *Levin v. Midland Ross*, Del. Ch., 194 A.2d 853 (1963). However, since the appraisal statute was amended in 1976

to add 8 *Del. C.* §262(j), the equitable fund doctrine has been applied to appraisal actions. *In re Appraisal of Shell Oil Co.*, Del. Ch., C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (June 16, 1992), *reargument denied*, July 20, 1992, *interlocutory appeal dismissed sub nom. McElroy v. Shell Petroleum, Inc.*, Del. Supr., No. 311, Moore, J. (Sept. 2, 1992), *appeal filed and pending*, Del. Supr., No. 375 (Aug. 19, 1992); *Tannetics, Inc. v. A.J. Indus., Inc.*, Del. Ch., C.A. No. 5306-NC, Marvel, C. (Dec. 16, 1980).

[3-4] A prerequisite for the applicability of the equitable fund doctrine is the creation of a benefit for a class. Accordingly, this Court has held that in a class appraisal action the litigation must create a benefit in order for the person litigating the suit to be entitled to the recovery of his attorneys' fees, *pro rata*, from all those who receive the litigation benefit. *In re Appraisal of Shell Oil Co.*, Del. Ch., C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (June 16, 1992), *reargument denied*, July 20, 1992, *interlocutory appeal dismissed sub nom. McElroy v. Shell Petroleum, Inc.*, Del. Supr., No. 311, Moore, J. (Sept. 2, 1992), *appeal filed and pending*, Del. Supr., No. 375 (Aug. 19, 1992). The standards governing the award of attorneys' fees in an appraisal class action, therefore, are identical to those in other types of shareholder benefit litigation. *CM & M Group, Inc. v. Carroll*, Del. Supr., 453 A.2d 788, 795 (1982) (no award of counsel fees in an individual action where there was no benefit to corporation); *In re Kahn v. Occidental Petroleum Corp.*, Del. Ch., C.A. Nos. 10,808, 10,823 & 10,860-NC, Hartnett, V.C. (Jan. 10, 1992) (no award of counsel fees in class action where suit neither brought benefit to class or corporation).

In certain instances, attorneys' fees may be awarded in shareholder litigation without the creation of a monetary benefit if the litigation produces some other benefit to the corporation or to the shareholders' non-pecuniary interests. *See, e.g., Chrysler Corp. v. Dann*, Del. Supr., 223 A.2d 384 (1966) (reform of incentive compensation plan); *Allied Artists Pictures Corp. v. Baron*, Del. Supr., 413 A.2d 876 (1980) (return of voting rights to common shareholders). These cases are not relevant in this matter, however, because the only benefit here is a measurable monetary benefit. *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 542 A.2d 1182, 1187 (1988) (holding that the only relief available in an appraisal is a money judgment).

[5-7] The amount of attorneys' fees to be awarded is a matter of discretion. *Krinsky v. Helfand*, Del. Supr., 156 A.2d 90 (1959); *Tandycrafts, supra*. While the benefit achieved in the litigation is the most important factor, other factors such as the difficulty of the litigation,

the contingent nature of the fee, the standing and ability of counsel, and the time and effort of counsel are relevant in determining the amount of attorneys' fees that may be awarded in shareholder litigation. *Sugarland Indus., Inc. v. Thomas*, Del. Supr., 420 A.2d 142 (1980). The trial court has considerable discretion in weighing and balancing the various *Sugarland* factors. *Tandycrafts, supra*. Here all these factors justify a substantial award. The primary factor to be considered in the discretionary award of attorney fees, however, is the value of the benefit achieved through the litigation. *Id.*; *Sugarland Indus., supra*; *Smith v. Van Gorkom*, Del. Ch., C.A. No. 6342-NC, Berger, V.C. (Oct. 11, 1985), slip op. at 22; *North American Phillips Stockholders' Litig.*, Del. Ch., C.A. No. 9178-NC (Consolidated), Jacobs, V.C. (Dec. 16, 1987), slip op. at 2.

The primary issue in considering this application, therefore, is how to measure the value of the benefit to the class resulting from the appraisal action. Unfortunately, there is scant authority to guide the Court in this area.

Petitioners' counsel urge that the value of the benefit obtained by the appraisal action should be measured by merely comparing the amount actually awarded with the amount that would have been awarded had the defendant corporation's position at trial been adopted by this Court.

Petitioners' counsel calculates that the amount of the award was $121.27 per share based on the appraisal award of $71.20 per share plus 10% simple interest accrued over the seven years and twelve days between the effective date of the short-form merger and Shell's payment of the appraisal award. Had Shell's position at trial of $55 per share and 7.7% simple interest prevailed, petitioners' counsel calculates that the award would have been $84.78 per share. Petitioners' counsel, therefore, argue that the difference between these two amounts, or $36.49 per share, is the proper measure of the benefit.

There are at least two difficulties with the position of petitioners' counsel. First, using such a measure would make the Court's computation of the value of the benefit dependent on the tactical litigation posture of the defendant corporation.

More importantly, this ignores the nature of an appraisal and the motive of a stockholder who seeks an appraisal. As the Delaware Supreme Court recognized in the *Technicolor* appraisal action, "An appraisal remedy is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth

(fair value) of their shareholders." *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 542 A.2d 1182, 1186 (citations omitted).

A shareholder who refuses the proffered merger consideration on the grounds that the price is inadequate and seeks an appraisal does so only because he hopes to receive more in the appraisal action than the offering price. If he does not, then he has received no benefit from the appraisal action. Therefore, in arriving at the appropriate measure of the benefit produced in an appraisal action for the purpose of awarding counsel fees, the Court should focus on the difference between what the shareholder received as a result of the appraisal action and what he would have received had he accepted the merger consideration.

An appraisal action will sometimes result in a shareholder receiving less after trial than he would have received had he accepted the merger consideration. *See, e.g., Cede & Co. v. Technicolor, Inc.*, Del. Ch., C.A. No. 7129-NC, Allen, C. (Oct. 19, 1990). Under those circumstances, 8 *Del. C.* §262(j) would not, logically, in the absence of an agreement, authorize any *pro rata* assessment of attorney fees among the appraisal class. Clearly if the counsel for the class (as here) has agreed to a contingency fee, he is not entitled to any attorney fee at all if no benefit is achieved.

Tannetics, Inc. v. A.J. Industries, Inc., Del. Ch., C.A. No. 5306-NC, Marvel, C. (Dec. 16, 1980), may seem to be to the contrary. In *Tannetics*, attorneys' fees were assessed *pro rata* against all shareholders participating in the appraisal although the appraisal award, before interest, was slightly less than the merger price. *Id.*, slip op. at 3, 7.

Perhaps because there was a benefit achieved, if the amount of interest awarded was deemed to be part of the benefit, *Tannetics* does not discuss the issue of whether shareholder litigation must produce a benefit as a prerequisite for the assessment of attorneys' fees. Accordingly, *Tannetics* provides no guidance to aid this Court in evaluating the measure of benefit to be used in determining the amount of attorneys' fees to be allowed in an appraisal action.

More recent decisions in this area do focus on the necessity for a benefit as a prerequisite to the award of attorneys' fees in both appraisal actions and other shareholder litigation. *In re Appraisal of Shell Oil Co.*, Del. Ch., C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (June 16, 1992), *reargument denied*, July 20, 1992, *interlocutory appeal dismissed sub nom. McElroy v. Shell Petroleum, Inc.*, Del. Supr., No. 311, Moore, J. (Sept. 2, 1992), *appeal filed and pending*, Del. Supr., No. 375 (Aug. 19, 1992); *CM & M Group, Inc. v. Carroll*, Del.

Supr., 453 A.2d 788, 795 (1982); *In re Kahn v. Occidental Petroleum Corp.*, Del. Ch., C.A. Nos. 10,808, 10,823 & 10,860-NC, Hartnett, V.C. (Jan. 10, 1992); *Tandycrafts, supra.*

III

[8] In summary, the value of the benefit produced by the litigation can best be ascertained by measuring the difference between the amount of the appraisal award and the amount that a shareholder would have received had he accepted the merger and not sought an appraisal. The next step for the Court in making a discretionary award of attorney fees here is to apply that standard to the facts in this case.

The value of the benefit here is unique and its determination is made difficult because the shareholders who waived their appraisal rights received not just the $58 per share offering price but the $2 per share *Joseph* settlement, the $2 per share *Smith* Disclosure claim award, and the $0.25 per share *Smith* Dividend claim settlement.

[9] The $2 per share available from the *Joseph* settlement should be considered as being part of the sum that a non-dissenting shareholder has received. That settlement sum was available to all the shareholders at the time they were determining whether or not to seek an appraisal and, while it had to be waived if an appraisal were to be pursued, it would have been received by a shareholder if he waived his right to an appraisal and elected to receive it. Although the additional $2 per share was not technically a part of the merger consideration, this Court, as a court of equity, should not permit form to be exalted over substance. *Monroe Park v. Metropolitan Ins. Co.*, Del. Supr., 457 A.2d 734 (1983).

The *Smith* Disclosure claim award presents a more difficult issue. Although it was not available to the shareholders at the time of the merger, it has been received by all the minority shareholders who did not seek an appraisal.

[10] Although the basis for the successful *Smith* Disclosure claim award was, for the most part, discovered as a result of the discovery in the appraisal action, petitioners' counsel here, who were also counsel in the *Smith* case, have already been amply rewarded for the benefits produced as a result of that revelation. *Smith v. Shell Petroleum, Inc., sub nom. Smith v. SPNV Holdings, Inc.*, Del. Ch., C.A. No. 8395-NC, Hartnett, V.C. (ORDER dated Sept. 29, 1992). It would be inappropriate to award attorney fees on the same benefit twice.

The Court therefore concludes that, in considering the *Smith* Disclosure benefit, for the purpose of awarding attorney fees in this