I. Long Arm Jurisdiction Is Not Available With Respect To The Claim Asserted Against Wright

[3-4] If Section 3104(c)(1) were the only grounds for personal jurisdiction, the claims against Wright would be dismissed as insufficient under both the long arm statute and the due process clause. Section 3104(c) of Delaware's long arm statute states, in relevant part, that:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident or his personal representative, who in person or through an agent: (1) Transacts any business or performs any character of work or service in the State.

10 *Del. C.* §3104(c)(1). To meet its prima facie burden under this specific jurisdiction test,[2] Carlton lists four contacts that Wright had with Delaware, claiming that each satisfies the transacting business test and, therefore, provides jurisdiction to hear Carlton's claims related to those contacts. These four contacts merit only brief discussion because, even if they were sufficient to satisfy the transacting business test of the long arm statute, which is doubtful, they would not, in my opinion, meet the constitutional requirements of fairness and substantial justice originally enunciated by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and elaborated in subsequent cases.[3]

[5] First, Carlton claims that Section 3104 authorizes specific jurisdiction over Wright for claims of breach of fiduciary duty relating to a corporate jet leased by Transport for Beatrice's use. Wright voluntarily came to Delaware in 1988 to accept delivery of the jet in his capacity as an officer of Beatrice. Second, Carlton bases an assertion of specific

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[2]*See Applied Biosystems, Inc. v. Cruachem Ltd.*, 772 F. Supp. 1458, 1466 (D.Del. 1991) (noting that Section 3104(c)(1) authorizes the exercise of specific not general jurisdiction).

[3]*See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (finding that purposeful acts outside a forum state can be a sufficient basis for personal jurisdiction if they create a substantial relationship with the jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (finding that where an individual should have had a reasonable expectation that his purposive actions might result in an assertion of personal jurisdiction in the forum, such jurisdiction comports with the due process clause); *see also In re USACafes, L.P. Litig.*, Del. Ch., 600 A.2d 43, 50-51 (1991) (discussing due process requirements).

jurisdiction on the fact that Wright, in his capacity as an officer of Beatrice, signed nine franchise tax payments in New York which were then submitted by mail to the Delaware Secretary of State on behalf of entities controlled by Lewis. Third, Carlton claims that by signing checks, in his capacity as an officer of Beatrice, drawn on a Delaware bank for Payments made by Beatrice to one Everett Grant as part of a severance agreement, Wright exposed himself to specific jurisdiction. Lastly, Carlton argues that Wright's voluntary submission of three affidavits to this Court in connection with this action satisfied the transacting business test.

I conclude that these alleged contacts with Delaware are insufficient to satisfy the long arm statute, but, more clearly, appear inadequate to permit this Court to exercise personal jurisdiction without violating due process requirements.

[6-9] It cannot, in my opinion, be said that Wright should have reasonably anticipated being haled into court in Delaware on the basis of the four contacts with the forum alleged by Carlton. Taking these assertions in order, the first contact with Delaware, the acceptance of the delivery of the jet, is an inadequate basis for personal jurisdiction because this action as an employee of Beatrice is not sufficiently related to the active wrongs alleged concerning the leasing and purchasing of the jet. As to the second and third contacts with Delaware, Wright's signing of checks was again a primarily ministerial activity performed in his capacity as an officer of Beatrice. Since Wright merely signed the checks, which were authorized and paid by others, such contacts are insufficient to require Wright to defend against claims concerning such checks in a Delaware court. Finally, jurisdiction over Wright cannot be obtained on grounds that he submitted evidence to this Court. Not only is this claim groundless under Section 3104 because the submission of affidavits does not constitute a transaction of business upon which claims have been made in this case, but also, as a general matter, submission of evidence of this type should not expose an individual to personal jurisdiction in the forum.[4] Since these ministerial contacts with Delaware do not make it fair to require Wright to defend a lawsuit against him in Delaware, making any assertion of personal jurisdiction on this basis a

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[4]*See American Centennial Insurance Co. v. Handal*, 901 F. Supp. 892, 898 (D.N.J. 1995) (holding that nonresident's three trips to forum state as coordinator of litigation and for his deposition was insufficient to establish the minimum contacts required for general jurisdiction). Analogously, nonresident witnesses are exempt generally from service of process while in jurisdiction on business of the court. *See Page Co. v. MacDonald*, 261 U.S. 446, 448 (1923).

violation of the due process clause, service of process cannot be made under Section 3104, regardless of whether such contacts constitute transacting business in the forum.

II. Director's Consent Statute Does Provide Means For Personal Jurisdiction

[10-12] Personal jurisdiction over Wright under Delaware's director consent statute, Section 3114, may, however, be exercised here without contravening the fairness requirements of the due process clause. Section 3114 states, in relevant part that:

> (a) Every nonresident of the State who after September 1, 1977 accepts election or a appointment as a director . . . of a corporation organized under the laws of this State . . . shall be deemed thereby to have consented to the appointment of the registered agent of such corporation . . . as his agent upon whom service of process may be had in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director . . . is a necessary or proper party, or in any action or proceeding against such director for violation of his duty in such capacity.

10 *Del. C.* §3114. Since Wright served as a director for Transport and Acquisition II, both Delaware corporations, beginning in late April 1991, he impliedly consented to service of process under this statute.[5] This motion must be denied if the plaintiff has sufficiently shown prima facie facts to support an allegation that while the defendant was a director of a Delaware corporation he breached a legal or equitable duty to such corporation. *See Hart Holding Company*, 593 A.2d at 539; *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch.. C.A. No. 13950, Allen, C. (Dec. 19, 1995), Amended Order at 2-3.

[13-14] As a factual matter, Carlton contends that Wright breached fiduciary duties in his capacity as director of the two Delaware corporations in the following ways. First, with respect to Transport. Carlton sets forth allegations that Transport and Wright are liable for waste, misappropriation, and breach of fiduciary duty in connection with

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[5]This opinion presumes that Wright will be, or has been, properly served as a director of these two corporations under Section 3114, correcting the earlier improper service naming him as a director of Beatrice.

the lease, purchase, and maintenance of the corporate jet which was purportedly used almost exclusively for Lewis's personal benefit, as opposed to Beatrice's corporate purposes.[6] Wright was involved in transactions concerning the jet originally in his capacity as an officer of Beatrice, as set forth above. In addition, Wright signed several checks on Transport's account for expenses related to the jet and allegedly intentionally participated in the jet transactions as a director of Transport. Although many of these allegations concern activities which occurred prior to April 1991, when Wright became a director of Transport, this does not preclude a finding of jurisdiction for claims involving the ongoing impact of such continuing activities while Wright was a director nor breaches that originated after such time.[7]

[15-16] Second, with respect to Acquisition II. Carlton alleges that Lewis appointed Wright to be a director of Acquisition II to facilitate Lewis's purported diversion of assets from Beatrice and its subsidiaries. Although there are no allegations that Wright breached his fiduciary duties to Acquisition II, there are allegations that, in his role as Acquisition II's director he breached his fiduciary duties to Beatrice by either expressly approving and/or failing to oversee Lewis's misappropriation of assets through self-dealing transactions with Beatrice's French subsidiaries. Specifically, claims have been made that TLC France, Acquisition II's wholly, owned subsidiary, improperly forgave a $18.5 million loan to Maxime Delrue in 1989 with a return to good fortune clause which was later canceled in exchange for 6 million French francs,[8] and that Lewis was involved in self-dealing transactions involving TLC France's accounts which allegedly resulted in a tax audit for the fiscal years 1989-1991 and corresponding claim for $47 million. Although Carlton has pleaded sufficient prima facie facts to state a claim against Lewis concerning the French subsidiaries,[9] I have concluded that

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[6]This Court has held that Carlton has alleged sufficient facts to state a claim that "Transport participated in the breach of fiduciary duties in facilitating the lease of the corporate jet for TLC Beatrice and Lewis." *Carlton Investment v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (Nov. 21, 1995), Slip Op. at 39. Lewis allegedly caused Beatrice to organize Transport as an acquisition vehicle to purchase the $13 million jet and enter into a leaseback agreement for over $1 million per year.

[7]As was noted in an earlier opinion in this case, culpable inaction by directors is a sufficient ground for a breach of fiduciary duty claim permitting service of process under Section 3114. *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (Dec. 19, 1995), Amended Order at 3.

[8]In 1991, the ultimate sale price of Maxime Delrue exceeded the amount of the forgiven loan.

[9]*See Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (April 16, 1996) (finding that Carlton pleaded sufficient facts to support its

Carlton has not adequately shown prima facie facts to support a claim that Wright knew about Lewis's self-dealing in connection with the French subsidiary transactions. Only such a prima facie showing that Wright knew about such activities and took no action as director to correct the alleged abuses could be used to obtain personal jurisdiction under Section 3114 for a breach of fiduciary duty by Wright in his capacity as director. In my opinion, therefore, since no such prima facie showing has been made, Wright is not amenable to service of process under the director consent statute for his role as director of Acquisition II.

[17] Wright argues that service under Section 3114 is inappropriate with regard to Transport as well, because none of the above allegations concern breach of fiduciary duties owed to Transport, but, if anything, to its parent. In order to properly apply Section 3114, however, the double derivative suit nature of this action must be addressed.

[18-19] Since Transport was wholly owned by Beatrice, it is the case that the directors of Transport owed a fiduciary duty to Beatrice in at least some circumstances and, therefore, in effect, can be said to have owed fiduciary duties to the shareholders of Beatrice as well. The utility of the legal entity fiction in corporate law is great and the court offers great deference to that fiction. But it is well established that the effects of separate incorporation may be denied or ignored when the forum is used to perpetuate a fraud. If the allegations were true (sufficient evidence for the limited purpose of jurisdiction has I think been shown) and Mr. Wright actively cooperated in effectuating a diversion of assets to Mr. Lewis, then the recognition of the separateness of Transport from Beatrice would simply advance a wrong. In *In re USACafes, L.P Litig.*, this Court held that the directors of a corporate general partner of a limited partnership owed fiduciary duties to the limited partners, not only to the general partner and its shareholders. 600 A.2d at 49.

[20-21] As a factual matter, Wright may be correct in arguing that Transport was not injured by his actions in his capacity as director. Beatrice, not Transport, appears to have paid the jet related expenses. However, Beatrice and its shareholders were allegedly hurt due to the claimed breach of fiduciary duties by Wright in connection with property which was leased, and later, purchased by Transport, to be used purportedly for primarily Beatrice's corporate purposes. The holding of *In re USA Cafes, L.P. Litig.* was based in part on the general principle that one who controls the property of another may not use the property

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claim of breach of fiduciary duty with regard to Lewis's transactions involving the French subsidiaries).

to benefit oneself to the detriment of the owner of such property. *Id.* at 48; *see also James River-Pennington Inc. v. CRSS Capital Inc.*, Del. Ch., 1995 WL 106554 at *11 (March 6, 1995); 4 A. Scott & W. Fratcher, *The Law of Trusts* §326.3, at 304-306 (4th ed. 1989). In this case, where Wright understood that Transport was a wholly owned subsidiary, where no rights of Transport creditors are implicated, and where there is a self-dealing aspect to the underlying transaction, even if Transport itself was not harmed by Wright's alleged improprieties as its director, Wright may be liable for breach of fiduciary duties.[10]

[22] Provided that there is no contravention of the due process clause's constitutional protections, service of process under Section 3114 is appropriate for actions arising out of Wright's alleged breaches of fiduciary duties while acting as a director of Transport.

As to the due process requirements discussed above, I conclude that service of process under Section 3114 would not offend traditional notions of fundamental fairness. The director consent statute itself provides an additional, significant factor to be considered in this determination. The existence of the director consent statute, Wright's choice to act as a director of two Delaware corporations, and the facts alleged, permit this Court to exercise personal jurisdiction over Wright consistently with the constitutional protections to which he is entitled.

[23] Delaware's director consent statute can be said to have put Wright on notice that if he were charged with a violation of fiduciary duties owed to Transport or Acquisition II, or derivatively to the owners of such corporations, he might be subject to adjudication in Delaware. By accepting a position as director in two Delaware corporations, Wright impliedly consented to service of process under this statute as to any actions in which he is a "necessary or proper party, or actions for breach of directorial duties." *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (Nov. 21, 1995), Slip Op. at 21; *In re USACafes, L.P. Litig.*, Del. Ch., 600 A.2d 43, 50 (1991). It appears to be fair and reasonably foreseeable that Wright, a director of two Delaware corporations, would be required to appear in court to defend claims of breach of fiduciary duty in this type of derivative suit.

[24-26] As has been noted in the past, actions involving claims that a director has breached his fiduciary duties to a Delaware corporation are

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[10]Again, if Carlton had made the necessary prima facie showing, it would have been similarly appropriate for this Court to find personal jurisdiction to hear claims concerning a breach of fiduciary duties to Beatrice and its shareholders in connection with the French subsidiaries although Carlton did not allege that Wright breached his fiduciary duties to Acquisition II per se.

of special concern to this Court. *In re USACafes, L.P. Litig.*, 600 A.2d at 52. Section 3114 recognizes the strong interest that this Court has in assuring the effective administration of the law governing corporations organized in Delaware and, therefore, in hearing cases regarding internal corporate governance issues. Since after a realistic evaluation of Wright's involvement in the governance of two Delaware corporations this Court has concluded that Wright had sufficient contacts with Delaware to satisfy the traditional notions of fair play and substantial justice required by the due process clause, and this action involves claims of particular importance to Delaware, Wright can be properly served under Section 3114.

[27] Insofar as Wright is effectively served with process under Section 3114, he is subject to the jurisdiction of this Court with respect to all claims of breach of fiduciary duty arising from his position as a director of Transport. It is worth noting, however, that the scope of claims concerning Wright's role in activities which allegedly created liability for breach of fiduciary duties must be limited at trial to breaches of fiduciary duty by Wright in his role as director of Transport for which Section 3114 provides personal jurisdiction over Wright. Wright will not be required to defend claims related to an independent set of facts, such as allegations concerning the French subsidiaries.

Based on these findings, Wright's motion to dismiss is denied.

CINCINNATI BELL CELLULAR SYSTEMS CO. v. AMERITECH MOBILE PHONE SERVICE OF CINCINNATI, INC.

Court of Chancery of the State of Delaware, New Castle

No. 13,389

September 3, 1996

Plaintiff sought judicial dissolution and the sale of a limited partnership engaged in the business of providing cellular telephone services. Plaintiff alleged that: (1) it is not reasonably practicable to continue the partnership for its intended purpose, (2) defendant breached its fiduciary duties by committing gross negligence in managing the

partnership, and (3) defendant was involved in self-dealing by failing to sell the partnership and employing one of its wholly-owned subsidiaries as the general partner. Both parties filed cross-motions for summary judgment.

The court, per Vice-Chancellor Chandler, granted defendant's motion for summary judgment on all counts. The court concluded: (1) judicial dissolution was not appropriate where the limited partnership was still a viable business; (2) Ameritech, as general partner, did not commit gross negligence by making business decisions in good faith; and (3) Ameritech, as general partner, was not able, nor obligated, to sell the partnership despite the fact it may be more valuable if offered for sale.

1. Judgment ⚷ 181(1)

The court may award summary judgment if the moving party establishes that no genuine issue of material fact exists with respect to the dispute and that he or she is entitled to judgment as a matter of law.

2. Judgment ⚷ 181(1)

When the nonmoving party has the ultimate burden of proof on its claim, the court may grant summary judgment if the moving party can demonstrate a complete failure of proof on an essential element of a claim.

3. Judgment ⚷ 185(2)

In the moving party properly supports its motion, then the burden shifts to the nonmoving party to demonstrate that material issues of fact exist so that summary judgment is inappropriate.

4. Judgment ⚷ 185(2)

For a summary judgment motion, the court assumes that uncontroverted facts which are set forth in the record are true.

5. Judgment ⚷ 185(2)

On a cross-motion for summary judgment, the court may imply both that the parties concede the absence of material factual disputes and acknowledge that the record is sufficient to support their motions.

6. Partnership ⚷ 267, 276, 314

Under the Delaware Limited Partnership Act, judicial dissolution of a limited partnership may be ordered if the court finds it is not reasonably practicable to carry on the business in conformity with the partnership agreement. DEL. CODE ANN. tit. 6, § 17-802 (1996).

7. Partnership ⚷ 267

In evaluating whether to dissolve a partnership pursuant to section 17-802, courts must determine the business of the partnership and the general partners' ability to achieve that purpose in conformity with the partnership agreement.

8. Contracts ⚷ 168

In evaluating whether to dissolve a partnership pursuant to section 17-802, the court will not find an implied reasonable time period for performance of a contract where the agreement is silent on that point.

9. Partnership ⚷ 267

In evaluating whether to dissolve a partnership, the court is not to compare the ideal degree of financial success with the actual figures.

10. Partnership ⚷ 267, 276

Where a partnership's performance is less than anticipated, but still adequate to sustain the business, the court should not order judicial dissolution.

11. Contracts ⚷ 168

When the relationship between the parties is primarily contractual in nature, Delaware courts will not reform agreements to bestow additional rights on the parties for which they did not bargain unless it is clear that, had they negotiated that matter, they would have agreed to that point.

12. Partnership ⟹ 92, 267, 276

Competition between a limited partnership and one of the limited partnership's limited partners does not provide a viable rationale to find a partnership cannot be carried on in a reasonably practicable manner consistent with the partnership agreement.

13. Partnership ⟹ 267

Absent some limitation on competition against the partnership in the partnership agreement, the fact that a limited partner is frightened of future competition is not a basis for unilaterally dissolving a viable business at the request of one limited partner.

14. Partnership ⟹ 267

The conjectural rationale of a mere speculation of competition in the future is not a basis on which the court may dissolve the partnership, especially when the partnership agreement does not proscribe competition between partners.

15. Partnership ⟹ 92, 267, 276

Where a partnership agreement is silent on the competition among partners, competition between partners is not a basis for dissolution.

16. Partnership ⟹ 70, 88, 92

The possibility of competition among the partners does not prove a willful or grossly negligent violation of the fiduciary duty of loyalty.

17. Judgment ⟹ 181(1), 185(1)
Partnership ⟹ 267

Where the plaintiff has failed to show that the business is no longer reasonably practicable to continue for a dissolution claim of a partnership, the defendant is entitled to summary judgment in its favor.

18. Partnership ⟹ 70, 79

Where the partnership's stated purpose is to promote and provide a cellular services to subscribers in a geographic region, the general partner does not have the authority to sell the partnership.

19. Partnership ⟹ 70, 351

Under the Revised Uniform Limited Partnership Act, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners. DEL. CODE ANN. tit. 6, § 17-403(1) (1993).

20. Partnership ⟹ 70, 79

The Delaware Uniform Partnership Law, which governs a partner in a partnership without limited partners, provides that unless other partners give authorization or they have abandoned the business, one or more, but less than all partners, have no authority to dispose of the businesses's good will or do anything that would make it impossible to carry on the ordinary business of the partnership. DEL. CODE ANN. tit. 6, § 1509(c) (1993).

21. Partnership ⟹ 70, 79

In absence of language in a partnership agreement expressly empowering the general partner to sell the partnership's business, a general partner cannot sell the business without unanimous consent of all the partners. Therefore, each partner has a right to withhold consent to a sale of the partnership's business.

22. Partnership ⟹ 276, 313

The court of chancery's power to order dissolution and sale is a narrow and limited one.

23. Corporations ⟹ 307
Partnership ⟹ 1, 2, 70

General fiduciary principles as applied in Delaware's corporation law decisions are applicable in the context of this limited partnership, because partnerships and corporations have much in common.

24. Corporations ⟹ 174

A majority stockholder in a corporation owes no duty to sell its holdings in the corporation just because the sale would profit the minority.

25. Corporations ⟹ 307, 310(2)

Directors of the corporation have no obligation to approve a sale of the company's assets, even if such a sale would be advantageous, where the directors rightfully hold a veto of such a sale as shareholders.

26. Partnership ⟹ 1, 70

A majority partnership owner does not breach its fiduciary duties to minority owners by failing to sell the partnership, even if a sale would be advantageous.

27. Partnership ⟹ 70

If the partners want to sell the partnership's business, all of the partners must consent to such a sale.

28. Partnership ⟹ 70, 267

Unless it is not reasonably practicable to carry on the business in conformity with the partnership's purpose or unless all the partners agreed to a dissolution of the business, the general partner and majority partnership owner is under a duty to carry out the partnership's purpose as expressed in the partnership agreement.

29. Partnership ⟹ 70

General partner did not breach its fiduciary duties of loyalty and care by refusing to sell the partnership business.

30. Corporations ⟹ 519(1)
Partnership ⟹ 121, 328(1)

Under Delaware law, when the plaintiff alleges gross negligence and gross mismanagement, the plaintiff has the burden to plead and to

prove that the general partners were recklessly uninformed or acted outside the bounds of reason.

31. Limitation of Actions ⚷ 39(1)

Claims for breach of contract and money damage claims for breach of fiduciary duty must be filed within three years unless the statute of limitations has been tolled. DEL. CODE ANN. tit. 10, § 8106 (1996).

32. Limitation of Actions ⚷ 95(2), 95(9)

Where a plaintiff knows or should know of a supposed wrong, the statute of limitations is not tolled.

33. Limitation of Actions ⚷ 95(1.5)

A statute of limitations begins running even though actual or substantial damages are inflicted at a later date.

34. Limitation of Actions ⚷ 98, 104

Equitable tolling occurs when the plaintiff can show it was ignorant of the wrong due to the defendant's fraud or fraudulent concealment or some other circumstance justifying why plaintiff did not have reason to know of the facts constituting the alleged wrong.

35. Limitation of Actions ⚷ 55(6)

A combination of negligent acts by the same person may constitute gross negligence when the negligent acts can be viewed as cumulative with causative factors or inextricably related events leading to a particular incident or injury. However, separable acts of separate persons making independent business judgments under distinct business conditions cannot be woven together as though they are part of an intertwined fabric constituting a monolithic course of conduct.

36. Corporations ⚷ 310(2)
Partnership ⚷ 70

Where a general partner makes business decisions in good faith, there is no reckless or willful violation of fiduciary duties.

37. Partnership ⟹ 70, 79, 88

If the majority interest holder and general managing partner were legally obligated to turn management of the partnership over to an outside party, it would remain fully liable as the general partner.

38. Partnership ⟹ 88

Damages for the general partners' breach of fiduciary duties or for gross mismanagement would fall on the partnership and all its partners.

39. Damages ⟹ 6

Damages cannot be speculative or uncertain, but must be based on a reasonable estimate.

40. Damages ⟹ 6

Where damages are based on assumptions about industry averages and are not linked specifically to the alleged acts of gross negligence or gross mismanagement, the damage claim will not be considered a reasonable estimate.

Vernon R. Proctor, Esquire, and John H. Newcomer, Jr., Esquire, of Bayard, Handelman & Murdoch, P.A., Wilmington, Delaware; James R. Adams, Esquire, William D. Baskett, III, Esquire, and Michael F. Haverkamp, Esquire, of Frost & Jacobs, Cincinnati, Ohio, of counsel; and Alan R. Bromberg, Esquire, and George W. Coleman, Esquire, of Jenkins & Gilchrist, Dallas, Texas, of counsel, for plaintiff.

Richard L. Sutton, Esquire, Paul P. Welsh, Esquire, Thomas C. Grimm, Esquire, Matthew B. Lehr, Esquire, and Maryellen Noreika, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendants Ameritech Mobile Phone Service of Cincinnati, Inc. and Ameritech Mobile Communications, Inc.

Richard D. Kirk, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendant 360° Communications Company.

Thomas A. Beck, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendants Git-Cell, Inc. and The Champaign Telephone Company.

CHANDLER, *Vice-Chancellor*

Plaintiff in this lawsuit seeks judicial dissolution and ultimately the sale of a Delaware limited partnership engaged in providing cellular telephone services. The case illustrates the partnering arrangements that increasingly characterize the telecommunications industry's effort to exploit emerging technologies and to meet increasing competitive pressures. Because technology (along with competitive interests) often advances in ways unanticipated by the entities that create these partnering arrangements, this kind of litigation should not be unexpected.

In 1982, plaintiff Cincinnati Bell Cellular Systems ("Cincinnati Bell") and defendant Ameritech Mobile Phone Services of Cincinnati ("AMPS")[1] formed a limited partnership (the "Partnership") to "fund, establish and provide" cellular mobile services within and including the geographic area bounded by Cincinnati, Dayton and Columbus, Ohio. See Agreement Establishing Cincinnati SMSA Limited Partnership (the "Partnership Agreement" or "P. Agmt.") §§ 1.3, 2.5. AMPS, the Partnership's general partner, is a wholly-owned subsidiary of defendant Ameritech Mobile Communications, Inc. ("AMCI") which, in turn, is a wholly-owned subsidiary of Ameritech Corporation ("Ameritech Corp." and collectively with AMCI and AMPS, "Ameritech"). Ameritech Corp. is the regional bell company for the Columbus and Dayton markets. Cincinnati Bell, one of the Partnerships limited partners, is the regional bell company for Cincinnati. Ameritech owns 52.793% of the Partnership, 12,793% as a limited partner and 40% as the general partner. Cincinnati Bell owns a 45.067% limited partnership interest in the Partnership. Sprint Cellular Company (recently renamed as 360° Communications Company), the champaign Telephone Company and Git-Cell, the other limited partners, collectively own 2.14% of the Partnership.

In July of 1994, Cincinnati Bell filed an amended and supplemental complaint requesting several forms of relief.[2] First, Cincinnati Bell requests this Court to dissolve the Partnership pursuant to 6 Del. C. § 17-802 and appoint a liquidating trustee to effectuate the dissolution. Count I asks the Court to dissolve the partnership, alleging that it is not reasonably practicable to carry on the partnership's business for its intended purpose. Count II alleges Ameritech has breached unspecified

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[1]In 1982, AT&T owned AMPS, formerly Advanced Mobile Phone Services. Later, however, AT&T divested itself of this subsidiary. Thus, Ameritech Corp. now owns AMPS.

[2]Cincinnati Bell filed its initial complaint on February 23, 1994. It contained the same causes of action as the amended and supplemental complaint.

fiduciary duties to the limited partners and committee gross negligence in managing the partnership. Cincinnati Bell also pleads demand futility in this Count.[3] Count III claims that Ameritech has been involved in self-dealing, in breach of their fiduciary duties, by failing to sell the Partnership and continuing to employ AMCI as the general partner. In Cincinnati Bell's view, a more effective manager could have produced a higher rate of return for the Partnership.[4]

Before me now are the parties' cross-motions for summary judgment. Cincinnati Bell moves for summary judgment as to Count I's request for dissolution and Count III's claim that Ameritech breached unspecified fiduciary duties to the limited partners by failing to sell the partnership. However, as to Count II's claim for gross negligence in managing the Partnership and Count III's self-dealing claim concerning Ameritech's duty to sell the Partnership, Cincinnati Bell argues that issues of fact exist which preclude summary judgment. Ameritech also moves for summary judgment and does so as to each of the three counts.

The parties have generated a substantial record. After carefully reviewing that record, the amended complaint and the parties' extensive briefing on the legal issues, I conclude that summary judgment should be granted on all counts of the complaint in favor of defendants and against plaintiff.

I. SUMMARY JUDGMENT STANDARD

[1-3] The Court may award summary judgment if the moving party establishes that no genuine issue of material fact exists with respect to the dispute and that he or she is entitled to judgment as a matter of law. Ch. Ct. Rule 56(c); Gilbert v. El Paso Co., Del. Supr., 575 A.2d 1131 (1990). When the non-moving party has the ultimate burden of proof on its claims, this Court may grant summary judgment if the moving party can demonstrate a complete failure of proof on an essential element of a claim. Burkhart v. Davies, Del. Supr., 602 A.2d 56, 60 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 316, 322-23 (1986)). If the moving party properly supports its motion, then the burden shifts to the non-moving party to demonstrate that material issues of fact exist so that

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[3]Ameritech does not contest the futility of demand allegation.

[4]In addition to dissolution, damages and attorney fees, Cincinnati Bell requests this Court to order Ameritech to account to Cincinnati Bell for all transactions since the Partnership's formation and to provide Cincinnati Bell with all Partnership records. The parties did not mention the request for an accounting in the briefing on the pending motions.

summary judgment is inappropriate. State v. Regency Group, Inc., Del. Super., 598 A.2d 1123, 1129 (1991).
[4-5] Further, the Court must assume that uncontroverted facts which are set forth in the record are true. Tanzer v. Int'l Gen. Indus., Inc., Del. Ch., 402 A.2d 382 (1979). On a cross-motion for summary judgment, the Court may imply both that the parties concede the absence of material factual disputes and acknowledge that the record is sufficient to support their motions. Merrill v. Crothall-American, Inc., Del. Supr., 606 A.2d 96, 100 (1992).

II. THE UNDISPUTED FACTS

The Partnership is governed by the Partnership Agreement and the Delaware Limited Partnership Act, 6 Del. C. §§ 17-101 - 17-1109. The Partnership Agreement allows Ameritech, as general partner, to determine if the Partnership requires additional capital to fund expansion or operations of the business. P. Agmt. § 5. It does not limit the amount of capital that the general partner may request. Rather, if a partner does not wish to participate in that capital call, then it may choose not to contribute. In that case, the non-participating partner's interest in the Partnership is diluted accordingly. Id.

Each year since the parties formed the Partnership, Ameritech, as general partner, has required its limited partners to make capital contributions. From 1984 through 1994, the partners contributed a total of $*[5] million to the Partnership. Each of the partners, including Ameritech, has participated in the capital calls. In 1995, the Partnership made its first capital distribution of $* million.

The Partnership Agreement allows a limited partner to sell its interest in the Partnership. If a limited partner wishes to sell its interest, the Partnership Agreement grants the current partners the first right of refusal to purchase that interest. P. Agmt. § 11. The Partnership Agreement also allows the limited partners to withdraw from the Partnership. In that case, the Partnership must pay the limited partner for its interest. P. Agmt. § 12.
[6] The Partnership Agreement allows the partners to dissolve the Partnership if the partners unanimously agree to do so. P. Agmt. § 14.1(e). Only Cincinnati Bell seeks to dissolve the partnership. The Delaware Limited Partnership Act also provides a judicial method of dissolution should the Court of Chancery find that "it is not reasonably

[5]Throughout this Opinion, an asterisk denotes proprietary information redacted by the Court with the parties' consent.

practicable to carry on the business in conformity with the partnership agreement." 6 Del. C. § 17-802.

The Partnership Agreement charges Ameritech, as general partner, with the following duties. First, it must act in the best interests of the Partnership. Second, the general partner must manage the Partnership, file all instruments required by law, maintain the Partnership's accounts, furnish financial statements, and develop an annual business plan. P. Agmt. § 8. Notably, however, the Partnership Agreement exculpates Ameritech from liability for loss to the Partnership or the limited partners for "any act or failure to act" unless that act or omission amounts to willful misconduct or gross negligence. P. Agmt. § 16.1. Further, the Partnership Agreement does not provide the limited partners with a method by which they may remove Ameritech as general managing partner of the Partnership.

The Partnership Agreement denotes the following as the Partnership's business purpose--"to fund, establish, and provide Cellular Service" in the specified geographic area. P. Agmt. § 1.3. The Partnership Agreement does not specify a certain time by which the Partnership must be profitable or any other measure of performance that, if not met, will signify that the Partnership is performing outside of its business purpose or is a basis upon which a partner may seek dissolution. However, in the event that the partners dissolve the Partnership, the Partnership Agreement requires the general partner to distribute its license to provide cellular services in the Cincinnati SMSA, as well as the assets involved in this service, to Cincinnati Bell. P. Agmt. § 14.3.

The Partnership has provided cellular services to its chosen geographic area for approximately ten years. It has increased its subscriber base from 7,692 in 1984, to over *, generating revenues of approximately $* million. The Partnership has also improved its operating cash flows. In its first five years of existence, the Partnership produced negative cash flows. In contrast, over the last five years, the Partnership has produced positive cash flows. For example, in 1994, the Partnership has produced positive cash flows. For example, in 1994, the Partnership netted a positive cash flow of over $* million. The parties dispute whether the Partnership has performed adequately as a financial matter, especially compared to other cellular service providers. No one disputes that the Partnership made its first partnership distribution in 1995 in the amount of $* million.

In the coming years, cellular service providers will face increasing amounts and forms of competition. Cincinnati Bell appears especially concerned about competition from "personal communication service" or "PCS" providers. Analysts project that AT&T and GTE may begin

providing PCS services as soon as 1997. In spite of the Partnership's less than stellar performance and the forecasted increase in competition, Cincinnati Bell's own expert projects that the business in worth $* million.[6]

Apparently, the cellular phone service business is not merely a complement to landline services. Instead, Cincinnati Bell has found that cellular services compete directly with landline service. Importantly, the Partnership Agreement does not contain a non-competition clause whereby the partners are limited from competing with one another. On the contrary, the Partnership Agreement provides that the partners are permitted to resell cellular services or equipment independently from the Partnership either in or outside of the Partnership's geographic area. However, if a partner choose to resell services or equipment, the transaction must be on an arms-length basis. P. Agmt. §§ 8, 10.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 (the "Act") into law. Pub.L. 104-133, 110 Stat. 56 (1996). The Act allows greater competition in the telecommunications industry. For example, the Act allows the regional Bell companies, including Ameritech and Cincinnati Bell, to compete with one another. Apparently, Ameritech intends to take advantage of this new business opportunity. Ameritech issued a notification stating that Ameritech Communications, Inc. ("ACI") is AMCI's agent with respect to ordering and providing telecommunications services and facilities. Then Ameritech notified its partners, including Cincinnati Bell, that the Partnership will begin offering long distance cellular services "bundled" with local cellular services in states such as Ohio. This packaging of services allows customers to purchase cellular and landline services from one entity. Cincinnati Bell also provides long distance services with its own long distance subsidiary, Cincinnati Bell Long Distance Inc. The bundling will allow Ameritech Corp. to compete with Cincinnati Bell's primary business, its landline services. Therefore, ACI's plan to bundle services is particularly aggravating to Cincinnati Bell. Although Cincinnati Bell has expressed concern about the bundling, Ameritech's notification states that the profits from the arrangement will accrue to the Partnership.

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[6]Cincinnati Bell's expert claims that its projection of the Partnership's worth is based on the assumption that the Partnership is managed by an entity other than Ameritech. Under Ameritech's management, Cincinnati Bell projects that the Partnership has a zero net present value. Ameritech, however, disputes this fact. Lehman Brothers, Ameritech's expert, values the Partnership at $* million.

III. DISCUSSION

A. COUNT I: Judicial Dissolution Pursuant to 6 Del. C. § 17-802.

In Count I of the amended complaint, Cincinnati Bell seeks dissolution of the Partnership and appointment of a liquidating trustee. Both parties request summary judgment in their favor as to Count I pursuant to 6 Del. C. § 17-802. Under this section, the Court of Chancery may dissolve a limited partnership when "it is not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 Del. C. § 17-802 (emphasis added).

Ameritech opposes dissolution and argues that Cincinnati Bell has not provided the Court with any rationale on which the Court may dissolve the Partnership pursuant to § 17-802. Ameritech emphasizes that the Partnership is serving its stated purpose "to fund, establish and provide Cellular Service." Ameritech notes that the Partnership Agreement does not require the Partnership to be the best in the industry or to meet any level of economic performance. In any case, Ameritech's expert, Lehman Brothers, estimates that the business can be profitable; their discounted cash flow analysis indicated that the business is worth $* to $* million. Further, Cincinnati Bell's own expert testified that the opportunity to carry on the Partnership's business is extremely valuable, estimating that the business is worth between $* and $* million. In fact, all of the partners, except Cincinnati Bell, wish to carry on the business, with or without Cincinnati Bell.

In contrast, Cincinnati Bell argues that two bases exist on which this Court may grant summary judgment in its favor on the dissolution claim. First, Cincinnati Bell argues that the Partnership has not performed adequately in the past and will fare worse with increased competition from the PCS providers. Cincinnati Bell insists that the Partnership's purpose is to generate economic returns. It notes that, by definition, the law presumes that Delaware partnerships are "for profit" entities, citing 6 Del. C. § 1506 (defining "partnership" as two or more entities associated to carry on a business for profit). In support of its argument, Cincinnati Bell claims that the present situation mirrors the situation in PC Tower Center, Inc. v. Tower Center Dev. Assoc., L.P., Del. Ch., C.A. No. 10788, Chandler, V.C. (June 8, 1989) where the Court dissolved the partnership pursuant to § 17-802 based upon the finding that the partnership in question was unlikely to turn a profit at any point in the foreseeable future.

[7] In evaluating whether to dissolve a partnership pursuant to § 17-802, courts must determine the business of the partnership and the general partners ability to achieve that purpose in conformity with the partnership agreement. Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prod., Inc., Del. Ch., C.A. No. 12036, Allen, C. (July 28, 1993), Mem. Op. at 2 (citing PC Tower Center, Inc. v. Tower Center Dev. Assoc., L.P., Del. Ch., C.A. No. 10788, Chandler, V.C. (June 8, 1989)). In the present case, the Partnership Agreement states that the Partnership's business purpose is "to fund, establish and provide Cellular Service" in the specified geographic area. P. Agmt. § 1.3. The Partnership Agreement does not establish a time schedule by which the Partnership must be profitable or any other measure of performance. Nor does the Partnership Agreement establish required performance standards. Further, Cincinnati Bell has failed to provide any evidence suggesting that the parties were not intentionally silent on this point when they entered the Partnership Agreement.

[8] Moreover, Cincinnati Bell has not suggested a reasonable time period which the parties surely would have specified had they considered the issue. The Court will not find an implied reasonable time period for performance of a contract where the agreement is silent on that point. See Gluckman v. Holzman, Del. Ch., 53 A.2d 246 (1947) (relying on the fact that the parties were intentionally silent on the time period for performance). Cf. Bundesen v. Beck, Del. Ch., C.A. No. 11347, Berger, V.C. (June 23, 1992) (Bundesen II), Mem. Op. at 5 (finding that if the parties did not intentionally omit a time period for performance, then the Court may add some reasonable time frame for performance to the agreement).

In spite of the fact that the Partnership appears to be operating within its stated business purpose, Cincinnati Bell believes the Court should dissolve the business because its financial position is so weak that it is impractical to carry on the business. However, the record shows that the Partnership has improved its financial position and currently has over * subscribers, generating revenues of approximately $* million. The Partnership has also improved its operating cash flows. In its first five years of existence, the Partnership produced negative cash flows. In contrast, over the last five years, the Partnership has produced positive cash flows.

Cincinnati Bell's reliance on PC Tower is misplaced. In PC Tower, the partnership owned certain rental real estate in Dallas, Texas. The Dallas real estate market had taken such a dramatic downturn that the partnership was unable to service its debt and had gone into default on its loans. The value of the partnership's real estate had dropped to a

level below that of the debt. Thus, the partnership could only be run at a loss of $6 million per year. Importantly, because the Dallas real estate market was over-developed, the partnership had no reasonable prospect to redeveloping equity in the property. Notably also, the partnership agreement stated that the business purpose was for profit. Thus, the financial situation in PC Tower was extremely poor, and the prospects for future recovery were dim.

[9-10] In contrast, in the present case, the undisputed record demonstrates that the Partnership is currently producing returns for its investors. Perhaps the Partnership's returns are not as great as its competitors, but it is meeting its stated purpose of providing cellular services. Moreover, Cincinnati Bell admits that the business is quite valuable, believing that they could receive a healthy return on their investment if the Partnership's business were sold. In effect, Cincinnati Bell urges the Court to compare the Partnership's ideal degree of financial success with the actual figures and use this as a basis for dissolving the Partnership. Such a comparison, while perhaps demonstrating disappointing past returns, is an inappropriate basis on which to order dissolution. Although Cincinnati Bell may be disappointed in its investment, it has not demonstrated that the cellular business can no longer be sustained. See Red Sail, Del. Ch., C.A. No. 12036, Allen, C. (Oct. 6, 1992) Mem. Op. at 10 (noting that a "blizzard of accounting complaints . . . do not make the business of the firm impracticable . . . ."). A report by Cincinnati Bell's own expert, Joseph N. Walter, shows that the Partnership's performance--measured by number of subscribers, growth in market share, revenues and EBITDA, and reduction in the churn rate--has improved steadily from 1992 through 1994. See The Walter Group Report, Appendix to Ameritech's Opening Brief, Vol. II at pp. R664, R703. The undisputed facts, therefore, fail to provide a basis upon which the Court could order dissolution of the Partnership.

In its second argument in support of its dissolution request, Cincinnati Bell posits that another purpose of the Partnership is to provide cellular services as a complementary, rather than competitive, service to its limited partners' primary business -- local exchange service. Cincinnati Bell notes that the parties did not anticipate the extent to which cellular services would compete with landline services when they entered the Partnership Agreement. The parties have found that consumers substitute cellular service for landline services. Thus, Cincinnati Bell finds itself in the position of funding its own competition.

Moreover, Cincinnati Bell raises its concern over the Partnership's intention to provide bundled local and long distance cellular services. In

Cincinnati Bell's view, the bundling allows the Partnership to compete directly with Cincinnati Bell's primary business, i.e., its wireline communications. Cincinnati Bell characterized Ameritech's bundling of services as the general partner using the Partnership to advance its own competitive position against its limited partners' primary business. This competition, argues Cincinnati Bell, violates the Partnership Agreement, making it not reasonably practicable to carry on the Partnership.

Ameritech insists that the Partnership can, in conformity with the Partnership Agreement, compete with the limited partners' wireline services. Ameritech notes that the Partnership Agreement contains no prohibition or limitation on the Partnership's competing with wireline services. Thus, this competition may occur without violating the Partnership Agreement. Moreover, Ameritech notes that the parties were aware at the time of entering the agreement that wireless services could compete with wireline services. Instead of protecting itself in the Partnership Agreement, Cincinnati Bell executed the Partnership Agreement that does not contain a non-compete clause; nor did it ever seek an amendment to the Partnership Agreement.

[11] Considering the standard for dissolution under § 17-802, I cannot accept Cincinnati Bell's argument. Indisputably, the Partnership Agreement does not limit the Partnership from competing with its limited partners. In fact, the Partnership Agreement contains a section which permits competition. It also provides that the partners may resell cellular services or equipment independently from the Partnership either in or outside of the Partnership's geographic area. The only limitation imposed by these sections is that the transactions must be on an arms-length basis. P. Agmt. §§ 8, 10. When the relationship between the parties is primarily contractual in nature, Delaware courts will not reform agreements to bestow additional rights on the parties for which they did not bargain unless it is clear that, had they negotiated on that matter, they would have agreed to that point. See generally Katz v. Oak Indus. Inc., Del. Ch., 508 A.2d 873 (1986) (considering the relationship between a corporation and its debt holders as contractual in nature). Here, it is not clear that the parties would have included a no compete provision in the agreement.

[12-13] Competition between the Partnership and Cincinnati Bell is not a viable rationale for determining that the Partnership cannot be carried on in a "reasonably practicable" manner, consistent with the Partnership Agreement.[7] Notably, Cincinnati Bell is free to cash out its

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[7]This rationale for dissolution would also broaden the standard for dissolution expressed in 6 Del. C. § 17-802. As mentioned later in this Opinion, it is not appropriate to

interest in the Partnership. Thus, it need not continue to fund competition against itself. Strangely, however, while it complains about funding its own competition, Cincinnati Bell continues to hold its Partnership interest.[8] Absent some limitation on competition against the Partnership in the Partnership Agreement (or some indication that had the parties considered it ex ante, they would have included such a provision in the Partnership Agreement), the fact that Cincinnati Bell is frightened of future competition is not a basis for unilaterally dissolving a viable business at the request of one limited partner.

Finally, Cincinnati Bell argues that Ameritech will compete with the Partnership itself by bundling services. Cincinnati Bell explains that ACI will place Ameritech in a conflict of interest situation because ACI will choose between selling wireline services or wireless services. If it chooses to sell wireline services, then Ameritech will receive 100% of the wholesale profit, whereas if it sells wireless service, AMCI will receive only 53% of the profit. Cincinnati Bell insists that this alleged competition is a breach of Ameritech's fiduciary duties and that the breach is a basis upon which to dissolve the Partnership.

Ameritech contends that Cincinnati Bell has no basis for asserting that Ameritech will provide cellular service within the Partnership area other than by reselling the Partnership's services. Section 7.1(a) of the Partnership Agreement expressly permits reselling of services and, further, authorizes Ameritech, as general partner, to cause the Partnership to enter into agreements for such services. Additionally, Ameritech argues that the profits will accrue to the Partnership itself and that providing long distance services is in the Partnership's best interest. Ameritech notes that it has not violated its duties to the Partnership at this point and that Cincinnati Bell's concerns are merely speculative. Ameritech also notes that Cincinnati Bell is free to enter into similar reselling arrangements.

Cincinnati Bell suggests that by reselling cellular services through ACI, ACI is competing with the Partnership's retail cellular service operations. Cincinnati Bell notes that the Partnership has 16 stores that

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broaden the dissolution standard so as to expand the Court of Chancery's power beyond what the Legislature intended.

[8]Notably, Cincinnati Bell and Ameritech entered discussions concerning a sale of Cincinnati Bell's interest in the Partnership to Ameritech in 1992. Ameritech offered a substantial amount of money for Cincinnati Bell's interest, an amount that even Cincinnati Bell's chief executive officer has characterized as a "good return all in all" considering the size of Cincinnati Bell's investment at the time. Because Cincinnati Bell's officers and directors viewed the Partnership as ultimately worth more than Ameritech's offer, they decided Cincinnati Bell should remain in the Partnership.

sell cellular services, but these stores do not provide the "bundled" service. Thus, according to Cincinnati Bell, ACI is a subsidiary of AMCI that competes with one of the Partnership's lines of business. Even though Cincinnati Bell acknowledges that ACI is currently selling long distance services through the Partnership, it believes that Ameritech intends to offer long distance through ACI or another subsidiary.

[14-15] Cincinnati Bell's argument here is flawed because its own concessions demonstrate that Ameritech currently does not compete with the Partnership. First, by recognizing that ACI is currently selling long distance services through the Partnership, Cincinnati Bell is conceding that Ameritech is not competing with the Partnership currently. Whether Ameritech will compete with the partnership in the future is unknown. Second, the fact that Ameritech plans for the profits from the bundling to accrue to the Partnership also demonstrates that Ameritech is not competing with the Partnership. Cincinnati Bell is merely speculating that Ameritech will compete with Cincinnati Bell by offering long distance through ACI in the future. This conjectural rationale is not a basis on which the Court may dissolve the Partnership now, especially considering that the Partnership Agreement does not proscribe competition between partners. Moreover, even if such competition were occurring today, it is not a basis for dissolution because the Partnership Agreement is intentionally silent on the risks of competition between and among partners.

[16] As more fully explained later in this Opinion, Cincinnati Bell agreed to limit Ameritech's fiduciary duties as the general partner. In Section 16.1 of the Partnership Agreement, Cincinnati Bell agreed that Ameritech would not be liable to either Cincinnati Bell or the Partnership for any breaches (fiduciary or otherwise) unless the breach involved willful misconduct or gross negligence. Ameritech believes that bundling services does not violate the Partnership Agreement. This interpretation of the Partnership Agreement appears reasonable and, at the very least, reasonable minds may disagree as to whether the bundling of services is beneficial to the Partnership. Thus, one cannot conclude as a matter of law that by bundling services, Ameritech willfully or in a grossly negligent manner violated its duties of loyalty to the Partnership's business. Its duties to the limited partners only go so far as the business of the Partnership itself. See Davenport Group MG v. Strategic Investment Partners, Inc., Del. Ch., C.A. No. 14426, Steele, V.C. (Jan. 23, 1996), Mem. Op. at 15. In sum, because the exculpation provision in the Partnership Agreement encompasses the allegedly self-dealing plan to bundle services, this alleged breach is not a reason for the Court to dissolve the Partnership.

[17] Cincinnati Bell has failed to point to specific facts on which this Court may determine that the business is no longer reasonably practicable to continue. Since Cincinnati Bell has the ultimate burden of proof on its dissolution claim, and it has failed to show specific facts supporting this claim, Ameritech is entitled to summary judgment in its favor on the dissolution claim. Burkhart v. Davies, Del. Supr., 602 A.2d 56, 60 (1991).

B. Counts II and III: Ameritech's Duty to Sell the Partnership Assets

The parties agree that the Partnership's business purpose is "to fund, establish and provide" cellular mobile services within a geographic area bounded by Cincinnati, Dayton and Columbus, Ohio. The Partnership Agreement does not contain provisions authorizing the general partner or the limited partners to sell the Partnership assets as a going concern. Nevertheless, Cincinnati Bell seeks summary judgment on the claim, asserted in Counts II and III of its complaint, that Ameritech, as general partner, has a fiduciary duty to sell the Partnership's business and distribute the sale proceeds proportionately to the partners. This duty to sell the business, contends Cincinnati Bell, arises from two interconnected sources: (1) the general fiduciary duty that all general partners owe to their limited partners, Boxer v. Husky Oil Co., Del. Super., 429 A.2d 995, 997 (1981), and (2) the specific fiduciary duties of a trustee with respect to the assets of a trust, since trust law principles are applicable by analogy (argues Cincinnati Bell) to limited partnerships. Against the backdrop of these two legal frameworks, Cincinnati Bell then argues that Ameritech has a fiduciary duty to the limited partners to sell the Partnership's business because the business is worth more if sold than if it is managed by Ameritech. Cincinnati Bell believes the truth of this factual claim--that the partners' return on equity would be greater if the Partnership were liquidated immediately--is incontestably demonstrated by the record evidence.

Cincinnati Bell first points to the Partnership's lackluster performance over its ten-year life. Next, Cincinnati Bell's experts testified that Ameritech's financial forecasts for future cash flow are implausible. In fact, Cincinnati Bell's experts suggest that the net present value of the Partnership, based on Cincinnati Bell's own forecasts, is negative. Finally, Cincinnati Bell's experts testified that the Partnership can be sold today to a strategic buyer (another telecommunications company) for $700 million to $850 million, making its sale value enormously greater than its operating value.

Ameritech responds to all of these arguments but it especially attacks the claims regarding the Partnership's past and predicted future financial performance. Assembling its own financial experts, Ameritech challenges the conclusions of Cincinnati Bell's experts and, without doubt, the "battle of the experts" in this case would consume much time and effort were this issue ever tried before the Court. But I find it unnecessary to enter into the fray over the Partnership's net present value as an operating business compared to its sale value to a third party. This debate, in my opinion, obscures the essential point: Under the Partnership Agreement Ameritech, as the general partner, has no authority to sell the Partnership's business. The Partnership Agreement specifically provides that the Partnership's purpose is to fund, establish and provide cellular services in the designated geographic area. The general partner is given broad powers in furtherance of this purpose--to market, sell and maintain cellular services in the limited geographic area for which the Partnership is licensed. In a fundamental sense, selling the Partnership's business would be contrary to the Partnership's stated purpose. A forced sale by judicial decree of dissolution would end the Partnership's ability to carry out its purpose of providing cellular services in the affected region.

[18] Cincinnati Bell notes that the Partnership Agreement, in Section 4.1, grants Ameritech the power to sell the "cellular service system," as well as cellular services and, thus, such action is actually consistent with the Partnership Agreement's terms and conditions. See Kansas RSA 15 Limited Partnership v. SBMS RSA, Inc., Del. Ch., C.A. No. 13986, Allen, C. (March 8, 1995) (refusing to grant summary judgment where similar language was in issue). Nevertheless, I find this language consistent with the purpose of funding, establishing and providing cellular services in the particular geographic region. The general partners' power to market, sell, operate and maintain the cellular service system is necessary for carrying out the Partnership's business purpose--promoting and providing cellular services to subscribers. Based on the terms of the partnership Agreement, I conclude as a matter of law that Ameritech, as the general partner, has no authority to sell the Partnership's business.

[19-20] Nor do applicable provisions of Delaware's partnership statutes give Ameritech the right to sell the Partnership's business without the unanimous consent of all the partners. Under § 17-403(a) of the Revised Uniform Limited Partnership Act, a general partner of a limited partnership "has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners." 6 Del. C. § 17-403(a). A partner in a partnership without limited partners is governed

by Delaware Uniform Partnership Law § 1509, which provides in pertinent part:

> (c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all partners have no authority to:
>
> * * *
>
> (2) Dispose of the good will of the business;
>
> (3) Do any other act which would make it impossible to carry on the ordinary business of a partnership . . . .

6 Del. C. § 1509(c) (emphasis added).

[21] In the absence of language in a partnership agreement expressly empowering the general partner to sell the Partnership's business (as here), a general partner cannot sell the business without unanimous consent of all the partners. As a result, each partner, including Ameritech in this case, has a right under the applicable Partnership Law Statute (6 Del. C. § 1509) to withhold consent to a sale of the Partnership's business.

Cincinnati Bell dismisses the statute's unanimous consent restriction by saying the restriction cannot "supersede the unquestioned duty of a general partner to sell a business when necessary to meet [the general partner's] fiduciary obligations owed the limited partners." Cincinnati Bell urges the Court to order dissolution and sale of the Partnership because Ameritech has a fiduciary duty to sell it and refuses to do so.

[22] In some respects I think Cincinnati Bell's argument for dissolution and sale implicitly broadens this Court's power to decree judicial dissolution of a limited partnership as defined under § 17-802 of the Revised Uniform limited partnership Act. The Court of Chancery's power to order dissolution and sale, in my opinion, is a narrow and limited power. See PC Tower, Del. Ch., C.A. No. 10788. The Court should not enlarge the dissolution power beyond the reach intended by the legislature when it enacted § 17-802. Cf. Red Sale Easter Limited Partners, L.P. v. Radio City Music Hall Productions, Inc., Del. Ch., C.A. No. 12036, Allen, C. (Oct. 6, 1992) (applying PC Tower standard and § 17-802 standard and refusing to adopt broader dissolution principles from general partnership law).

Nevertheless, I have considered Cincinnati Bell's argument that general fiduciary duty principles, by analogy to corporation law or to trust law, require Ameritech to sell the Partnership to another competing telecommunications company. Fiduciary duties of care and loyalty require a sale in these circumstances, Cincinnati Bell argues, because (1) it's the prudent thing to do when an asset's operating value is less than its sale value; (2) the partners never expected that the Partnership's wireless phone business would compete directly against the partners' wireline phone business; and (3) Ameritech as general partner is competing, via the Partnership that it manages, against Cincinnati Bell's wireline business in the Cincinnati region. These developments--together with Cincinnati Bell's prediction that the level of competition threatened by the Partnership's business will increase dramatically in the future--have changed the partners' underlying business assumptions about the partnership's business. With the Partnership poised to compete directly against the limited partners who fund it with significant capital contributions, Cincinnati Bell vigorously contends that Ameritech's refusal to sell is a violation of its fiduciary obligations to the other partners.

Ameritech is quick to point out that the partners did foresee the competitive threat wireless services posed to wireline companies, that the Partnership Agreement itself does not proscribe competition between the Partnership and the constituent partners, that the Partnership actually enhances each partner's competitiveness by allowing partners to "resell" and "bundle" services such as wireless plus local or long distance with wireline services, and that Ameritech's own experts demonstrate that the Partnership is more valuable if operated rather than sold now.

[23] All of the charges and counter-charges regarding this Partnership's lackluster past performance, and the highly conjectural claims over its sale value today versus five years from now, are beside the point. Even accepting Cincinnati Bell's factual allegations about the Partnership's competition with the partners and its contention that the Partnership has a greater value if sold than if operated, Ameritech is entitled to summary judgment as a matter of law on the breach of fiduciary duty claims in Counts II and III. Corporation law is the source of most Delaware jurisprudence relating to the fiduciary duty of managers. Partnerships have much in common with the business corporation, not least of which is that the general partner exercises full managerial authority of the partnership similar to that exercised by a board of directors for a corporation. Thus, general fiduciary principles as applied in Delaware's corporation law decisions are applicable in the context of this limited

partnership. Litman v. Prudential-Bache Properties, Del. Ch., 611 A.2d 12, 15 (1992).

[24-25] A majority stockholder in a Delaware corporation owes no duty to sell its holdings in the corporation just because the sale would profit the minority. Bershad v. Curtiss-Wright Corp., Del. Supr., 535 A.2d 840, 844-845 (1987) (holding that a shareholder is under no duty to sell its holdings in corporation even if it is a majority shareholder, merely because the sale would profit the minority). Similarly, directors of the corporation have no obligation to approve a sale of the company's assets, even if such a sale would be advantageous, where the directors rightfully hold a veto of such a sale as shareholders. Thorpe v. CERBCO, Inc., Del. Supr., 676 A.2d 436, 437 (1996) (discussing Thorpe v. CERBCO, Inc., Del. Ch., C.A. No. 117313, Allen, C. (Oct. 29, 1993), Mem. Op. at 10-11, where Chancellor Allen held that a majority stockholder's ownership of its stock includes the property right to cast the controlling vote and to veto a sale of the business, even if a sale would be in the best interests of minority stockholders).

These same principals apply in the context of this limited Partnership. Ameritech owns 52% of the Partnership. Ameritech has property rights akin to those of a majority stockholder. Cincinnati Bell, with a 45% interest, is a passive minority investor with limited liability. Cincinnati Bell has no management authority. As with a minority stockholder, Cincinnati Bell has no right to demand that the majority owner sell all the business assets just because a sale would profit Cincinnati Bell.

[26-29] Like a majority stockholder in a corporation, Ameritech is the general partner and majority Partnership owner and is entitled to exercise its veto of a sale of the Partnership's business. Exercise of its property right in this fashion does not breach Ameritech's fiduciary duty to the minority interest partners. Ameritech's responsibility is to manage the Partnership in accordance with its purpose of establishing and providing cellular services in the Cincinnati, Columbus and Dayton region. Ameritech is under no fiduciary obligation to abandon that purpose and sell the business because one limited partner--Cincinnati Bell--believes it would be in its own strategic business interest to do so. All of the partners are entitled to resell Partnership wireless services, and to bundles services (offering wireless via the Partnership with local/long distance wireline) for its own customers, thereby offsetting potential losses in the wireline business with wireless services from the Partnership. This is the purpose of the Partnership, clearly expressed in the Partnership Agreement. If the partners want to sell the Partnership's business, all of the partners must consent to such a sale. Unless it is not

reasonably practicable to carry on the business in conformity with its purpose or unless all the partners agreed to a dissolution of the business, Ameritech is under a duty to carry out the Partnership's purpose as expressed in the Partnership Agreement. If a partner does not share Ameritech's vision of the Partnership's viability in the cellular market, that partner retains the right under the Partnership Agreement to cash out its interest in the Partnership or to withdraw from the Partnership. In these circumstances, therefore, I conclude that as a matter of law Ameritech is entitled to summary judgment on Cincinnati Bell's claim in Counts II and III that Ameritech has breached its fiduciary duties of care and loyalty by refusing to sell the Partnership's business.[9]

C. Counts II and III: Cincinnati Bell's Claims of Mismanagement and Gross Negligence

In Counts II and III of its amended and supplemental complaint, Cincinnati Bell alleges that Ameritech has breached the Partnership Agreement and has managed the Partnership in a grossly negligent manner. Cincinnati Bell has alleged numerous specific examples of Ameritech's gross mismanagement, but Cincinnati Bell insists that it is the "pattern" of conduct of Ameritech that constitutes gross mismanagement. For this pattern of mismanagement, Cincinnati Bell seeks money damages.

Before turning to the specific instances of alleged mismanagement (and the pattern of conduct of which they form constituent elements), it is useful to review the relevant terms of the Partnership Agreement concerning management and control of the Partnership. As mentioned earlier, § 1.3 of the Partnership Agreement notes the Partnership's purpose is to fund, establish and provide cellular services. In §§ 7.1 and 7.2, the Partnership Agreement sets out in broad terms the powers of a general partner:

> 7.1 Partnership Powers. In furtherance of the business purpose specified in Section 1.3, the Partnership,

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[9]I do not accept Cincinnati Bell's argument that trust law principles apply in this setting. A trustee's duty is to invest and conserve the trust assets for the benefit of the cestui que trust. A general partner's obligation, like that of a director, is to manage a specific business, a task that implies entrepreneurial risks. Because of the fundamental difference between the duties and functions of a trustee and a general partner in this case, I do not think trust law principles should, by analogy, be applied to Ameritech's duties as general partner of the Partnership. Cf. Cinerama, Inc. v. Technicolor, Inc., Del. Ch., 663 A.2d 1134, 1148 (1994).

> and the General Partner on behalf of the Partnership, shall be empowered to do or cause to be done any and all acts reasonably deemed by the General Partner to be necessary or appropriate in furtherance of the purposes of the Partnership or [similarly to] forebear from doing any act . . . including without limitation, the power and authority:
>
> (a) To enter into, perform and carry out contracts and agreements of every kind necessary or incidental to the accomplishment of the Partnership's purposes, including, without limitation, contracts and agreements with the General Partner and Affiliates of the General Partner . . .
>
> * * *
>
> (c) To carry on any other activities necessary to, in connection with or incidental to any of the foregoing.
>
> 7.2 Powers of the General Partner. In addition to those powers vested pursuant to Section 7.1, the General Partner hereby is vested with the power to:
>
> (a) Manage, supervise and conduct the affairs of the Partnership;
>
> (b) Make all election, investigations, evaluations and decisions, binding the Partnership hereby, that may be necessary or appropriate in connection with the business purposes of the Partnership . . .

Importantly, § 16.1 of the Partnership Agreement confers upon Ameritech, in exercising these managerial powers, broad contractual protection for conduct in its capacity as general partner:

> 16.1 Exculpation of the General Partner. The General Partner will not be liable for any loss to the Partnership or the Limited Partners by reason of any act or failure to act unless the General Partner was guilty of willful misconduct or gross negligence.

These provisions clearly demonstrate that the parties to the Partnership Agreement contracted to broadly empower the general partner to decide how to conduct the Partnership's business, including dealing with itself. In addition, the parties expressly limited the general partner's liabilities for loss by reason of any act or failure to act unless the general partner was guilty of willful misconduct or gross negligence.

[30] Cincinnati Bell's complaint does not charge the general partner, AMCI, with willful misconduct. Instead, Cincinnati Bell characterizes AMCI's conduct over the years as gross negligence and gross mismanagement. Under Delaware law, therefore, it is Cincinnati Bell's burden to plead and to prove that AMCI was "recklessly uninformed" or acted "outside the bounds of reason." Tomczak v. Morton Thiokol, Inc., Del. Ch., C.A. No. 7861, Hartnett, V.C. (April 5, 1990), Mem. Op. at 31-32; Rabkin v. Philip A. Hunt Chemical Corp., Del. Ch., 547 A.2d 963, 970 (1986).

Ameritech argues that three acts of alleged gross negligence in particular are barred by the statute of limitations. I will consider these three events (hereinafter "the stale claims") at the outset, and treat the remaining nine examples of gross negligence (hereinafter "the pattern of mismanagement claims") later in this Opinion.

(1) The Stale Claims.

Cincinnati Bell charges that AMCI raised prices for cellular services in order to compensate for declining revenues per customer. AMCI miscalculated the effect of the increase. The price increase resulted in customer defections and a loss of sales to new customers. AMCI eventually was forced to roll back the price increases. Ameritech disputes this claim, providing uncontradicted evidence that the price increase occurred in other AMCI management partnerships, and not in the Ohio market. Importantly for this motion, however, is the undisputed fact that the increases occurred in 1989, over four years before this lawsuit was filed.

Next, Cincinnati Bell accuses AMCI of gross negligence or a breach of the Partnership Agreement when it caused the Partnership to acquire certain retail store operations in 1985 and 1989 and to operate them thereafter. Cincinnati Bell also complains that in 1992 AMCI changed its marketing strategy by offering to rent cellular telephones without first doing a study or analysis to determine the effect of such a change in strategy. Cincinnati Bell's own records, however, clearly show that the rental program began in 1990.

[31] Cincinnati Bell instituted this action on February 23, 1994. All of the above incidents of alleged gross negligence or breach of the Partnership Agreement occurred before February 23, 1991, or more than three years before Cincinnati Bell filed the complaint. Delaware's three years statute of limitation applies to claims for breach of contract and to money damage claims for breach of fiduciary duty. 10 Del. C. § 8106; Bokat v. Getty Oil Co., Del. Supr., 262 A.2d 246, 250-51 (1970). Accordingly, unless the statute of limitations has been tolled in this case, Section 8106 bars these three specific claims of alleged gross negligence.
[32] Not surprisingly, Cincinnati Bell offers five theories for why the statute of limitations should be tolled. Of course, where a plaintiff knows or should know of a supposed wrong, the statute of limitations is not tolled. See Kahn v. Seaboard Corp., Del. Ch., 625 A.2d 269, 277 (1993). Although Cincinnati Bell had contemporaneous knowledge, via its personnel monitoring the Partnership, of the incidents of which it now complains, it says it did not file the suit within the appropriate time because it relied on Ameritech's financial forecasts and was lulled into a false sense of complacency. Cincinnati Bell also characterizes AMCI's alleged wrongs as "continuing torts," for which the statute of limitations commences to run only when the tortious acts have ceased. See Van Heest v. McNeilab, Inc., 624 F. Supp. 891 (D.Del. 1985). Next, Cincinnati Bell contends that its cause of action against Ameritech did not accrue until some undefined moment after February 23, 1991, when Ameritech's complete "portfolio" of negligent acts amounted, in combination, to gross negligence, thereby giving rise to an actionable claim. Citing Bovay v. H.M. Byllesby & Co., Del. Supr., 38 A.2d 808 (1944), Cincinnati Bell also insists that Ameritech's self-dealing equitably tolled the statute of limitations. Finally, Cincinnati Bell argues that the three year statute of limitations pursuant to Section 8106 is tolled until actual damages caused by the asserted wrongs have been found to exist.
[33-35] Based on the uncontroverted facts, Cincinnati Bell's claims of gross mismanagement arising from the 1989 price increase, the 1985 and 1989 acquisition of retail stores and the 1990 cellular phone rental program, all are barred by the three year limitations period established in Section 8106. None of the reasons offered by Cincinnati Bell for tolling the statute are persuasive. First, a statute of limitations begins running even though actual or substantial damages are inflicted at a later date. Kaufman v. C.L. McCabe & Sons, Inc., Del. Supr., 603 A.2d 831, 834 (1992); Isaacson, Stolper & Co. v. Artisan's Savings Bank, Del. Supr., 330 A.2d 130, 132 (1974). Second, equitable tolling occurs when the plaintiff can show it was ignorant of the wrong due to the defendant's fraud or fraudulent concealment or some other circumstance justifying

why plaintiff did not have reason to know of the facts constituting the alleged wrong. Kahn v. Seaboard Corp., Del. Ch., 625 A.2d 269, 276 (1993). See In re Maxxam, Inc./Federated Development Shareholders Litig., Del. Ch., C.A. No. 12111, Jacobs, V.C. (June 21, 1995), Mem. Op. at 13-14; Patterson v. Hanby, Del. Ch., C.A. No. 6354 & 6062, Walsh, V.C. (April 24, 1985), Mem. Op. at 5-6. Cincinnati Bell cannot show that it was ignorant of the wrong because the undisputed facts show that it knew of the stale claims at the time, including the alleged self-dealing claim. Bovay v. H.M. Byllesby & Co., thus does not apply. Third, Cincinnati Bell's portfolio theory, combining all of Ameritech's alleged negligent acts to make one later claim of gross negligence, is inapt here where the stale claims are actually separate claims involving discrete business decisions made by different persons. A combination of negligent acts by the same person may constitute gross negligence when the negligent acts can be viewed as cumulative with causative factors or inextricably related events leading to a particular incident or injury. In this case, the undisputed facts show that Cincinnati Bell's claims relate to the alleged negligence of separate persons, making independent business judgments, under distinct business conditions. These separable acts cannot be woven together as though they are part of an intertwined fabric constituting a monolithic course of conduct. Indeed, each incident cited by Cincinnati Bell is a free-standing event, a business judgment with its own distinct subject matter. Cincinnati Bell has taken separate business decisions involving different people separated by time and lumped them together as one actionable wrong. Cincinnati Bell's argument, however, is belied by the pleadings and by the record evidence. Accordingly, Cincinnati Bell's portfolio theory, and the continuing tort theory, are inapplicable. Finally, even Cincinnati Bell's complaint contradicts the claim that it delayed bringing this lawsuit because of its reliance on Ameritech's financial forecasts. The complaint alleges that Cincinnati Bell did not assert its dissolution claim earlier because of Ameritech's rosy forecasts regarding the partnership's future profitability. No other particularized facts support Cincinnati Bell's argument that its reliance on Ameritech's financial forecasts causes it to delay filing a lawsuit concerning the stale mismanagement claims.

The undisputed facts do not support Cincinnati Bell's contention that the statute of limitations should be tolled. Accordingly, because Cincinnati Bell knew or should have known of the stale claims at the time of the alleged grossly negligent actions, I find that the three stale claims are barred by the statute of limitations. 10 Del. C. § 8106.

I turn now to the nine remaining examples of alleged gross negligence and mismanagement. Because Cincinnati Bell insists that the

examples should be viewed collectively, as a pattern of mismanagement, I will treat them collectively, rather than individually.

(2) Ameritech's Alleged Pattern of Mismanagement.

The complaint recites a litany of decisions by Ameritech that, in Cincinnati Bell's view, have had disastrous consequences for the Partnership. Cincinnati Bell portrays these decisions as either based on inadequate information, poor planning, self-interestedness, or disregard for the terms of the Partnership Agreement.

In early 1992, AMCI began implementation of the "D2000" initiative, which sought to reduce customer acquisition costs by cutting sales commission rates across the board. Unfortunately, D2000 had unfavorable results because competitors kept their commission rates high, thus causing the Partnership to lose many important channels of distribution to its competitors. The loss of distribution channels resulted in lower subscriber growth rates. Cincinnati Bell attacks AMCI for "inadequate investigation" of the D2000 initiative.

Cincinnati Bell also points to certain non-officer bonuses that AMCI paid in years when "revenue goals" were not achieved by the Partnership. Evidently, Ameritech rewards managers in the Ohio Partnership in whole or in part on the basis of AMCI's performance in managing all of Ameritech's Partnership ventures, not just on the basis of the Ohio Partnership's performance. In years when the Ohio Partnership performed poorly, therefore, AMCI still paid bonuses based on Ameritech's bonus "structure."

Cincinnati Bell next contends that since at least 1992 Ameritech should have made efforts to sell the Partnership, as a sale would have been instantly profitable to all the partners. This contrasts sharply, says Cincinnati Bell, with the ongoing dismal operating performance of the Partnership under AMCI. Furthermore, in light of the Partnership's allegedly poor performance, Cincinnati Bell contends Ameritech should turn over the Partnership's management authority from AMPS and AMCI to a "competent outside manager."

Yet another decision of which Cincinnati Bell complains occurred when Ameritech prematurely caused the Partnership to begin converting from analog to digital equipment, phasing out Series I cell site equipment and upgrading it to Series II equipment. This conversion cost the Partnership about $* million in 1993, an expense that Cincinnati Bell contends the Partnership does not need to incur until 1997.

Cincinnati Bell also faults Ameritech for not having an adequate marketing plan for the Ohio Partnership. Cincinnati Bell's expert, Dr.

Frederick Russ, a professor of marketing at the University of Cincinnati, testified that AMCI's Ohio market plans would not receive a passing grade in his marketing strategy class. To illustrate the deficiency, Professor Russ contends AMCI should adopt a plan that follows the general marketing plan framework suggested by Philip Kotler, an authority on marketing management.[10] Another instance of gross negligence, according to Cincinnati Bell, is AMCI's improper reimbursements for expenses and overhead from 1991-1994. AMCI staffs all Partnership activities and charges the Partnership with expenses and overhead. Cincinnati Bell notes that under Section 14.2 of the Partnership Agreement such expenses must be "incurred" by the general partner and that is AMPS, not AMCI. Thus, Cincinnati Bell contends these expenses and costs as allocated by AMCI were not allowed under the Partnership Agreement.

Cincinnati Bell argues that Ameritech has been grossly negligent in failing to merge or "partner" with other wireless carriers in a national consortium as a response to the advent of PCS and the efforts of AT&T and GTE to create a national wireless business composed of both cellular and PCS licenses. Finally, Cincinnati Bell claims that Ameritech's forecasts of the Partnership's cash flow, profitability and capital needs demonstrated gross mismanagement, both because of the manner in which the forecasts were prepared and because ultimately the forecasts proved inaccurate.

The Partnership Agreement exculpates Ameritech from liability for loss to the Partnership or the limited partners for its acts or omissions unless the act or omission amounts to willful misconduct or gross negligence. Cincinnati Bell lists nine acts or omissions as examples of a pattern of gross negligence and mismanagement. Cincinnati Bell contends the evidence surrounding these acts or omissions is in dispute and, thus, summary judgment is inappropriate.

[36] Most of the disputed evidence, however, centers around conflicting opinions by experts concerning the wisdom of a particular business strategy undertaken by AMCI on behalf of the Partnership (for example, the D2000 initiative; the switch from analog to digital equipment; the absence of a Kotler-type marketing plan; the failure to partner with other wireless carriers in a national consortium; the structure for awarding incentive bonuses). Ameritech counters each charge of mismanagement with an arsenal of statistics and expert opinion justifying the business

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[10]Philip Kotler is a professor at the Kellogg Graduate School of Management, Northwestern University, and author of the most widely used marketing textbook in graduate schools of business. See Ameritech's Appendix, Vol. II at 549-557.

decisions undertaken on behalf of the Partnership. None of this disputed evidence, however, is a basis for denying summary judgment because the material facts are in agreement--all of the questioned acts or decisions were business decisions undertaken in good faith by the managing partner to meet a strong competitor in the Ohio market (CCI), often on the advice of consultants and experts hired by the managing partner specifically for the purpose of making such decisions. Thus, in the D2000 initiative example, the uncontested facts reveal that Ameritech adopted it on the recommendation of qualified outside consultants and implemented the plan to the consultants' satisfaction. So even though Cincinnati Bell now points to opinions post hoc from its experts that the initiative was poorly conceived or implemented, it cannot show that Ameritech's conduct represents gross negligence. The evidence is and would be that Ameritech adopted D2000 after soliciting advice from recognized experts. As a matter of law, on those undisputed facts, I cannot conclude that Ameritech acted in a recklessly uninformed manner.

This same conclusion is inevitable with regard to the decisions not to join a national consortium of wireless carriers or to switch to digital equipment earlier rather than later in the Partnership's life. These are the sorts of business judgments typically made by a general partner. No evidence indicates that the general partner made these decisions without a review of the costs, advantages and disadvantages. In each instance, undisputed facts show that each suspect decisions was the product of a cost benefit calculation commonplace in business entities operating in a highly competitive market.

[37] Ameritech's failure to sell the Partnership's business and to hire a competent outside manager also do not fall outside the bounds of reason. As earlier noted, Ameritech is under no duty to sell its majority interest in the Partnership, even if to do so would benefit the minority. Nor is it legally required, as the majority interest holder and as the general managing partner, to turn management of the Partnership over to an outside party. If Ameritech were legally obligated to do so, it would find itself in the dubious position of having surrendered management to another while remaining fully liable as the general partner.

Even treating all nine discrete acts or omissions as one seamless web of general partner decisions, I cannot find from the uncontradicted facts that they fall outside the bounds of reason or that they were recklessly uninformed. See Tomczak v. Morton Thiokol, Inc., Del. Ch., C.A. No. 7861, Hartnett, V.C. (April 5, 1990). To the contrary, all of the acts, from forecasting cash flow and switching to digital equipment to foregoing a particular marketing plan and adopting the D2000 initiative--reflect decisions undertaken in good faith and based on informed

judgments, even if particular decisions ultimately proved mistaken or less advantageous than originally conceived.

Cincinnati Bell's claim suggests Ameritech should function as a guarantor of the Partnership's performance. But the Partnership Agreement is silent as to the performance, profitability or even an expected time for the limited partners to receive a particular return on their investments. Considering the terms of the Partnership Agreement and the absence of any disputed facts concerning the basis for Ameritech's acts on behalf of the Partnership as its general partner, I find as a matter of law that Ameritech's conduct does not rise to the level of gross negligence or gross mismanagement. Accordingly, I grant defendants' motion for summary judgment as to the gross mismanagement and gross negligence claims of Counts II and III of plaintiff's amended and supplemental complaint.

* * *

[38] Although the above conclusions make it unnecessary to consider further issues raised by the parties, it is noteworthy that Cincinnati Bell's claims for damages under Counts II and III appears unsupportable under Delaware law. In its amended complaint, Cincinnati Bell asks the Court to award "damages for the difference between the present value of [Cincinnati Bell's] limited partnership interest and the value such interest would have had but for [Ameritech's] gross mismanagement, negligence and breach of fiduciary duties." (Amended Complaint, ¶ 31, Prayer C).[11] Cincinnati Bell's claim for damages is clearly derivative in nature. Damages for the general partners' breach of fiduciary duties or for gross mismanagement would fall on the Partnership and all its partners. Litman v. Prudential-Bache Properties, Del. Ch., 611 A.2d 12, 15 (1992). Thus, I fail to see on what basis Cincinnati Bell can assert a claim for damages based upon what Cincinnati Bell's minority interest would be worth "but for" Ameritech's alleged gross mismanagement of the Partnership's business.

Additionally, Cincinnati Bell's damages claim appears predicated on assumptions about what the Partnership ought to be worth based on comparisons to industry averages. Cincinnati Bell's expert, for example,

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[11]It is also noteworthy that the parties have addressed the pending motions with reference to injunctive and declaratory relief being sought in connection with Counts II and III of the amended and supplemental complaint. Having carefully read the amended and supplemental complaint, I find no reference to injunctive or declaratory relief in either Count II or Count III, or the general prayers for relief.

created a financial model for purposes of this case based on financial and operating ratios characteristic of the cellular industry. Extrapolating from that data, Cincinnati Bell's expert drew comparative conclusions about the Partnership's predicted cash distributions, data from which Cincinnati Bell ultimately derives the measure of damage to its minority interest.

[39-40] Damages cannot be speculative or uncertain, Wise v. Western Union Telegraph Co., Del. Super., 181 A. 302, 305-06 (1935), but must be at least based on a "reasonable estimate." Thorpe v. CERBCO, Inc., Del. Ch., C.A. No. 11713, Allen, C. (Oct. 29, 1993), Mem. Op. at 10. Here, Cincinnati Bell's damage claims do not appear based on a reasonable estimate; rather, the damages are based on assumptions about industry averages and are not linked specifically to the alleged acts of gross mismanagement or gross negligence. Accordingly, summary judgment is equally appropriate with respect to Cincinnati Bell's damages claim under Counts II and III.

IV. CONCLUSION

For the reasons set forth above, I grant summary judgment in favor of defendants and against plaintiff as to all counts of the amended and supplemental complaint. An Order has been entered in accordance with this decision.

ORDER

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

1) that summary judgment is entered in favor of Defendants and against Plaintiff with respect to all claims in Counts I, II and III of the Amended and Supplemental Complaint; and

2) that the costs of this action are assessed to Plaintiff.

COPI OF DELAWARE, INC. v. KELLY

No. 14,529

Court of Chancery of the State of Delaware, New Castle

October 25, 1996
Revised December 3, 1996

Plaintiff filed a verified complaint for a permanent injunction against defendants to enforce a covenant not to compete and to stop trade secrets from being revealed to their competitor, a defendant in this action. Plaintiff, a Delaware corporation, was wholly owned by a Pennsylvania parent corporation. This Delaware corporation had three stockholders, one of which is a named defendant, Kelly, who left the plaintiff and went to work for the plaintiff's competitor, also a named defendant. The competitor defendant also hired a long time employee of the plaintiff. Both corporations were involved in service contracts with Konica Business Machines USA, Inc., a corporation involved with the manufacturing of machines that the opposing corporations serviced.

The court of chancery, per Vice-Chancellor Steele, limited this decision to only the equitable remedies sought and granted the permanent injunction against all defendants. The court concluded that the covenant not to compete was reasonable and that trade secrets were in danger of being revealed to the defendant corporation.

1. Injunction ⚷ 14, 189, 190

To merit a permanent injunction, a plaintiff must show: (1) actual success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction.

2. Injunction ⚷ 57, 58, 59(1), 61(1)

An injunction will be granted when there is a valid employment contract or agreement that contains a reasonable covenant not to compete.

3. Contracts ⚷ 115, 117.1, 117.2

A reasonable restriction in a covenant not to compete depends on the type of business. In the business of servicing business machines

twenty miles or twenty-five miles is not unreasonable, nor is a two year restriction prohibiting an employee from soliciting the plaintiff's customers.

4. Statute of Frauds ⇐ 43, 44.3, 49, 51

There is an exception to the statute of frauds for employment contracts which a person may not compete within one year. If the employer can dismiss an employee within a year of hiring that employee, then that employment falls outside the statute of frauds.

5. Corporations ⇐ 307

Officers and directors of a corporation owe a fiduciary duty to shareholders.

6. Corporations ⇐ 174, 180, 307

A majority shareholder or a shareholder who exercises control over the business affairs of the corporation may also owe a fiduciary duty to the other shareholders.

7. Corporations ⇐ 174, 223, 307

An employee who is privy to material information and joins wrongdoers in misconduct may owe a fiduciary duty to the corporation and other shareholders.

8. Corporations ⇐ 174, 307

If a person does not own stock or is not an officer or director, then that individual does not owe a fiduciary duty to the corporation or the shareholders.

9. Contracts ⇐ 115
Injunction ⇐ 61

An injunction may not prevent a defendant corporation from conducting business with plaintiff's customers where such a restriction would be overly burdensome; however, confidential information may not be utilized in entering a business transaction with those customers.

10. Trade Regulation ⚷ 541, 545

The Delaware Deceptive Trade Practices Act provides for injuctive relief to protect a person whom deceptive trade practices may harm. DEL. CODE ANN. tit. 6, § 2533(a) (1996).

11. Trade Regulation ⚷ 462, 464

The Delaware Deceptive Trade Practices Act defines, in part, that a person engages in a deceptive trade practice when he causes a likelihood of confusion or misunderstanding in the course of his business. DEL. CODE ANN. tit. 6, § 2532 (1996).

12. Injunction ⚷ 14, 138.15, 138.21

A court will grant a preliminary injunction if a plaintiff shows: (1) there is a reasonable probability of success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction.

13. Contracts ⚷ 227

A party to a contract may waive a right under the terms of the contract, as long as that party knows of that right and intends to waive it.

14. Trade Regulation ⚷ 462, 464, 469, 474

In determining the likelihood of confusion in regards to a deceptive trade practice, a court considers several factors: (1) the degree of similarity between the marks, (2) the similarity of the products for which the name is used, (3) the area and manner of concurrent use, (4) the degree of care consumers will likely exercise, (5) the strength of plaintiff's mark, (6) whether there has been actual confusion, and (7) the intent of the alleged infringer to foist his products as those of another.

Joseph J. Bodnar, Esquire, of Walsh & Monzack, P.A., Wilmington, Delaware; K. Kirk Karagelian, Esquire, and Sheryl L. Brown, Esquire, of Carroll, Sheridan & Karagelian, Media, Pennsylvania, of counsel, for plaintiff.

Davis Staats, Esquire, of the Law Office of David Staats, Wilmington, Delaware, for defendant Kenneth G. Kelly.

William W. Erhart, Esquire, of William W. Erhart, P.A., Wilmington, Delaware, for defendants Charles Rossiter and Smart Business Systems, Inc.

STEELE, *Vice-Chancellor*

[start - revised page - December 3, 1996]

This case presents the Court an opportunity to determine whether an unambiguous covenant not to compete, reasonable as to time and area, bargained for and agreed to between employer and employee as a condition of employment, applicable to a highly competitive personal service industry should be enforced when the facts show clear and unequivocal violation of the terms of the covenant.

I. CONTENTIONS OF PARTIES

On September 11, 1995, Plaintiff, COPI of Delaware, Inc. ("COPI(DE)"), filed a Verified Complaint and Motion for a Temporary Restraining Order against Defendants Kenneth G. Kelly ("Kelly"), Charles Rossiter (Rossiter"), and Smart Business Systems, Inc. ("SBS"). The individual Defendants were former employees of COPI(DE) who began working for SBS immediately after their resignation from COPI(DE) in June, 1995. In its Verified Complaint, Plaintiff alleges: (1) Kelly violated his employment contract with COPI; (2) SBS tortiously interfered with COPI's prospective economic advantage; (3) SBS engaged in unfair trade practices; (4) SBS tortiously interfered with Kelly's performance of his obligations under his employment contract with COPI; (5) Defendants misappropriated COPI's trade secrets; (6) Kelly and Rossiter breached their fiduciary duties to COPI; (7) Kelly and Rossiter usurped corporate opportunities from COPI; and (8) Defendants

[end - revised page - December 3, 1996]

engaged in a civil conspiracy against COPI.

In the Verified Complaint, Plaintiff demanded: (1) a temporary restraining order, a preliminary and a permanent injunction; (2) an accounting of all sales Defendants made to COPI's customers and entry of judgment in favor of COPI in the amount COPI lost in profits on such

sales plus pre and post judgment interest; (3) an award against Defendants jointly and severally for the actual and consequential damages COPI suffered, including costs and attorneys' fees; and (4) any further relief this Court finds appropriate. This Court granted the Temporary Restraining Order on September 22, 1995.

On February 29, 1996, Kelly and SBS filed a Counterclaim and Motion for Preliminary Injunction alleging COPI(DE) was engaging in deceptive trade practices. They also asked for a stay of further proceedings. This opinion addresses only the equitable relief requested - Plaintiff's request for a permanent injunction and the Counterclaim's Motion for Preliminary Injunction. I decline to employ the "clean-up" doctrine and adjudicate the issues at law. The parties may look to a contemporaneous Superior Court action to determine what monetary damages, if any, are available to Plaintiff and/or Counterclaiming Defendants. I will address only the arguments relevant to the equitable remedies sought.

II. FACTUAL BACKGROUND

This is largely a case hinging on credibility of witnesses. After listening to the testimony at trial and reviewing the paper trail, these are my findings of fact. Considering the credibility of the parties on the witness stand, I have endeavored to assemble the most accurate factual account I can glean from a veritable jungle of alleged facts and purported legal issues advanced by the parties.

COPI(DE) is a Delaware corporation with its principal place of business in New Castle, Delaware. COPI(DE) sells and services reprographic office equipment which Konica Business Machines USA, Inc. ("Konica") manufactures. COPI(DE) is affiliated with Communication Office Products, Inc. ("COPI"), the "parent" of COPI(DE). COPI sells and services Konica reprographic office equipment in Pennsylvania. Richard Sgrignoli ("Sgrignoli") has always been the sole director of COPI(DE). Herbert Rudd ("Rudd") was president at all times relevant to this suit. Kelly was vice-president of COPI(DE) until June 6, 1995. Kelly, Rudd, Sgrignoli, and COPI were shareholders of COPI(DE). COPI employed Rossiter for nineteen years.

Since its formation in June, 1995, SBS has been a direct competitor of COPI(DE). Richard McDaniel ("McDaniel") owns SBS. After McDaniel formed SBS, Kelly and Rossiter left COPI(DE) to join SBS. They acted in the same capacity as they had at COPI(DE) - essentially, Kelly was a salesman, and Rossiter was a repair consultant for reprographic machinery.

Kelly joined COPI in December, 1992 after working for another Delaware competitor of COPI(DE), Hilyard's, Inc. ("Hilyard's"). The principals of Hilyard's dismissed Kelly in November, 1992 because they suspected he had compromised his loyalty to the company. Before the two week notice of dismissal had elapsed, Sgrignoli hired Kelly as COPI's sales manager for western Montgomery County, Pennsylvania.

Sgrignoli asked Kelly to sign an employment agreement which Kelly reluctantly did sign. It was a standard form which Sgrignoli required all COPI employees to sign. Kelly began working for COPI on December 12, 1992. On this date, Kelly filled out and signed an application for employment. Kelly's compensation package consisted of the following: an annual draw of $50,000 against commissions with the eligibility to earn a $10,000 bonus. This bonus represented two percent of his $500,000 quota on the sale of equipment, accessories, service, and supplies Kelly actually sold. COPI would pay the bonus, if any, by February 28, 1994 for the 1993 calendar year.

In the fall of 1993, Sgrignoli and Rudd included Kelly in their decision to expand their business into Delaware. Their plan led to the creation of COPI(DE). Sgrignoli, Rudd, and Kelly each agreed to purchase twenty percent of COPI(DE) stock. COPI itself would hold forty percent. They agreed to condition the issue of stock on the execution of a shareholders' agreement. Sgrignoli, Rudd, and Kelly each paid $10,000. COPI contributed "other property, managerial experience and support." *Plaintiff's Post Trial Brief* at 8. Kelly took responsibility for preparing a market plan and for identifying a location to conduct business in Delaware.

Sgrignoli, Rudd, and Kelly collectively selected Konica as their equipment supplier for their new business entity. COPI, not COPI(DE), contracted with Konica to take advantage of COPI's strong credit. Apparently, Konica knew COPI would assign the contract and delegate its responsibilities to COPI(DE). Konica accepted COPI's application and marketing plan. On March 8, 1994, Sgrignoli incorporated COPI(DE) in Delaware.

Sgrignoli, Rudd, and Kelly agreed Kelly's compensation package for his work with COPI(DE) would remain the same as his compensation package with COPI. They agreed the same general terms and conditions in Kelly's COPI agreement would control his employment with COPI(DE). In addition, Sgrignoli and Rudd discussed the possibility Kelly could receive the $10,000 bonus or receive ten percent of COPI(DE) stock, if he met his sales quota. Sgrignoli and Rudd rejected such an arrangement. They agreed Kelly would remain an employee of

COPI, servicing certain accounts in his COPI territory in Pennsylvania, while concurrently working for COPI(DE).

Kelly was not as successful a salesman as Sgrignoli and Rudd expected. In part, his poor sales may have resulted from a conflict of interest. While Kelly worked for COPI and COPI(DE), he ran Kelly Computer Services. He also provided assistance to two businesses whose principals were his friends. Kelly arranged the sublet of an unused portion of COPI(DE)'s business location (with Sgrignoli's permission), interviewed personnel, installed computers, consulted and provided advice with respect to telemarketing activities to assist the two businesses. Plaintiff claims it was aware of his "moonlighting." Sgrignoli advised Kelly of his lackluster sales performance in July, 1994. At that time, Sgrignoli told Kelly he was applying the commissions against Kelly's growing deficit with COPI. Kelly agreed.

On August 9, 1994, Kelly met with Sgrignoli and Rudd to discuss his 1993 bonus. Rudd agreed to go back and recalculate Kelly's sales to determine if a bonus was appropriate. At the meeting, Kelly proposed he purchase COPI(DE) by buying out the other principals. Sgrignoli and Rudd informed Kelly they were not interested in selling. Kelly growing increasingly disenchanted with his situation at COPI/COPI(DE) and determined to leave, secretly recorded the conversation with a miniature tape recorder.

In early 1995, McDaniel met with Frank Modesto ("Modesto"), a long-time friend and Konica representative, to discuss a Konica distributorship. Modesto apprised McDaniel of the requirements for owning such a business including the need for a salesman and a service manager. Shortly thereafter, McDaniel called Kelly and Rossiter to discuss these issues. Kelly was a salesman and Rossiter a service manager for COPI at the time. At McDaniel's request, Kelly prepared a business plan and financial statements for submission to Konica for SBS. He also helped McDaniel complete the formal Konica application. In May, 1995, Kelly did a final review and approval of the completed forms McDaniel was submitting to Konica. The application did not specify the names of the salesman and service manager, but it did describe persons remarkably, and hardly coincidentally, similar to Kelly and Rossiter. Kelly signed McDaniel's name to these documents, dated them May 17, 1995, and mailed them to Modesto. Modesto sent the package to a regional manager for Konica, Harry Hecht. Throughout, Kelly remained an employee at COPI and corporate officer and employee of COPI(DE). During this application process, Kelly was soliciting a contract with the State of Delaware on behalf of COPI(DE).

On June 6, 1995, Kelly resigned from COPI and COPI(DE). He gave two weeks notice, but the companies released him on June 9, 1995. Kelly left with some COPI/COPI(DE) information which may have included prospect lists, lead generation forms, and pricing information. Kelly signed the Konica Dealership Agreement on June 12, 1995. The next day, Kelly filed a complaint in Superior Court seeking a judgment declaring the COPI/COPI(DE) restrictive covenants to be unenforceable. A temporary restraining order issued from this Court on September 22, 1995 precluding Kelly from using any COPI/COPI(DE) trade secret information with which he may have absconded.

On June 12, 1995, McDaniel offered Rossiter a job with SBS. On June 15, 1995, Rossiter, already unhappy at COPI(DE), resigned from COPI(DE). There was no covenant not to compete in Rossiter's former contract with COPI nor current contract with COPI(DE). The record indicates Rossiter had become dissatisfied with his work situation at COPI. His last day was June 30, 1995. He informed Sgrignoli and Rudd he was moving to another unspecified position in Dover, Delaware.

In June, 1995, SBS began doing business in New Castle County, Delaware. At this time, Konica had only authorized SBS to conduct business in Kent and Sussex Counties, Delaware and in Cecil County, Maryland. Sometime thereafter, COPI's largest customers - MBNA, Comcast, Gerhart's, Hospital Billing, and Girls, Inc. defected to SBS.

In July, 1995, SBS began marketing its cost-per-copy plan as "SmartPlan." In December, 1995, COPI(DE) began marketing its cost-per-copy plan in Delaware under the name "SmartCopy."

III. CONCLUSIONS OF LAW

1. Plaintiff's Request for a Permanent Injunction

I granted a Temporary Restraining Order against Kelly, SBS, and Rossiter on September 22, 1995. I now convert that order into a Permanent Injunction against Defendants.

(a) Kelly

[1] Plaintiff insists it is entitled to a permanent injunction to enjoin Kelly from violating the restrictive covenants in his employment agreement and from misappropriating trade secrets and interfering with Plaintiff's current and prospective customers. To merit a permanent injunction, a plaintiff must show: (1) actual success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an

injunction outweighs the harm to the opposing party if the court issues the injunction. ***Draper Communications, Inc. v. Delaware Valley Broadcasters, L.P.***, Del. Ch., 505 A.2d 1283, 1288 (1985).

[2] Plaintiff has met its burden. The evidence shows the existence of a valid employment contract containing an enforceable covenant not to compete and other restrictive covenants between COPI(DE) and Kelly. Unquestionably, Kelly worked for COPI and COPI(DE). Unequivocally, Kelly conducted business in violation of the restrictive covenants, e.g., solicitation of clients within the geographic radius which the restrictive covenants covered and his appropriation of COPI trade secret information for use at SBS.

The evidence shows his employment agreement with COPI(DE) mirrored that between him and COPI. Kelly readily admits he signed an employment contract with COPI, although he avers the employment contract Plaintiff produced at trial containing substantially the same terms as those with which he agreed to be a forgery. His argument that follows lacks even a semblance of credulity.

[3-4] Assuming *arguendo*, the employment contract is a forgery, somewhere there exists the employment agreement Kelly did sign. Kelly ludicrously suggests the agreement offered should not be enforced because he agreed to a restriction of 25 miles, not the 20 contained in COPI's averred contract. The evidence indicates Sgrignoli and Rudd conditioned Kelly's employment with COPI(DE) on a restrictive covenant, and Kelly knew it. He admitted he agreed to a more expansive geographical area. Whether its radius spanned 20 miles or 25 miles is irrelevant. Either distance is reasonable for this type of contract. *See* ***Gas Oil Prods., Inc. of Del. v. Kabino***, Del. Ch., C.A. No. 9150, Berger, V.C. (Oct. 13, 1987), Letter op. at 3. The two year restriction prohibiting Kelly from soliciting COPI or COPI(DE) customers is also reasonable. ***C. Edgar Wood, Inc. v. Clark***, Del. Ch., C.A. No. 883-K, Allen, C. (Jan. 21, 1986), Mem. op. at 7-8. After weighing all testimony regarding this issue, I must find the existence of a valid employment agreement containing a restrictive covenant between COPI and Kelly. Because this agreement exists and is valid as a matter of law, the parallel employment agreement between COPI(DE) and Kelly is also valid.[1] Kelly's

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[1]Even the absence of a written employment agreement between COPI(DE) and Kelly does not preclude Plaintiff from establishing an employment agreement between COPI(DE) and Kelly. There is an exception to the Statute of Frauds for employment contracts which a person may complete within one year. *See* 6 *Del.C.* § 2714; ***Brandner v. Delaware State Housing Auth.***, Del. Ch., 605 A.2d 1, 1-3 (1991).

Conceivably, COPI(DE) management, i.e., Sgrignoli and Rudd, could dismiss Kelly within one year of hiring him. Thus, Kelly's employment with COPI(DE) could terminate

resignation letter also suggests a separate employment agreement with COPI(DE). This writing specifically indicates his resignation from *both* COPI and COPI(DE).

The employment agreement between Kelly and COPI(DE) is valid. The terms of the restrictive covenant are reasonable. Accordingly, the employment agreement holds Kelly to his word. I enjoin him from violating the restrictive covenants and from using COPI's confidential trade secret information consistent with the September 22, 1995 Temporary Restraining Order.

(b) Rossiter

Plaintiff accuses Rossiter of breaching his fiduciary duty to the corporation mandating a permanent injunction against him. I disagree, at least in substantial part.

[5-7] Officers and directors of a corporation owe a fiduciary duty to shareholders. A majority shareholder or a shareholder who exercises control over the business affairs of the corporation may also owe a fiduciary duty to the other shareholders. *Zirn v. VLI Corp.*, Del. Ch., C.A. No. 9488, Hartnett, V.C. (Jul. 17, 1989), Mem. op. at 11. An employee who is privy to material information and joins wrongdoers in misconduct may owe such a duty. *Id.*

[8] No such situation applies to Rossiter. COPI(DE) employed Rossiter. He ran the service department. He did not own stock in COPI(DE). He did not participate in management and has never been an officer or director of COPI(DE). Thus, he owed no fiduciary duty to COPI(DE). Even though Rossiter was a COPI(DE) employee, the evidence does not indicate he had knowledge of material information Kelly and SBS used to Plaintiff's detriment. Plaintiff has not convinced me Rossiter exported trade secrets from COPI for his own use and to the benefit of SBS. However, to the extent Rossiter does have confidential COPI information, he is permanently enjoined from its use consistent with the September 22, 1995 Temporary Restraining Order.

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within one year and would fall outside the Statute of Frauds. Even if the length of the restrictive covenant - *two* years after termination - runs afoul of the Statute of Frauds, the balance of the contract restrictions would not. The balance of the employment agreement not in conflict with the Statute of Frauds could survive, e.g., no use of COPI(DE)'s trade secret information.

(c) SBS

[9] To the extent SBS is utilizing confidential, proprietary, and trade secret information Kelly appropriated from COPI in breach of his employment agreement, I grant Plaintiff's request to enjoin SBS from interfering with COPI's business opportunities consistent with the September 22, 1995 Temporary Restraining Order. However, I cannot patently preclude SBS from conducting business with COPI's customers. This would be an overly restrictive burden on SBS's ability to conduct business in Delaware. Additionally, it would punish innocent parties - COPI's customers. COPI's customers should have the opportunity to contract with a product and service provider that offers the best combination of price and service. I will not enter an order impinging on that right. I merely permanently enjoin SBS from utilizing any of COPI's confidential information in entering a business transaction with COPI's customers.

2. Counterclaim Plaintiffs' Motion for a Stay

I deny the request for a stay. Deciding the equitable issues will not impinge on Kelly's and SBS's right to a jury trial on their counterclaim. I leave all issues of law and fact relevant to the damages claims for the Superior Court to decide - both Plaintiff's and Counterclaimant's claims. A resolution of the breach of the covenant not to compete will not affect Kelly's Superior Court action.

3. Counterclaim Plaintiffs' Motion for a Preliminary Injunction

(a) The General Law

[10] The Counterclaiming Defendants seek a preliminary injunction against COPI(DE) on the theory it has violated and continues to violate The Delaware Deceptive Trade Practices Act ("The Act"), 6 *Del.C.* § 2531 *et. seq.* The gravamen of the Counterclaim is (1) COPI(DE) represents itself as an authorized dealer of Konica products, and (2) it uses the term "SmartCopy" to confuse customers to the detriment of SBS and Kelly. The Act provides for injunctive relief to protect a person whom deceptive trade practices may harm. 6 *Del.C.* § 2533(a).
[11] The relevant portions of Section 2532 of The Act are:

> (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

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> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
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> ***
>
> (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have, or that a person has sponsorship, approval, status, affiliation, or connection that he does not have;
>
> ***
>
> (12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

[12] A court will grant a preliminary injunction if a plaintiff shows: (1) there is a reasonable probability of success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction. *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1341 (1987).

(b) COPI(DE)'s Status as an Authorized Konica Products Dealer

Counterclaimants have not convinced me COPI(DE) has engaged in deceptive trade practices by representing itself as an authorized Konica products dealer. Counterclaimants assert COPI(DE) is not the authorized Konica dealer it holds itself out to be because Konica has no such agreement with COPI(DE). I disagree.

[13] COPI(DE) has no *written* agreement with Konica qualifying COPI(DE) as an authorized dealer. COPI does, however. COPI has assigned its status as an authorized Konica products dealer to its affiliate, COPI(DE). Counterclaimants assert any such assignment is invalid