broad reading, or the defendants' narrower interpretation, of the word "transfer." Therefore, and lastly, the Court attempts to determine the contracting parties' likely intent by resorting to an interpretation of Section 13.1 grounded on principles fundamental to the law of assignments. *See id.* at 223-24. Based on that analysis I conclude that the plaintiffs' broad reading of "transfer" cannot be accepted, and that Section 13.1's prohibition against "transfers" cannot be interpreted to encompass the Merger.

B.

The critical language of Section 13.1 is that which states that the general partner (Baton Rouge Inc.) may "transfer" its interest as a general partner "only after written notice to all the other Partners and the unanimous vote of all the other Partners to permit such transfer . . . ." The dictionary definitions of "transfer," the differing judicial interpretations given to that word, and the scholarly commentary, all lead me to conclude that the word "transfer" has no plain or generally prevailing meaning.

The dictionary definition of "transfer" (when used as a verb) is: "To convey or remove from one place, person, etc., to another; pass or hand over from one to another; specifically, to change over the possession or control of (as, to transfer a title to land). To sell or give." *Black's Law Dictionary* 1497 (6th ed. 1990). The dictionary definition of "transfer" (when used as a noun) is more expansive:

> An act of the parties, or of the law, by which the title to property is conveyed from one person to another. The sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein . . . . The word is one of general meaning and may include the act of giving property by will.

Id. The principal difference between these definitions is that only the latter one includes the concept that transfers may occur by operation of law, such as a merger, as well as by voluntary acts, such as a sale or gift.

[9] In this particular case, when Baton Rouge Inc. merged into Louisiana Inc., its interest in the Partnership passed to the surviving corporation by operation of law (Ga. Code Ann. § 14-2- 1106(a)(2) (Michie 1989)), as distinguished from passage of title by an express act such as a sale or gift. The distinction between an express transfer by sale or gift and a transfer by operation of law is significant in

the realm of corporate law. *See Sterling v. Mayflower Hotel Corp.*, Del. Supr., 93 A.2d 107, 112 (1952) (merger "something quite distinct" from a sale of assets); *Torrey Delivery Inc. v. Chautauqua Truck Sales & Serv., Inc.*, N.Y. Supr., 366 N.Y.S.2d 506, 510-11 (1975) (merger not a "sale" since corporate property not affected). And it has ramifications here, because if "transfer" were construed to mean only "to sell" or "to give" or any similar voluntary act, then Section 13.1 would not prohibit a transfer by operation of law, such as the Merger. On the other hand, if "transfer" were given the plaintiffs' broad meaning, it would encompass transfers by operation of law, including mergers. That distinction has generated a conflict in the decisions.

When interpreting the scope of so-called "antiassignment" clauses in contracts, some courts have distinguished between transfers that occur by express, voluntary act and those that occur by operation of law. Other courts have not. *Compare, e.g., Dodier Realty & Inv. Co. v. St. Louis Nat'l Baseball Club, Inc.*, Mo. Supr., 238 S.W.2d 321, 325 (1951) (en banc) ("The merged corporation having succeeded to the rights of the original lessee by operation of law, it follows that there was no assignment [or transfer] within the prohibition of the covenant in question . . . .") *with PPG Indus., Inc. v. Guardian Indus. Corp.*, 6th Cir., 597 F.2d 1090, 1096 ("A transfer is no less a transfer because it takes place by operation of law rather than by a particular act of the parties. The merger was effected by the parties and the transfer was a result of their act of merging."), *cert. denied*, 444 U.S. 930 (1979).[8] Some scholars have criticized those decisions that mechanically interpret "transfer" to include all mergers. *See* Ballew, *The Assignment of Rights, Franchises, and Obligations of the Disappearing Corporation in a Merger*, 38 Bus. Law. 45, 59 (1982); Note, *Effect of Merger and Consolidation on Property, Rights and Franchises of the Constituent Corporations*, 38 Va. L. Rev. 496, 510 (1952) [hereinafter Virginia Note]; Note, *Effect of Corporate Reorganization on Nonassignable Contracts*, 74 Harv. L. Rev. 393, 394-96 (1960) [hereinafter Harvard Note].

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8. Plaintiffs argue that these differing results may be explained in terms of the substantive rights in dispute. They contend that for public policy reasons courts strictly construe antitransfer provisions in real estate leases (such as in *Dodier*), but loosely construe identical provisions in all other contracts (such as the patent license in *PPG*). However, that distinction does not easily harmonize all the cases. *See, e.g., Farmland Irrigation Co. v. Dooplmaier*, Cal. Supr., 308 P.2d 732, 740 (1957) (rejecting the presumption that patent licenses are not transferable unless the license explicitly so states and favoring the transferability of all types of property).

Even under Georgia law, which governs the legal effect of the Merger upon the property and other rights of the three merged BellSouth subsidiaries, the legal status of a merger under an antiassignment clause is less than clear. One Georgia court noted a split of authority regarding whether a Georgia merger breached a covenant barring assignments, but decided the case on other grounds. *See Albemarle, Inc. v. Eaton Corp.*, Ga. Ct. App., 357 S.E.2d 887, 888 (1987). The current Georgia merger statute, § 14- 2-1106(a)(2), does not employ the term "transfer." Rather, it provides that the property of the disappearing corporation "is vested in the surviving corporation," and the unofficial comment to that section states that "[a] merger is not a conveyance or transfer . . . ." However, the comment also purports not to substantially change the prior, superseded merger statute (§ 14-2- 216 of the 1982 Georgia Code), which provided that all property of the merged corporation "shall be taken and deemed to be transferred to and vested in the surviving corporation without further act or deed . . . ." *Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 5th Cir., 535 F.2d 287, 291 (1976), further evidences the unsettled state of the law on this question. There the Fifth Circuit, applying Georgia law, held that a transfer of an insurance policy pursuant to a Georgia statutory merger did not violate an antiassignment clause in the policy, and did not thereby defeat coverage. The Court stated that it was "unable to conclude that the no-assignment provision unambiguously and unquestionably applied to this transfer [by operation of law]." *Id.* at 292-93.

Because of the existing uncertainty in the law when the Agreement was drafted, the word "transfer" did not then (and does not now) have a plain or generally prevailing meaning. It, therefore, must be inferred that had the parties contemplated this specific dispute and intended to prohibit all mergers under Section 13.1, they would likely have not chosen the unaided term "transfer" to express that intent. Rather, they would have specifically addressed merger, or they would have provided by appropriate language that "transfer" means all transfers, including those arising by operation of law. In either case the Merger would fall within Section 13.1's prohibitory scope. *Citizens Bank & Trust Co. of Md. v. Barlow Corp.*, Md. Ct. App., 456 A.2d 1283, 1289 (1983). *Cf. Standard Operations, Inc. v. Montague*, Mo. Supr., 758 S.W.2d 442, 444 (1988) (en banc). However, as actually written, Section 13.1 does not plainly and unambiguously include mergers within the category of prohibited "transfer[s]."

Arguing the contrary, the plaintiffs suggest that because the "whereas" recitals in the Agreement refer to the FCC, the Court ought to consider the FCC Application for Transfer of Control, which evidences that the parties to the Merger regarded it as a "transfer."[9] But nothing in the Agreement's recitals persuasively establishes that the parties intended to define "transfer" in Section 13.1 by reference to the federal regulatory concept of "transfer of control."[10]

[10] In addition to the provisions of the Agreement, the Court has considered the extrinsic evidence, but that evidence also does not aid the plaintiffs' cause. Extrinsic evidence is considered in order to elucidate the parties' contractual intent by taking into account the context and circumstances in which the disputed contract language was employed. *Klair v. Reese*, 531 A.2d at 223. The plaintiffs contend that the FCC application, and certain documents executed contemporaneously with the Merger, evidence that the intent of the parties to the Merger was to "transfer" the general partner's interest from Baton Rouge Inc. to Louisiana Inc. The plaintiffs point to a November 21, 1991 letter written by a BellSouth manager, requesting the FCC's consent to "the pro forma *transfer* of control of [the Partnership] from [Baton Rouge Inc.] to [Louisiana Inc.]" (Christopher Aff. Ex. F.) (emphasis added). They also point to a provision in the Plan of Merger that "all property . . . and all and every interest of or belonging to [the three entities] shall be taken and deemed to be *transferred* to and vest in [Louisiana Inc.] without further act or deed . . . ." (Christopher Aff. Ex. D, 3) (emphasis added).

[11] Those documents may evidence what the parties to the Merger contemplated in 1991, but they do not shed light upon what the parties to the Agreement intended by "transfer" as used in Section 13.1 of the Agreement, which was drafted in 1984. Where, as here, a disputed writing is not plain on its face, the Court may consider

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9. The plaintiffs also argue that Section 13.1 of the Agreement must be read together with Section 11.1, which makes an exception for transfers by a limited partner to an affiliate. Section 11.1, while relevant, does not shed dispositive light upon the question of whether mergers are "transfers" within the meaning of 13.1.

10. The references to the FCC in one recital are to FCC orders concerning the need to implement cellular service; the references in another recital are to the partners' stated desire to further the FCC's objectives as set forth in those orders. Nowhere does Section 13.1 evidence an intent that the word "transfer" should be given a technical meaning related to FCC requirements. Had the parties wished to define the class of prohibited transactions as those requiring FCC approval, they could easily have drafted the Agreement to so provide.

extrinsic evidence, but only if it relates to the circumstances surrounding the drafting of the contract at issue. *See Klair v. Reese*, 531 A.2d at 223. The FCC Application and the Plan of Merger, both of which postdate the Agreement by seven years, do not.

[12] To summarize, the inquiry into the "plain meaning" of the Agreement and the extrinsic evidence uncovers nothing which compels the view that the contracting parties intended "transfer" to have the broad meaning that the plaintiffs advocate. Nor, by the same token, does it compel the more restrictive interpretation urged by the defendants. That being the case, the Court, in attempting to ascertain the contracting parties' intent, may consider applicable legal doctrines, including presumptions. *Id.* at 223-24; *see Playtex FP, Inc. v. Columbia Casualty Co.*, Del. Super., 609 A.2d 1087, 1092-93 (1991); *see also* 3 *Williston on Contracts* § 422, at 138 (Walter H. E. Jaeger ed., 3d ed. 1960). That analytical step brings into focus the objectives that parties to an antiassignment clause are generally presumed to be seeking to achieve.

[13] Antiassignment clauses are normally included in contracts to prevent the introduction of a stranger into the contracting parties' relationship and to assure performance by the original contracting parties. Harvard Note, *supra*, at 394. In some business relationships the continued personal involvement of an original contracting party is a material premise of the contract itself. In such cases any assignment is problematic. In other cases the parties fear that the assignee will either not perform or will perform inadequately, in which case what is problematic is not the assignment per se but the identity of the assignee. The Restatement addresses both concerns: "Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised." 3 *Restatement (Second) Contracts* § 318, at 19 (1981); *see also Restatement (Second) Contracts* § 317, at 15 (permitting an assignment of contract rights "unless it would materially increase the burden or risk imposed on [the obligor] or materially impair his chance of obtaining return performance or materially reduce its value to him").

[14] Courts that have addressed whether a merger violates an antiassignment clause have looked to these assignment law principles either explicitly or implicitly. *See* Ballew, *supra*, at 55, 59; 6 Am. Jur. 2d *Assignments* § 22 (1963). From those principles it may reasonably be concluded that where an antitransfer clause in a contract does not explicitly prohibit a transfer of property rights to a new entity by a merger, and where performance by the original contracting

party is not a material condition and the transfer itself creates no unreasonable risks for the other contracting parties, the court should not presume that the parties intended to prohibit the merger. *See* Ballew, *supra*, at 55; Harvard Note, *supra*, at 405-06; *cf. Imperial*, 535 F.2d at 293 (interpreting an ambiguous antiassignment clause in insurance contract to avoid a forfeiture, where the merger created no increased risk to the insurance company).

The interpretation of "transfer" which results from this analysis makes no bright-line distinction between permissible and impermissible transfers. The distinction does not rest upon whether the transaction occurred by operation of law, or upon whether the operative transaction was (or was not) a merger. Nor can the distinction be expressed in a single word or phrase. Some mergers would be permitted, while others would not be. To express it in terms of this case, for the Merger not to be a "transfer" prohibited by Section 13.1, it must not create unreasonable risks for the plaintiffs, and performance by Baton Rouge Inc. must not have been a material premise of the Agreement. The question is whether the Merger satisfies these criteria. I find that it does.

[15] The plaintiffs urge that had the parties to the Agreement contemplated the Merger, they would have intended to prohibit it, because the performance obligations of the general partner are inherently personal and because the Merger would cause "a significant change." (Pls. Op. Br., 14 n.10.) They argue that partnership law prevents a third party from becoming a partner without the express approval of the other partners. But neither the law nor the evidence supports the absolute application of that principle in all cases. Here, the Merger did not materially affect the plaintiffs' position in the Partnership or their rights under the Agreement. In such a case, and absent contract language expressly treating the point, the law should not conclusively presume that a general partner's identity is invariably a factor so inherently material that under no circumstances would the parties have intended to permit any change in that identity, however nominal or substantively inconsequential that change might be. *See Rossetti v. City of New Britain*, Ct. Supr., 303 A.2d 714, 719 (1972); *Trubowitch v. Riverbank Canning Co.*, Cal. Supr., 182 P.2d 182, 188 (1947).

To support their position, the plaintiffs rely most heavily upon *Nicolas M. Salgo Assocs. v. Continental Ill. Properties*, D.D.C., 532 F. Supp. 279 (1981). However, the difference between *Salgo*'s facts and those here render that precedent inapposite. In *Salgo*, the court held that an antiassignment clause in a partnership agreement was breached

by a merger of a corporate general partner into another entity. Two general partners each owned 50% of a real estate partnership. Under the partnership agreement either general partner could withhold its consent to certain specified types of transfers of a partnership interest "for any reason whatsoever." *Id.* at 280. A third party, Bouverie Properties, Inc. ("Bouverie") launched a hostile tender offer for the shares of one of the two general partners, and gained control of that general partner. Bouverie then replaced a majority of that general party's trustees, and caused the new trustees to agree to merge the general partner into Bouverie without seeking the consent of the other 50% general partner. The merger was found to have violated the antiassignment clause of the partnership agreement because, among other reasons, the merger with Bouverie (which was a stranger to the contracting parties' relationship) "effectively forced plaintiff to accept a new partner without his consent." *Id.* at 283. Here, in contrast, no "stranger" has been "forced" upon the plaintiffs in any meaningful sense. The defendants retained the same partner, but in a different corporate form.[11]

The record establishes that the Merger did not adversely impact the plaintiffs' position or rights. After the Merger, operational control of the Partnership remained in the hands of BellSouth, which made no material changes in the Partnership's management. Before the Merger, BellSouth managed the Partnership under a service agreement with Baton Rouge Inc., the then general partner. At that time BellSouth was also under contract to provide the identical management services to Lafayette Inc. and New Orleans Inc. The principal officers and directors of these three subsidiaries were essentially the same BellSouth officers and directors. Those same persons who managed Baton Rouge Inc. before the Merger manage Louisiana Inc. today. There is no evidence of any change in business practices or policies that altered the parties' bargain in any significant way.

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11. Citing *Pauley Petroleum Inc. v. Continental Oil Co.*, Del. Supr., 239 A.2d 629, 633 (1968), the plaintiffs insist that in the absence of fraud this Court cannot pierce the veil separating BellSouth from its subsidiaries, and must acknowledge that a new general partner has been thrust upon them. But the Court is not piercing any corporation's veil. It acknowledges and respects the separate corporate existence of Louisiana Inc. The Court's finding that the substitution of one subsidiary for another was purely a change of form that had no materially adverse practical or legal impact upon the plaintiffs, rests upon principles of contract law and inflicts no violence upon the equitable doctrine of piercing the corporate veil. *See* 4 *Corbin on Contracts* § 865, at 450 (1951).

The plaintiffs contend, nonetheless, that the Merger will adversely affect them, in two respects. They first argue that Louisiana Inc., as a "multi-purpose corporation," can more easily "co-mingle assets and liabilities, divert resources of one market to another market, gloss over conflicts of interest, and misapply costs and expenses among the several partnerships" than could Baton Rouge Inc., which operated in only one market. (Pls.' Opp'n Br., 14 n.10). Second,[12] they argue that before the Merger the directors of Baton Rouge Inc. owed fiduciary duties to the plaintiffs alone, so that if Baton Rouge Inc. resolved a conflict among the three BellSouth subsidiaries in a manner harmful to the plaintiffs, Baton Rouge Inc. would be liable. Plaintiffs contend that because of the Merger the directors of Louisiana Inc. (the new general partner) now have conflicting legal duties (i.e., duties owed to persons in addition to the plaintiffs) imposed on them by law. That change is claimed to be prejudicial, because if a conflict arose, the new general partner's directors could now discharge their fiduciary duties under a more relaxed standard. That is, the plaintiffs appear to argue that under this new arrangement they are no longer protected by the rule that individuals who choose to serve as directors of two corporations owe a duty of good management to both.

Neither argument has merit. Section 7.4 of the Agreement authorizes partners to "engage in or possess an interest in other business ventures of every kind and description." Section 8.8 specifically permits the general partner to provide "Cellular Service independently from the Partnership in areas other than the [Baton Rouge] MSA and adjoining areas." Those provisions expressly authorize the general partner to manage markets other than the Baton Rouge market. Since Baton Rouge Inc. was contractually entitled to become a "multi-purpose corporation," no cognizable harm can flow from the fact that its successor, Louisiana Inc., controls more than one FCC license.

Equally unpersuasive is the plaintiffs' second argument. The same BellSouth directors who presently owe fiduciary duties to the plaintiffs owe similar duties to other limited partners of other partnerships as well. But that was equally true before the Merger. The only difference is that those BellSouth directors now owe duties by virtue of being directors of one BellSouth subsidiary, rather than of

12. The plaintiffs' second contention was advanced by counsel for the first time at oral argument.

three. Today, as before the Merger, those directors owe the plaintiffs fiduciary duties, and conflicts of interest may arise. But no showing was made that the Merger has spawned new, more lax fiduciary principles that would somehow license Louisiana Inc.'s directors to discharge those duties less responsibly than they did earlier.

In short, the Merger created no material change in the control of the general partner or in the operations of the Partnership. The change was purely formal—the substitution of a new corporate entity for the entity that was the original general partner. That affected a change, to be sure, but one of legal form, not of substance. It altered none of the pre-Merger realities that were crucial to the limited partners' economic interests.

IV. *CONCLUSION*

The drafters of the Agreement could have provided that the antitransfer clause of Section 13.1 would apply to all transfers, including those (such as the Merger) arising by operation of law. They did not. Instead, they used, with no modification, a term ("transfer") that has no plain, settled meaning. No relevant extrinsic evidence persuasively establishes that the contracting parties intended for that word to be all inclusive. In these circumstances, the Court will not attribute to the contracting parties an intent to prohibit the Merger where the transaction did not materially increase the risks to or otherwise harm the limited partners.[13]

For the foregoing reasons the plaintiffs' motion for summary judgment is denied, and the defendants' cross-motion for summary judgment is granted. IT IS SO ORDERED.

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13. That result is especially appropriate in this case where the plaintiffs have seized upon the Merger as a vehicle for themselves, as limited partners, to oust their competitor, BellSouth, of its operational control and perhaps its economic interest in the Partnership. For this Court to permit such a result would effectively countenance a forefeiture, see *Jefferson Chem. Co. v. Mobay Chem. Co.*, Del. Ch., 267 A.2d 635, 637 (1970) (equity abhors a forfeiture and is not obligated to permit a party to get the advantage that a forefeiture would give him); *Clements v. Castle Mortgage Serv. Co.*, Del. Ch., 382 A.2d 1367, 1371 (1977), and it is by no means clear that a court of equity would grant the injunctive relief requested absent a showing of significant injury, 1 *High on Injunctions* 14-15 (4th ed. 1905).

STEPHANIS v. YIANNATSIS

No. 1508

Court of Chancery of the State of Delaware, Sussex County

October 4, 1993

Plaintiff, a minority shareholder of defendant corporation, filed suit individually and derivatively asserting that defendants, two of the corporation's directors and majority stockholders, breached their duty of loyalty by purchasing the stock of a deceased shareholder in an attempt to vest control of the corporation in the hands of immediate family members. Specifically, plaintiff contended that defendants usurped a corporate opportunity because the corporation possessed a right of first refusal to purchase any of its stock available for sale and was financially able to purchase the stock. Consequently, plaintiff argued that a constructive trust should be imposed on the stock purchased by defendant in favor of Sunview. Additionally, plaintiff asserted that a shareholder agreement should be set aside by the court because the difference between the agreement's valuation of plaintiff's stock and defendants' stock was grossly unfair. Finally, plaintiff claimed that defendants, in their capacity as directors, committed corporate waste because they caused the corporation to pay unreasonable and inappropriate compensation to themselves.

The court of chancery, per Vice-Chancellor Chandler, held that defendant violated the duty of loyalty she owed to the corporation and usurped a corporate opportunity by acquiring stock which the corporation was financially capable of purchasing. The court imposed a constructive trust on defendant's stock in favor of the corporation. Additionally, the court decided that because defendant's stock purchase was invalid, the resulting shareholder agreement was also invalid. Finally, after analyzing the facts and circumstances of defendants' employment, the court rejected plaintiff's corporate waste argument and held that defendants' compensation was reasonable.

1. Corporations ⟹185, 307, 314(1), 315

The corporate opportunity doctrine arises from the fiduciary obligation concept that a fiduciary must not use its position of trust for the benefit of itself.

2. Corporations ⟹185, 310(1), 314(1), 315

The corporate opportunity doctrine forbids the director of a corporation from using her position in the corporation to further her private interests.

3. Corporations ⟹185, 315

Whether a corporate opportunity has been wrongfully taken is wholly dependent on the facts presented.

4. Corporations ⟹185, 315

The ingredients necessary to find that a corporate opportunity has been usurped are: (1) the opportunity is either essential to the corporation or is one in which it has an interest or expectancy, (2) the corporation is financially able to take advantage of the opportunity itself, and (3) the party charged with taking the opportunity did so in an official rather than individual capacity.

5. Corporations ⟹185, 315

While Delaware courts have not faced directly the issue of what standard should be used when determining whether a corporation is financially able to avail itself of a corporate opportunity, financial inability must amount to insolvency to the point where the corporation is practically defunct. Mere technical insolvency, such as the inability to pay current bills when due or mere inability to secure credit, will not suffice. The corporation must be actually insolvent.

6. Corporations ⟹185, 315, 319(7)

The mere inability to secure credit does not preclude a finding that a corporate opportunity has been usurped.

7. Corporations ⟹185, 315, 319(7)

The court cannot reasonably infer that the corporation was financially unable to purchase stock when evidence indicated that one month before the shareholder's meeting during which the board decided not to purchase the stock, the corporation determined that it could afford to pay $150,000 for the purchase of stock being offered at $250,000, and the directors who purchased the stock individually secured the unpaid balance of the purchase price of the stock through a second mortgage lien on the corporation's property.

8. Corporations ⟹185, 315, 319(7)

The court cannot reasonably infer that the corporation was financially unable to purchase stock simply because it maintained small amounts of cash on hand.

9. Corporations ⟹ 316(1), 316(3), 316(4)

The burden rests on the party claiming ratification to establish that the stockholder approval resulted from a fully informed electorate.

10. Corporations ⟹ 316(1), 316(3), 316(4)

Director and shareholder of corporation could not have ratified a director's purchase of stock by entering into shareholder agreements when he was not fully informed about the transactions.

11. Corporations ⟹ 316(1), 316(3), 316(4)

A director cannot be deemed to have ratified a transaction by signing papers immortalizing it when the papers, in this case the board of directors' meeting minutes, were inaccurate.

12. Corporations ⟹ 315, 316(1)

Because director usurped a corporate opportunity when she purchased stock, she cannot be deemed to have validly purchased the shares and, as a result, the subsequent agreements entered into by the director as a shareholder of the corporation cannot be valid, enforceable agreements.

13. Trusts ⟹ 91, 102(1)

The equitable jurisdiction of the court of chancery permits it to impose a constructive trust.

14. Trusts ⟹ 91, 102(1)

Constructive trusts arise from principles of equity for the purpose of working out justice in the most efficient manner. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.

Collins J. Seitz, Jr., Esquire, and Arthur G. Connolly, III, Esquire, of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware, for plaintiff.

Edward M. McNally, Esquire, and Kent A. Jordan, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendants.

CHANDLER, *Vice-Chancellor*

Plaintiff, John Stephanis, is a shareholder of Sunview Corporation ("Sunview"). He filed this action against Sunview and two other shareholders and directors of Sunview, Demos and Stella Yiannatsis. Plaintiff brought this action derivatively, on behalf of Sunview, alleging that actions committed by the Yiannatsis' constitute breaches of fiduciary duty, self-dealing and waste. Specifically, Plaintiff contends that Stella Yiannatsis usurped a corporate opportunity when she purchased the Sunview shares she currently holds. Plaintiff seeks to impose a constructive trust upon this stock in favor of Sunview. Plaintiff also sues the Yiannatsis' individually, to stop them from continuing and benefitting from an alleged scheme to take control of and dominate Sunview. I conducted a trial on the merits April 19 and 20, 1993. This is my decision on these claims.

I.

John Stephanis ("Plaintiff") together with Demos Yiannatsis ("Demos"), John's cousin, and purportedly Stella Yiannatsis ("Stella"), Demos' wife, own all of the shares of stock of Sunview. Sunview owns certain real estate and other property located in Rehoboth Beach, Delaware, including retail shops, an arcade and a motel (collectively the "Rehoboth property"). Sunview acquired the Rehoboth property from relatives of Plaintiff and Demos after those relatives retired.[1]

Plaintiff and Demos are two of the three original shareholders of Sunview. The other original shareholder was Costas Stephan ("Costas"), Plaintiff's and Demos' uncle. Since the original issuance of the Sunview shares, no other shares have been validly issued.

1. Members of Plaintiff's and Demos' family have owned the Rehoboth property since the 1940s.

The shareholders of Sunview organized its operations as follows. Upon Sunview's inception, Plaintiff, Demos and Costas comprised Sunview's Board of Directors. Shortly thereafter, Stella became a Board Member. Demos was, and continues to be, president of Sunview; John was at one time secretary of Sunview. Costas ran the ice-cream parlor, Demos and Stella ran (and continue to run) the motel, and Demos, John and Costas together ran the arcade. Sunview leased the remaining Rehoboth property to a third party.

The operations of both the motel (Stella and Demos) and the ice-cream parlor (Costas, and later, John) paid monies akin to rent to Sunview.[2] In return, they retained all profits earned from the operation of the motel and ice-cream parlor, respectively. Sunview did not require the motel and ice-cream parlor to account for their profits. In addition, Sunview paid each stockholder a salary from the arcade's net profits. Essentially this salary was a division of the net profits from the arcade.

Sunview's operations ran smoothly until 1984 when Costas died. Shortly before Costas' death, Plaintiff and his wife took over the operation of the ice-cream parlor. After Costas' death, pursuant to an "Agreement Restricting Right To Transfer Stock Between Demos Yiannatsis, Costas Stephanis and John Stephanis" (the "1975 Agreement"), negotiations began concerning the sale of Costas' stock (the "Costas Stock").

The 1975 Agreement provides that if a shareholder of Sunview (or the executor or administrator of a deceased holder) desires to sell or transfer his shares, the shareholder must first deliver written notice of this intention to Sunview, stating the number of shares offered for sale and the price desired for each share. The agreement also provides a mechanism by which shares of Sunview would be valued should a dispute arise as to their valuation. The crux of the 1975 Agreement, however, grants to Sunview a right of first refusal to purchase any and all outstanding shares of the corporation should they become available.

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2. At trial, the parties disagreed whether monies paid to Sunview from the operations of the motel were properly deemed rent or corporate transfers. Sunview's accountant testified that monies paid by the motel were considered corporate transfers on Sunview's books. Stella and Demos contend the monies paid from motel operations to Sunview constitute rent. I find that monies paid to Sunview from the operation of the motel, while perhaps not technically rent, are monies akin to rent. That is, these monies are paid by the party or parties operating the motel, to Sunview, with the expectancy that the party or parties will continue to occupy and operate the motel.

Sunview never invoked the 1975 Agreement upon the death of Costas. Instead, counsel for the estate of Costas and Demos and Stella, purportedly acting on behalf of Sunview, haggled over the value of the Costas Stock. Initially, Costas' estate valued the Costas Stock between $188,000 and $258,000 (as adjusted for outstanding mortgage amounts) plus one third the value of the business.[3] Subsequently, Costas' estate made an offer to sell the Costas Stock for $250,000. Sunview's counsel counter-offered for $150,000. Thereafter, on December 14, 1983, at the annual meeting of the Sunview Board of Directors, Costas' estate eventually offered to sell the Costas Stock for $150,000 cash plus $55,000 over time. That same day, Sunview purportedly rejected the offer to buy the Costas Stock. One business day later, it was determined that Stella would purchase the Costas Stock. The transfer of the Costas Stock from Costas' estate to Stella took place shortly thereafter.

About a month after Stella's purchase, Plaintiff, Demos and Stella entered into a "Supplemental Agreement Restricting Right To Transfer Shares of Common Stock of Sunview Corporation" (the "1985 Agreement"). The 1985 Agreement provides that the 1975 Agreement restricting the transfer of stock applies to Stella. The 1985 Agreement contains an exception, however. It provides that restrictions on the transfer of stock created by the 1975 Agreement do not apply to the transfer of stock from Stella to Demos or vice-versa during either's lifetime or as the result of either's death.

Three years later, in 1988, Plaintiff, Demos and Stella entered into another agreement, the "Stockholders Agreement" (the "1988 Agreement"). The 1988 Agreement significantly alters the terms of the 1975 Agreement and the 1985 Agreement. Pursuant to the terms of the 1988 Agreement, Demos and Stella can transfer their stock to each other or their heirs during life or upon death, but Plaintiff, in all events, must first offer his stock to Sunview or the other shareholders.[4] In addition, the 1988 Agreement provides that

3. Plaintiff never received a copy of the letter containing this valuation.

4. Plaintiff was induced to sign the 1988 Agreement under false pretenses. When Demos brought the papers to Plaintiff for his signature, Demos represented to him that he was merely signing something that would entitle Plaintiff's wife to receive $250,000 upon his death. Apparently, when Demos made this statement he was referring to the life insurance funding aspect of the 1988 Agreement. Plaintiff was not told about the change in restrictions of the stock nor the disparate value accorded to Plaintiff's stock in comparison with Demos' and Stella's stock.

Demos' and Stella's shares will be valued at more than twice an amount per share than Plaintiff's shares. Specifically, Plaintiff's shares have a designated purchase price of $2,500.00 per share, whereas Demos' and Stella's shares have a designated purchase price of $5,501.79 per share.

In September of 1989, Demos, as acting president of Sunview, terminated Plaintiff's employment at the arcade purportedly because Plaintiff's illness prevented him from performing his job adequately. Approximately eight months later, Demos terminated Plaintiff's lease of the ice-cream parlor, and in September 1991, Stella and Demos purported to remove Plaintiff as an officer and director of Sunview.

After Plaintiff's eviction, Sunview filed the first of three landlord-tenant actions against Plaintiff aimed at removing Plaintiff as a tenant of the ice-cream parlor. While ruling for Plaintiff in the landlord-tenant proceedings, the Justice of the Peace Courts that addressed the landlord-tenant actions refused to resolve Plaintiff's claim that Stella does not validly own her shares of Sunview. That issue is now before this Court. Thus, I must determine the validity of Stella's ownership of the Sunview stock as well as the fairness of the 1988 Agreement.

II.

Plaintiff alleges individually, and derivatively, on behalf of Sunview, several things: first, that Demos and Stella, as majority shareholders and officers and directors of Sunview, breached the duty of loyalty they owed to Sunview by usurping Sunview's corporate opportunity to purchase the Costas Stock; second, that the 1988 Agreement is unfair to Plaintiff as a minority shareholder; third, that Demos and Stella, through misrepresentations, defrauded Sunview by diverting funds belonging to Sunview for their own personal use; and finally, that Demos and Stella caused Sunview to pay excessive amounts of compensation to Stella amounting to corporate waste.

Demos and Stella argue, on the other hand, that they did not usurp a corporate opportunity from Sunview because Sunview was financially unable to purchase the Costas Stock. Moreover, they argue, Plaintiff ratified Stella's purchase of the Costas Stock by signing the stock certificate issued to Stella and by entering into various stockholder's agreements with Stella after Stella's purchase. In addition, Stella and Demos assert that Stella's compensation

does not amount to corporate waste because it is reasonable compared to similar executives in similar, seasonal businesses. Finally, Demos and Stella contend that the 1988 Agreement is governed by contract law and, therefore, need not be inherently fair. Rather, they argue, the agreement must be enforced as written because all parties to the 1988 Agreement consented to the terms as stated.

III.

[1-3] Plaintiff first asserts that Stella's purchase of the Costas Stock was a usurpation of a corporate opportunity from Sunview. The corporate opportunity doctrine arises from the fiduciary obligation concept that a fiduciary must not use its position of trust for the benefit of itself. Translated into corporate terms, this concept forbids Stella, as a director of Sunview, to use her position in the corporation to further her private interests. *Guth v. Loft, Inc.*, Del. Supr., 5 A.2d 503, 510 (1939). But, whether a corporate opportunity has been wrongfully taken "is wholly dependent upon the facts presented." *See Schreiber v. Bryan*, Del. Ch., 396 A.2d 512, 519 (1978).

Plaintiff contends that Sunview had an expectancy of and interest in purchasing the Costas Stock pursuant to the 1975 Agreement. And, Plaintiff argues, Sunview had determined that it could underwrite the buyback of the shares one month before Stella purchased the shares. Moreover, asserts Plaintiff, Stella and Demos undeniably benefitted from Stella's purchase of the shares because the purchase effectively vested control of Sunview into the Yiannatsis' hands.

[4] This Court has previously stated the ingredients necessary to find that a corporate opportunity has been usurped:

> (1) . . . the opportunity is either essential to the corporation or is one in which it has an interest or expectancy, (2) . . . the corporation is financially able to take advantage of the opportunity itself, and (3) . . . the party charged with taking the opportunity did so in an official rather than individual capacity.

Id.

Undeniably, Sunview had an interest in acquiring the Costas Stock. The original shareholders of Sunview entered into an agreement whereby Sunview obtained a right of first refusal to purchase any of its stock available for sale. Stella and Demos do not deny that Sunview had an interest in purchasing the Costas Stock. In-

stead, they assert that Sunview did not have the wherewithal to purchase the shares and, therefore, the transaction whereby Stella purchased the Costas Stock was not a corporate opportunity. Specifically, Stella and Demos contend that Sunview did not have the income to support a $150,000 plus loan and could not use its assets to secure such loan. In my mind, these arguments have no merit. [5] In *Schreiber*, this Court found one of the requirements necessary to finding that a corporate opportunity has been usurped is that "the corporation is financially able to take advantage of the opportunity itself." *See id.* Delaware courts have not faced directly the issue of what standard should be used when determining whether a corporation is financially able to avail itself of a corporate opportunity. "It has been said, however, that such financial inability must amount to insolvency to the point where the corporation is practically defunct. Mere technical insolvency, such as inability to pay current bills when due or mere inability to secure credit, will not suffice. The corporation must be actually insolvent." 18B Am. Jur. 2d *Corporations* § 1790, at 642-43 (1985) (footnotes omitted). *See also CST, Inc. v. Mark*, Pa. Super., 520 A.2d 469, 472 (1987); Annotation, *Financial Inability of Corporation to Take Advantage of Business Opportunity as Affecting Determination of Whether "Corporate Opportunity" was Presented*, 16 A.L.R.4th 185, §4[b] (1982).

Delaware cases addressing a corporation's financial ability to take advantage of an opportunity are in agreement with the proposition stated above. For example, in *American General Corp. v. Texas Air Corp.*, Del. Ch., Nos. 8390, 8406, 8650, & 8805, Hartnett, V.C., slip op. at 12 (Feb. 5, 1987), this Court found that Texas Air Corporation did not usurp a corporate opportunity from Continental because Continental was financially unable to avail itself of the opportunity. There, Continental was in bankruptcy. And, in *Maclary v. Pleasant Hills*, Del. Ch., 109 A.2d 830, 837 (1954), this Court opined that a director usurped a corporate opportunity from the corporation where view was taken of "the fairly healthy financial condition of the corporate defendant at the time and the fact that the corporation was engaged in the business [usurped]."

Here, it is obvious that Sunview is neither bankrupt nor insolvent. In fact, I find that Sunview is in reasonably, if not very, healthy condition. Sunview owns prime beachfront real estate worth over $1 million that has been managed profitably for over forty years. Sunview has not had problems paying its bills when they become due, and in fact, Sunview prepaid a portion of the mortgage it incurred when it purchased the Rehoboth property. Moreover,

Sunview's shareholders have been able to invest significant amounts of money as a result of the distributions made by Sunview each season.[5]

[6-8] Notwithstanding these facts, Demos and Stella contend that Sunview could not have secured a loan to purchase the shares held by Costas' estate because Sunview has little yearly income. This argument falls short for three reasons. First, as noted above, "mere inability to secure credit" does not preclude finding that a corporate opportunity has been usurped. Indeed, case law in other jurisdictions expressly states that such a showing is insufficient. *See, e.g., CST, Inc. v. Mark, supra.* Second, the evidence at trial directly contradicts Stella's and Demos' assertion that Sunview could in no way afford to purchase the Costas Stock. Approximately one month before the December 1984 shareholder's meeting, the corporation determined that it could afford to pay at least $150,000 for the purchase of the Costas stock. Sunview's counsel memorialized this fact when he tendered to Costas' estate a written offer, on behalf of Sunview, to purchase the Costas Stock for $150,000. Even more astounding is the fact that Stella and Demos secured the unpaid balance of the purchase price of the Costas Stock by a second mortgage lien on Sunview's property. It is wholly contradictory for Stella and Demos to assert that Sunview was financially unable to secure a loan for the purchase of the Costas Stock when they, themselves, used Sunview's assets to secure a loan for the very same purpose. Finally, I cannot reasonably infer that Sunview was financially unable to purchase the Costas Stock simply because Sunview maintains small amounts of cash on hand. Had Sunview been given the opportunity, it easily could have altered its current policy of distributing the majority of earnings to stockholders, instead retaining some of those profits.[6] Subsequently, these retained earnings could have been used to purchase the Costas Stock or to secure a loan for that same purpose. The Sunview directors never explored these options, however.

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5. Demos and Stella own two residences, valued in the aggregate at approximately $200,000. Plaintiff has invested in real estate in Greece.

6. The operators of the Sunview motel and ice-cream parlor are allowed to keep all profits arising from these operations after paying monies akin to rent to Sunview. As a result, Sunview's current operational policy is to distribute virtually all profit to its shareholders.

Indeed, it is evident that the real obstacle to Demos' and Stella's assertion that Sunview was financially unable to purchase the Costas Stock is the fact that Sunview was never given adequate opportunity to determine whether in fact it should or could purchase the Costas Stock. Within the span of one board meeting, the terms of the purchase of the Costas Stock were agreed upon and Sunview purportedly rejected the opportunity to purchase the shares. During the time after which the purchase price of the Costas Stock was agreed upon and before which Sunview purportedly rejected the opportunity to purchase the Costas Stock, Sunview never explored the possibility of purchasing the Costas Stock.

On the contrary, it appears that Stella and Demos never intended Sunview to explore this opportunity; instead, they intended Stella to be the purchaser. In fact, the evidence shows that Stella was the intended purchaser of the shares before the purchase price was agreed upon.[7] George Siampos, the attorney-in-fact representing Costas' estate, testified that Demos indicated to him that Stella was to be the purchaser of the Costas Stock *before* the parties agreed upon the purchase price of the shares. Because the purchase price had not yet been agreed upon, Demos' indication necessarily took place before Sunview allegedly rejected the opportunity to purchase the shares.

In addition, the evidence shows that Stella and Demos knew that they could only afford to pay $150,000 in cash for the Costas Stock before they entered the December 1984 Board Meeting. Not uncoincidentally, the terms of purchase of the Costas Stock were set at $150,000 cash and $55,000 over time. One final piece of evidence showing that Stella was always the intended purchaser of the Costas Stock is that Stella's lawyer named Stella the intended purchaser before Stella and Demos purportedly applied for a loan to purchase the Costas Stock.

Viewing this evidence in its entirety, it is clear that Sunview never had an opportunity to purchase the Costas Stock. As a result, when Stella, as a director of Sunview, purchased the Costas Stock, she usurped an opportunity in which Sunview had an interest and of which it was financially able to take advantage.

But, contend Demos and Stella, even if Stella usurped a corporate opportunity, Plaintiff ratified Stella's purchase of the Costas

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7. As early as 1978, Stella tried to acquire Sunview stock through an issuance that was later declared invalid.

Stock and, therefore, cannot have the contract of sale set aside. Specifically, Demos and Stella assert that Plaintiff ratified Stella's purchase when he reviewed the purchase agreement in 1984, when he signed the stock certificate issued to Stella, when he signed the 1985 Agreement and finally, when he signed Board of Director's meeting minutes that confirmed his agreement to the sale.

[9] "The burden rests on the party claiming ratification to establish that the stockholder approval resulted from a fully informed electorate." E. Folk, R. Ward & E. Welch, 1 *Folk on the Delaware General Corporation Law* § 144.5.2.3 at § 144:14-15 (1992) (citations omitted). As a result, Demos and Stella have the burden of showing that Plaintiff was fully informed when he reviewed and signed the above documents.[8]

[10] I find that Plaintiff was often uninformed when he signed documents relating to Sunview. Stella admits that she did not always translate or explain documents in their entirety to Plaintiff before asking him to sign at the "X." In fact, when Plaintiff signed the stock certificate and reviewed the purchase agreement, he was told only that his signature authorized Stella to purchase the shares. No one explained to Plaintiff that Sunview had a right to buy the shares before Stella did and, most importantly, that Plaintiff would no longer be an "equal" shareholder of Sunview after Stella's purchase. Likewise, Stella and Demos did not fully explain the terms and consequences of the 1985 Agreement. As a result, Plaintiff could not have ratified Stella's purchase of the Costas Stock by entering into the shareholder agreements because Plaintiff was not fully informed about these transactions.

[11] Finally, Stella and Demos argue that Plaintiff ratified the sale of the Costas Stock when he signed Board of Directors' meeting minutes confirming the sale. There are two problems with this argument. First, like the shareholder agreements described above, no one fully explained to Plaintiff the repercussions of his signature

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8. Stella and Demos argue that "competency in business transactions is presumed." Without determining whether this standard is controlling, I merely point out that Stella, herself does not presume Plaintiff is competent. Stella and Demos do not controvert the fact that Plaintiff speaks little English, obtained the equivalent of a seventh grade education and was recently diagnosed as having multiple sclerosis. In fact, Plaintiff was often directed by Demos or Stella to sign at the "X." And, Stella translated all business documents from English to Greek for Plaintiff. The only reasonable inference I can draw from these facts is that Stella, herself, did not presume Plaintiff was competent in business transactions. As a result, she cannot ask the court to do so.

on the December 1984 Sunview Board of Directors' meeting minutes. Again he was merely told that his signature authorized the transfer of shares from Costas' estate to Stella. Second, Stella testified that the minutes confirming Plaintiff's agreement to the sale were not accurate. Plaintiff cannot be deemed to have ratified a transaction by signing papers memorializing it when those papers are inaccurate. Consequently, Plaintiff's act of signing the minutes could not amount to a fully informed ratification of the sale of the Costas Stock to Stella.

Taking account of the above facts, Stella's and Demos' knowledge of Plaintiff's limited mental capacity and inability to speak English and Stella's and Demos' past practices of telling Plaintiff to sign at the "X," I find that Stella and Demos have failed to meet their burden of proving that Plaintiff ratified Stella's purchase of the Costas Stock on a fully informed basis.

Plaintiff's second contention is that the 1988 Agreement is unfair to Plaintiff as a minority shareholder. Specifically, Plaintiff contends that Demos and Stella violated the fiduciary duty they owed to Plaintiff as majority shareholders because the difference between the values of Plaintiff's stock and the Yiannatsis' stock in the 1988 Agreement was "grossly unfair." In addition, Plaintiff contends that Demos and Stella defrauded him into signing the 1988 Agreement and the 1985 Agreement.

In response, Demos and Stella contend that the 1988 Agreement cannot be set aside for unfairness. Demos and Stella assert that the 1988 Agreement is a contract to which Plaintiff consented. As such, they argue, contract law, not the law of fiduciary duty, governs. Thus, they contend, Plaintiff cannot set aside the 1988 Agreement simply because he now believes it is unfair.

[12] I find it unnecessary to reach these arguments in light of my finding above. Because I have determined that Stella usurped a corporate opportunity when she purchased the Costas Stock, she cannot be deemed to have validly purchased these shares in 1984. As a result, the agreements entered into by Stella, as a shareholder of Sunview, cannot be valid, enforceable agreements. I, therefore, decline to rule on the fairness of the 1988 Agreement.

Plaintiff's third contention is that Stella and Demos have committed corporate waste by causing Sunview to pay unreasonable amounts of compensation to themselves. Specifically, Plaintiff cites the fact that Stella and Demos retain all profit earned by the motel operations while causing Sunview to pay for all equipment for the

business. Demos and Stella, on the other hand, contend that their compensation is reasonable and appropriate.

Taking into consideration all the facts and circumstances of Stella's and Demos' employment with Sunview, I find that their compensation is indeed reasonable. For example, Sunview's accountant found that Stella's compensation is reasonable compared to similar executives in similar, seasonal businesses. In addition, it is undisputed that Stella spends long periods of time at the motel during peak season to ensure that the motel is operating smoothly. Sunview's compensation of Stella for her time spent at the motel is not inappropriate. Based on these facts and circumstances, I find that Sunview's compensation of Stella does not amount to corporate waste.

I V.

The 1975 Agreement grants Sunview an express right of first refusal to purchase the Costas Stock. Nonetheless, Stella and Demos caused Sunview to reject the opportunity to purchase this stock without giving Sunview any chance to explore the opportunity. They diverted that opportunity to themselves so that they could vest control of Sunview into the hands of their immediate family. As a result, I find that Stella and Demos usurped a corporate opportunity from Sunview when Stella purchased the Costas Stock. [13-14] Plaintiff submits that as a result of Stella's and Demos' breach of their duty of loyalty to Sunview, the Court should impose a constructive trust upon Stella's stock in favor of Sunview. The equitable jurisdiction of this Court does in fact permit it to impose a constructive trust. *McMahon v. New Castle Assocs.*, Del. Ch., No. 8707, Allen, C. (Aug. 21, 1987). Constructive trusts arise from principles of equity,

> for the purpose of working out justice in the most efficient manner. . . . They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.

3 J. Pomeroy, *Equity Jurisprudence* § 1044, at 2370 (1919); *Beatty v. Guggenheim Exploration Co.*, N.Y. Supr., 122 N.E. 378, 380 (1919) (Cardozo, J.) ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been

acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.") *See also Sladen v. Rowse*, R.I. Supr., 347 A.2d 409 (1975) (imposing constructive trust on certain stock held by shareholder who breached his fiduciary duties to the company and other shareholders when he acquired that stock for his own account). Here, Stella holds 100 shares of Sunview stock that she obtained in violation of the duty of loyalty she owes to Sunview. As a result, I impose a constructive trust on the Sunview stock currently held by Stella in favor of Sunview.

Because Stella did not validly purchase the Sunview stock she currently possesses, the agreements entered into by her, Plaintiff and Demos concerning the stock of Sunview are invalid. I, therefore, decline to determine the fairness of the 1988 Agreement.

In regard to Plaintiff's assertion that Demos and Stella caused Sunview to pay excessive amounts of compensation to Stella amounting to corporate waste, I find this contention without merit.

An Order has been entered in accordance with this Memorandum Opinion.

ORDER

For the reasons set forth in this Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that:

1) A constructive trust is imposed in favor of Sunview Corporation upon the 100 shares of Sunview Corporation stock currently issued to, and held by, defendant Stella Yiannatsis.

2) The 1985 Supplemental Agreement Restricting Right to Transfer Shares of Common Stock of Sunview Corporation and the 1988 Stockholders Agreement are invalid because defendant Stella Yiannatsis did not validly purchase stock in the Sunview Corporation.

3) Plaintiff's claim that defendants Demos and Stella Yiannatsis caused Sunview Corporation to pay excessive compensation to defendant Stella Yiannatsis amounting to a waste of corporate assets is without merit and judgment thereon is entered in favor of defendants and against Plaintiff.

4) Costs of this proceeding are assessed against the defendants.

TELEPHONE & DATA SYSTEMS, INC. v. EASTEX CELLULAR L.P.

No. 12,888 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

August 27, 1993

Plaintiff sought specific performance of an alleged oral contract to purchase defendant and defendant's general partner. Intervenors, who had subsequently entered into a purchase agreement with defendants, filed a declaratory judgment action asking the court to declare that: (1) no contract existed between plaintiff and defendants, and (2) intervenor did not tortiously interfere with any contractual or legal rights of plaintiff. The suits were consolidated.

The court of chancery, per Vice-Chancellor Jacobs, held that intervention should be permitted as a matter of right because the defendant's interest in the litigation was neither identical to nor of the same intensity as intervenor's interest. The court further held that the evidence presented did not support a finding that plaintiff and defendant intended to be contractually bound by their oral agreement, thus no binding contract had been reached. Lastly, the court, upon finding no enforceable contract, agreed with intervenor that they did not tortiously interfere with plaintiff's contractual or legal rights.

1. Contracts ⟹ 325

Delaware applies the substantive law of the state that has the most significant relationship to the controversy.

2. Contracts ⟹ 14

In determining whether a binding contract arose between parties, the relevant inquiry is whether the communications between the parties, viewed objectively from the standpoint of a reasonable person, manifested an intention of the parties to be contractually bound at that stage.

3. Contracts ⟹ 14

In determining whether the communications between parties manifested an intention of the parties to be contractually bound at that stage, the parties' uncommunicated statements concerning their own subjective intent play no role.

4. Contracts ⟹ 15, 28(3)

A contract comes into existence if a reasonable person would conclude, based on the objective manifestations of assent and the surrounding circumstances, that the parties intended to be bound to their agreement on all essential terms.

5. Contracts ⟹ 32, 149

If parties contemplate that an oral agreement will be reduced to a writing, and they specifically communicate that they do not intend to be legally bound until a formal writing is executed, then no contract arises until that condition occurs.

6. Contracts ⟹ 32, 149

If parties contemplate that they intend their present expressions to be binding and have agreed to all essential terms, then an enforceable oral agreement arises.

7. Contracts ⟹ 14, 28(3)

If the parties' specific expressions cannot, by themselves, be viewed as manifesting an intention to be bound by contract, then the fact that one party subjectively thought, supposed, or expected that there was an enforceable agreement does not establish that one arose.

8. Contracts ⟹ 14

Intent to be bound by contract may be inferred from the parties' actions at the time of the negotiations and from their conduct both before and after the controversy arose.

9. Contracts ⟹ 14, 148

Factors often considered in determining whether the parties intended to be bound before the execution of an integrated writing include (but are not limited to) the type of contract involved, the completeness of the negotiations, and the industry practice.

10. Contracts ⟹ 148, 149

If an oral contract would have been inconsistent with industry practice, it is less likely that a reasonable person would understand that the speaker intends to be contractually bound by his word.

11. Contracts ⟹ 148

It is difficult to conclude that a binding oral agreement had been reached when its subsequently drafted written embodiment was unclear on a matter so basic as when the transaction would close.

12. Contracts ⟹ 148

If a reasonable negotiator would understand that a buyer would want to have clearly delineated representations and warranties running in its favor, and those terms remained unresolved at the time of the oral agreement, then that oral agreement may not be deemed to be complete.

13. Parties ⟹ 40(2)

Where an applicant seeking intervention has an interest similar to, but not identical with, that of an existing party to the litigation, the applicant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

14. Parties ⟹ 40(2)

Where the court of chancery has denied intervention as a matter of right, it was satisfied that the action would be fully litigated by a party with an intense and parallel interest to that of the applicants.

15. Parties ⟹ 40(2)

Where a particular resolution would effect the intervention applicant differently from the party with the similar interest as the applicant, then intervention should be allowed, as a matter of right.

16. Parties ⟹ 40(2)

Where the applicant's economic incentive to win the suit remains great, but the party's economic incentive to win has diminished, then it cannot be said that the party will in all circumstances be motivated to protect adequately the applicant's interest, and intervention should be allowed as a matter of right.

17. Torts ⟹ 12

Under Texas law, the elements of a cause of action for tortious interference with contractual relations are (1) a contract subject to interference, (2) a willful and intentional act of interference, (3) an intentional act that proximately caused plaintiff's damages, and (4) actual damage or loss.

18. Torts ⟹ 12

Under Delaware law, the elements of a cause of action for tortious interference with contractual relations are (1) a contract subject to interference, (2) a willful and intentional act of interference, (3) an intentional act that proximately caused plaintiff's damage, and (4) actual damage or loss.

19. Torts ⟹ 12

Where there is no valid contract, there can be no tortious interference with contractual relations.

20. Torts ⟹ 12

Intent requires knowledge of facts that would lead a reasonable person to believe in the existence of a contract.

R. Franklin Balotti, Esquire, Gregory P. Williams, Esquire, Scott R. Haiber, Esquire, of Richards, Layton & Finger, Wilmington,

Delaware; and Richard J. O'Brien, Esquire, and Rabea J. Zayed, Esquire, of Sidley & Austin, Chicago, Illinois, for Telephone & Data Systems, Inc.

Edward B. Maxwell, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; and Mark J. Sonnenfeld, Esquire, and Karen Pieslak Pohlmann, Esquire, of Morgan, Lewis & Bockius, Philadelphia, Pennsylvania, for Eastex Cellular, L.P. and D Altos Corporation.

Lawrence A. Hamermesh, Esquire, and Kenneth J. Nachbar, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Robert Stokes, Jr., Esquire, Heather C. Francks, Esquire, and Michael P. McGinn, Esquire, of Stokes, Eitelbach & Lawrence, P.S., Seattle Washington, for LIN Broadcasting Corporation and McCaw Cellular Communications, Inc.

JACOBS, *Vice-Chancellor*

The plaintiff, Telephone and Data Systems, Inc. ("TDS"), seeks specific performance of an alleged oral contract with the defendants, Eastex Cellular L.P. ("Eastex") and Eastex' general partner, D Altos Corporation ("D Altos"). TDS claims that on February 26, 1993, it entered into an oral contract with the defendants to purchase all of Eastex' assets for 784,703 shares of TDS stock, then worth $29.6 million. The agreement was never reduced to a writing signed by the parties. On March 8, 1993, a joint venture consisting of LIN Broadcasting Corporation ("LIN") and McCaw Cellular Communications, Inc. ("McCaw")[1] offered to purchase Eastex' assets for $34 million. Four days later, on March 12, 1993, Eastex and D Altos signed a nonbinding letter of intent to sell Eastex' assets to LIN/McCaw for $34 million.

TDS filed this action on March 8, 1993. On March 18, 1993, LIN/McCaw filed a separate action against TDS in this Court for a declaratory judgment that (a) TDS has no binding contract with Eastex, and that (b) LIN/McCaw did not tortiously interfere with any contractual or other legal right of TDS. These two actions, filed respectively by TDS and by LIN/McCaw, were then consol-

1. McCaw owns 52% of LIN and controls the LIN board of directors. These two affiliated companies are sometimes referred to as "LIN/McCaw."

idated, and the Court ordered that the case would proceed on an expedited basis.

On April 13, 1993, TDS moved to dismiss the LIN/McCaw action for lack of subject matter jurisdiction. LIN/McCaw responded by moving to intervene in the TDS action. The Court reserved for post-trial briefing the questions of its subject matter jurisdiction over LIN/McCaw's claims and entitlement to intervene, and subject to that reservation, permitted LIN/McCaw to participate as co-defendants and litigate the claims alleged in TDS' (and in their own) complaint.

The case was tried on June 4 and 7-9, 1993, and post-trial briefing was concluded on July 23, 1993. This is the Opinion of the Court after trial on the claims advanced by TDS and LIN/McCaw.

I. *PERTINENT FACTS*

A. *Events Preceding the February 26 Agreement*

During the 1980s the Federal Communications Commission ("FCC") issued "non-wireline" licenses by lottery to entities that would provide cellular communications service within a defined geographic region.[2] A predecessor of Eastex, Synapse Partnership, applied for licenses in several regional markets, and was awarded a license to operate in the market designated as Texas Rural Service Area 17 ("Texas 17"). That market encompasses a ten-county region in eastern Texas that straddles the interstate highway which connects Dallas and Houston. To develop the Texas 17 market, the partners of Synapse Partnership formed Eastex and transferred the FCC license to Eastex. Mr. Alan Tresemer ("Tresemer"), who had held a 52% partnership interest in Synapse Partnership, formed D Altos to serve as Eastex' general partner. Eastex then built the cell sites that transmit cellular communications, and Texas 17 became operational in April 1991. Eastex now has five cell sites, ten employees, and between 1,500 and 1,600 cellular telephone subscribers. (Trial Tr. at 599.)

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2. Two communications licenses were awarded in each region. The "wireline" license was awarded to a company that provided telephone service in the region. The "non-wireline" license could be issued to any qualified entity that did not own an interest in that region's wireline license.

In September 1992, Tresemer asked his Eastex partners if they were interested in selling Texas 17. (PX 30.) A majority responded affirmatively. (PX 32.) Tresemer reported to his partners that the companies that had indicated an interest in purchasing Texas 17 included McCaw and TDS, among others. (PX 32.) Because LIN, McCaw, and TDS each own adjoining cellular markets, Texas 17 was (and is) a highly attractive property to them. Owning Texas 17 would enable these firms to expand their areas of service and sources of revenue.

On October 20, 1992, Eastex and D Altos engaged the brokerage firm of Daniels & Associates ("Daniels") as their exclusive agent to sell Texas 17 "on such terms and conditions, including purchase price, as shall be acceptable to [Eastex and D Altos]." (PX 20, at 1.) These parties executed a letter agreement providing (*inter alia*) that Daniels would (i) prepare a brochure describing Texas 17, (ii) identify and solicit prospective purchasers, and (iii), if requested, assist in negotiating the sale of Texas 17. For their part, Eastex and D Altos (as the "Client") agreed:

> that when Daniels produces a purchaser which enters into an agreement for a Transaction on terms approved by Client (or a party ready, willing and able to enter into a Transaction in accordance with such terms), Client will use its best efforts to consummate the Transaction and to meet all conditions and requirements thereof. In connection with any such agreement or offer, Client agrees that it will execute and deliver, or cause the appropriate person or entity to execute and deliver, all instruments of conveyance and other documents reasonably required by the purchaser(s), and make, or cause the appropriate person or entity to make, appropriate and reasonable representations, warranties and covenants regarding the Client, the Client's assets, business and affairs and otherwise fully cooperate in consummating such transaction.

(PX 20, ¶ 4, at 2.)[3]

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3. "Transaction" is defined as "a transaction for the sale or other transfer of all or a portion of the assets or the equity ownership interests related to [Texas 17]." (PX 20, at 1.) Eastex and D Altos agreed to deal only through Daniels, which would "submit to Client for its consideration any proposal received for a Transaction and Client shall promptly approve or reject any such proposal." (*Id.* at 3.)

In late 1992, Mr. Robert S. Lazzeri ("Lazzeri"), an officer of Daniels, prepared an offering book that described Texas 17. Lazzeri forwarded that offering book to approximately twenty-five prospective purchasers. He then contacted them to gauge their interest in purchasing the Texas 17 market. Several companies initially expressed an interest, but by late February, 1993, only two bidders were willing to offer prices meriting consideration. One bidder was a joint venture of LIN and BellSouth Mobility, Inc. ("BellSouth"), who together control the Houston market adjoining Texas 17. (Trial Tr. at 967-69.) The other bidder, which also controls nearby cellular markets, was TDS.

At this point, Tresemer sought specific advice from a friend, Mr. Steven Skinner ("Skinner") about how to sell Texas 17.[4] (*Id.*) In a discussion that took place on February 22, 1993, Skinner told Tresemer that the McCaw-affiliated companies (such as LIN) had a better reputation as companies with which to transact business, than did TDS. (Trial Tr. at 612.)[5] Skinner also advised Tresemer that TDS' Chairman, Mr. Leroy T. Carlson, Sr. ("Carlson"), made the decisions and was the person at TDS with whom to deal. Skinner added that Carlson was known to make decisions quickly and that when negotiating with Carlson, Tresemer must be certain of all terms and conditions to which he would be committing. (Skinner Dep. at 24.)

Skinner also outlined his view of how a cellular business is sold. He advised Tresemer to initiate a bidding process, select the buyer to whom he wanted to sell the business, and then "try to cut a final deal" in a face-to-face meeting. (*Id.* at 22.) The parties would then sign either a binding or a nonbinding letter of intent. Skinner advised Tresemer to decide what provisions the letter of intent should contain before having any face-to-face meeting. (*Id.* at 23.) After the parties executed the letter of intent, the buyer would then conduct a due diligence investigation and the parties would negotiate the final terms of a definitive agreement. (*Id.*) Also discussed (and explained by Skinner) were the differences between

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4. Tresemer had previously worked with Skinner and trusted him. Skinner is an officer of Horizon Cellular Telephone Company ("Horizon"). (Skinner Dep. at 5.) Horizon had also received the Daniels' offering book concerning Texas 17, but withdrew from the bidding after the price became too high. (Skinner Dep. at 19-20.)

5. Skinner prefaced his comments by disclosing that McCaw was a minority investor in Horizon. (Skinner Dep. at 25.)

selling an FCC license alone and selling an entire operating cellular business; and also specific contractual issues such as environmental liabilities, escrow, and potential lawsuits. (Trial Tr. at 614-15, 619; DX 33.)

With that discussion (and negotiating sequence) in mind, Tresemer, through Lazzeri, proceeded to deal with TDS, LIN/BellSouth and (later) LIN/McCaw.

Under the Eastex partnership agreement, a sale of the partnership's assets requires the approval of at least 66.67% of the aggregate percentage interests of all limited partners. (DX 32, at 11, 13-14.) On February 24, 1993, Tresemer wrote the limited partners to inform them that LIN/McCaw and TDS both "want[ed] to arrive at a final deal *within one week*" and "want our decision." (PX 37.) Tresemer advised his partners that he was now seeking their "*official* approval (or disapproval) of the sale of our FCC authorization at some price over $24 million net to the Partnership." (*Id.*)[6]

Mr. Carlson had previously offered a price of $107 per POP.[7] On February 25, 1993, Lazzeri called Carlson, who refused to raise that price. Carlson knew that Eastex wanted more (Trial Tr. at 328), but his objective was to purchase Texas 17 without engaging in a bidding war with LIN/BellSouth. He, therefore, told Lazzeri that Eastex should name a specific price (described in industry parlance as a "take-away price" or "strike price") at which TDS could purchase the market. (Trial Tr. at 878.)

Lazzeri then called Ms. Angela Harwood ("Harwood") of BellSouth and Mr. Scott Anderson ("Anderson"), who was McCaw's Senior Vice President for Acquisitions and also a LIN representative. (Trial Tr. at 943). Anderson and Harwood told Lazzeri that they were willing to offer $28 million, consisting of cash and LIN stock.

Lazzeri next spoke with Stephen Fitzell, Esq. ("Fitzell"), a partner at the law firm of Sidley & Austin, which serves as counsel to TDS and Carlson's other affiliated companies. Lazzeri told Fitzell

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6. Eastex contends that Tresemer did not have authorizations from the requisite two-thirds of the limited partners on February 26. Because the Court ultimately finds that no binding agreement with TDS arose on that date, it does not reach that issue.

7. A "POP" is an industry term of art representing the price per population unit within a given market. A price of $107 per POP would net approximately $24 million to Eastex. (DX 46.)

that to match LIN/BellSouth's offer, TDS would have to raise its bid. (Trial Tr. at 49, 788.) The two then identified other issues that would have to be resolved for any transaction to go forward. Fitzell asked Lazzeri if TDS, as acquirer, would be bound by long-term contracts into which Eastex had entered with the adjoining Houston cellular system. (Trial Tr. at 46-47, 789.) Fitzell also inquired if Tresemer had authority to bind Eastex, and Lazzeri responded affirmatively. (Trial Tr. at 46.) Lazzeri asked about TDS' ownership of a minority interest in the "wireline" license in Texas 17—an important issue because under FCC regulations, TDS would have to dispose of the "wireline" interest before it could acquire Eastex' FCC license. (Trial Tr. at 48, 789-90; *see supra* note 2.) Finally, they discussed whether the transaction would be structured as a purchase of assets or of partnership interests, and for how long Tresemer would be legally required (under the federal securities laws) to hold any TDS stock that he might receive in the transaction. (Trial Tr. at 789-90, 792-93.)

At the end of the day (February 25), Lazzeri called Tresemer to report on the status of the bidding and to express his belief that the bidders were getting close to their maximum price. (Trial Tr. at 871.)

The events that are central to this dispute occurred on Friday, February 26, when Lazzeri called both bidders to elicit their best offers. By this point Lazzeri knew that each bidder wanted to be the last to bid, and that TDS still wanted to avoid an auction. (PX 24, at 2.) Lazzeri spoke to Fitzell and confirmed that Eastex had no long-term arrangements that would bind TDS. (Trial Tr. at 53, 793.) The two discussed whether Tresemer could bind Eastex and whether TDS would assume Eastex' debt. (Trial Tr. at 53-54.)[8] Lazzeri also assured Fitzell that Tresemer was D Altos' sole shareholder, that Tresemer controlled Eastex, and that the unanimous approval of the limited partners was not needed for Eastex to sell its assets. (Trial Tr. at 53, 56-57.) Lazzeri also told Fitzell that TDS would have to raise its price if it wanted to purchase the market. Fitzell responded that he did not know if Carlson would be willing to pay more. (Trial Tr. at 53-54.)

Lazzeri next called Anderson and Harwood, and advised them that LIN/BellSouth's $28 million offer was inadequate. That news

8. Neither TDS nor LIN/BellSouth was willing to assume the approximately $4 million of outstanding long-term Eastex Debt. (Trial Tr. at 869, 976-77.)

prompted Anderson to request and obtain from his superior, Mr. Wayne Perry ("Perry"), authorization to increase LIN/BellSouth's bid to $29 million. Anderson and Harwood then decided to offer $29 million. (Trial Tr. at 1050-51.) To underscore the finality of their bid, they decided that Harwood would present the bid and leave it open for only one hour—until 6:00 that evening. (Trial Tr. at 795, 988, 1052-54.) On that basis their bid was presented to Lazzeri, who told Anderson and Harwood that he expected Tresemer to accept it, and that Tresemer would be crazy if he did not. (*Id.* at 1055.) The three then agreed that Harwood and Anderson would prepare a letter agreement, and that Lazzeri would immediately attempt to contact Tresemer for his reaction. (Trial Tr. at 1055-56.)

Lazzeri reached Tresemer, and they both concluded that LIN/BellSouth had reached its upper limit. (Trial Tr. at 691).[9] However, as TDS had not yet made its final proposal, Tresemer instructed Lazzeri to call Carlson to ascertain if TDS would raise its bid. (Trial Tr. at 796.)

Shortly after 5:00 p.m., Lazzeri called Carlson, who answered on a speaker phone and then included Fitzell on the conference call.[10] (Trial Tr. at 61.) Carlson reviewed his earlier bid, after which Carlson and Lazzeri agreed that the dollar amount of any purchase would be expressed as a fixed number of TDS shares, to be determined on the basis of that stock's average trading price over a specified sixty-day period. (Trial Tr. at 62, 330.) Fitzell also confirmed that the transaction would be structured as an asset purchase, that Tresemer was authorized to bind Eastex, and that no Eastex employees would be protected.[11] (Trial Tr. at 62.) Also discussed was the timing of the disposition of TDS' interest in the "wireline" Texas 17 license. (Trial Tr. at 63-64, 800.) Finally, Carlson continued to insist that he be presented with a take-away price. (Trial Tr. at 62, 535, 625-26.)

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9. Tresemer's notes from that day indicate that he thought LIN or McCaw wanted to bid higher than $29 million, but that BellSouth could not. (DX 33, at 6.)

10. Also present in Carlson's office during the call were Mr. Edward Towers ("Towers"), Vice President of United States Cellular Corporation, a subsidiary of TDS, and Michael Hron, Esq. ("Hron"), the senior partner at Sidley & Austin responsible for TDS matters. (Trial Tr. at 242-43, 327, 352-53, 534).

11. In reviewing the Daniels' offering book the day before, Fitzell had noted that two Eastex employees were receiving salaries at a level above what TDS would pay. (Trial Tr. at 52.)

At approximately 6:00 p.m. on Friday, February 26, Lazzeri and Tresemer spoke about what price to present to TDS. (Trial Tr. at 626.) Tresemer decided that because he believed that TDS had the lesser reputation, TDS should be asked to pay $29.6 million to be equivalent to LIN/BellSouth's offer of $29 million.[12] (*Id.*)

B. *The February 26 Oral Agreement*

Lazzeri then called Carlson and told him that Eastex would be willing to accept a price of $29.6 million, out of which the Eastex partners would pay the partnership's long-term debt of $4.15 million. (Trial Tr. at 67, 325, 535-36, 797; PX 8.) That price, it was calculated, would convert to 784,703 TDS shares. (Trial Tr. at 68-70, 330, 536, 798; PX 6, 8, 9; DX 53.) Carlson then told Lazzeri "it's a deal" at that price. (Trial Tr. at 72, 329, 433, 880.) Lazzeri replied that he needed to reconfirm the price with Tresemer, which he did. (Trial Tr. at 70, 72-73, 329.) After Lazzeri came back on the line, he told Carlson that Eastex would accept that price. (Trial Tr. at 73, 331, 452, 802.)

In that same conversation, three issues in addition to price were raised and discussed. First, because TDS was legally required to dispose of its wireline interest before the closing, Carlson wanted to delay the closing until sixty days after the FCC had entered its final order authorizing the transfer of that license. (Trial Tr. at 70, 800-02.) Tresemer, however, wanted only a thirty-day period. Ultimately, it was agreed that the closing would occur within forty-five days after the FCC final order. (Trial Tr. at 71, 802.)

Second, Tresemer wanted a written agreement in hand by Monday, March 1. Lazzeri instructed Fitzell to draft a definitive agreement, and asked him to deliver it on Monday.[13] Fitzell told Lazzeri

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12. Lazzeri testified that he and Tresemer discussed the take-away price immediately after receiving the offer from LIN/BellSouth. According to Lazzeri, he presented this price to TDS (and discussed related issues with them) in the 5:00 p.m. phone call, confirmed the price with Tresemer some time between 5:30 p.m. and 6:00 p.m., and then had a brief discussion with TDS. (Trial Tr. at 797-803.) Other testimony indicates that the initial discussion with TDS took place at 5:00 p.m. and that the strike price was not presented to TDS until 6:00 p.m. I find that whatever discrepancy may exist on this point is not material, and does not cast doubt on Lazzeri's credibility.

13. The testimony is in conflict as to whether Eastex intended for Fitzell to submit a letter of intent or a definitive agreement. Tresemer testified, and his contemporaneous correspondence establishes (DX 37), that he expected to receive

that by Monday he could deliver a letter of intent, but not a definitive agreement. (Trial Tr. at 74-75.) Accordingly, Lazzeri and Fitzell agreed that a proposed definitive agreement would be sent to Tresemer on Tuesday, and that Lazzeri and Fitzell would review the document that week during a trade convention that both would be attending. (Trial Tr. at 76-78, 799; DX 53, at 2.) Third, Carlson required absolute confidentiality during the negotiations because he considered the purchase price to be quite high. (Trial Tr. at 73-74, 332.) Lazzeri and Tresemer acceded to that condition. (Trial Tr. at 541, 629.)

As of this point, Tresemer had not yet retained (or contacted) a corporate attorney to represent Eastex. (Trial Tr. at 76, 630.)

C. *Events Following the February 26 Oral Agreement*

Although Fitzell undertook to furnish a definitive agreement by the following Tuesday, no work product was generated that weekend. Nor did Hron or Fitzell draft a confirmatory memorandum or letter to Eastex memorializing the terms to which the parties had orally agreed. (Trial Tr. at 238.) On Monday, March 1, Fitzell devoted an hour and a half to drafting a definitive agreement. On Tuesday, March 2, he spoke with Lazzeri, who was disappointed to learn that no written agreement was yet prepared. (Trial Tr. at 171-74.)

On Monday, March 1, Tresemer retained, and began soliciting the advice of, legal and financial professionals. He wrote a letter to Mr. David Silver ("Silver") of ADS Financial Services, Inc., informing Silver that Eastex had offered to sell its FCC authorization and assets to TDS and that the "sale is now in its final negotiations." (DX 37.) Tresemer also advised Silver that he expected to receive a binding letter of intent by Tuesday, and asked him to review it, focusing on issues such as how to establish an escrow account, what assets would be included, who would operate the system until the escrow closed, and what level of sales needed to be maintained. (*Id.*) Tresemer wrote a similar letter to a tax attorney, Thomas P. McCorriston, Esq., of the Philadelphia, Pennsylvania firm of Mor-

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a letter of intent. Lazzeri testified, and his notes reflect, that he understood that Tresemer wanted a definitive agreement. Since I find the testimony of both gentlemen to be credible, I conclude that in the flurry of discussions that occurred late in the day on February 26, Lazzeri misunderstood Tresemer's instructions. In any event, it is undisputed that whatever Lazzeri may have been told by Tresemer, Lazzeri instructed Fitzell that Tresemer wanted a definitive agreement.

gan, Lewis & Bockius, asking how the transaction should best be structured for tax purposes.

Monday, March 1, 1993, was also the first day of the annual Cellular Telecommunications Industry Association conference in Dallas, Texas. Among those attending were Messrs. Carlson, Towers, Anderson, Fitzell, Hron, and Lazzeri, as well as Mr. Thomas Johnston ("Johnston"). Although Johnston was not an Eastex or D Altos employee, he was responsible for the cellular operations of Texas 17. (Trial Tr. at 634-35.) Before Johnston left for the conference, Tresemer had told him that TDS had outbid LIN/BellSouth, and asked him to speak with the TDS people about their plans for operating Texas 17. Tresemer also instructed Johnston not to discuss or negotiate any terms of a deal. (Trial Tr. at 633-34, 754.)

On Wednesday morning, March 3, 1993, representatives of TDS and McCaw met in Carlson's hotel suite to discuss possible trades of cellular properties. (Trial Tr. at 84-85, 337, 384.) When the meeting began, Carlson announced—to the surprise of all present and despite his prior insistence on confidentiality—that TDS had a "deal" for Texas 17. (Trial Tr. at 86-87, 337, 996.) Anderson immediately asked Carlson if there was a written agreement. (Trial Tr. at 86, 338.) Gesturing in Fitzell's direction, Carlson responded that an agreement was being "worked on." (Trial Tr. at 87, 176, 998.) After hearing this exchange, Hron told Fitzell that they needed to have a signed agreement before Anderson could take any steps that might upset the deal. (Trial Tr. at 556.) Fitzell immediately called his office to speak with his associates about their progress on the draft definitive agreement. (Trial Tr. at 89-90, 178.) Because Lazzeri had told Fitzell that his client was unhappy with the delay in receiving documents, Fitzell called Tresemer directly and left a message that the documents would arrive on Thursday, March 4. (Trial Tr. at 185-86, 640-41.)

That same day (Wednesday, March 3), Lazzeri arranged an informal evening meeting with Fitzell, Johnston, and two employees of a TDS subsidiary. The purpose of the meeting was to discuss various transition issues and to reassure Eastex that despite the delay in preparing the draft documents, TDS was still interested in acquiring Texas 17. (Trial Tr. at 90, 186-88.)

Meanwhile, Anderson was attempting to determine whether in fact Texas 17 had been sold to TDS. Anderson had bid $29 million on behalf of LIN two days earlier, and had heard from Lazzeri just the day before Tresemer was still considering both offers. (Trial Tr.