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SHORT FORM ORDER

INDEX
NO.: 15391-02

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-3-07
SUBMITTED: 12-5-07
MOTION NO.: 030 -MG
031-MG
032-MG
033-MD; CASE DISP

STEPHEN B. AUERBACH, individually as a director and derivatively on behalf of CELLULAR DESIGN CORP.,

Plaintiff,

-against-

SAMUEL J. KLEIN, TELECOM COMMUNICATIONS, INC., RISK INVESTIGATIONS, INC., RICHARD KRANTS a/k/a RICHARD KRAMPS a/k/a RICHARD KRANTZ, HRK ASSOCIATES LLC, and SPECTRUM INITIATIVES, INC.,

Defendants.

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Upon the following papers numbered 1 to 158 read on these motions for summary judgment ; Notice of Motion and supporting papers 1-5; 6-8; 9-13; 68-114 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 14-55; 115-126; 127-133; 134-137 ; Replying Affidavits and supporting papers 56-62; 63; 64-67; 138-149 ; Other 150-152; 153-155; 156-158 it is,

ORDERED that the motion by the defendants Telecom Communications, Inc., and Risk Investigations, Inc., for summary judgment dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the motion by the defendant Samuel J. Klein for summary

judgment dismissing the complaint insofar as it is asserted against him is granted; and it is further

ORDERED that the motion by the defendants Richard Krants, HRK Associates, LLC, and Spectrum Initiatives, Inc., for summary judgment dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the motion by the plaintiff for partial summary judgment in his favor is denied.

The defendant Samuel Klein and the plaintiff, Stephen Auerbach, are each 50% shareholders of Cellular Design Corp. (hereinafter "CDC"), and they are its only officers and directors. CDC was engaged in the business of providing two-way radio (repeater) services to customers such as taxicab companies and other businesses with vehicles in the field that needed to communicate with each other and with their home base. CDC did not sell radios, telephones, or other equipment. Rather, it obtained licenses from the Federal Communications Commission (hereinafter "FCC") for the operation of communication stations on 900 MHZ frequencies and then constructed and maintained those stations.

Auerbach was the sole shareholder of Central Radio Communications Corp. (hereinafter "CRCC"), which was in the business of selling, installing, and servicing two-way radio systems, security video systems, pagers, mobile telephones, office telephone systems, and cellular telephones. CRCC did not provide its customers with repeater services, but referred them to such third-party providers as AT&T, CellularOne, and NorComm. After the formation of CDC, Auerbach referred his CRCC customers to CDC for repeater services.

Auerbach was primarily responsible for obtaining users for CDC's repeater system through his sales and service activities at CRCC. Klein, on the other hand, was primarily responsible for obtaining FCC licenses and for constructing and maintaining CDC's licensed repeater facilities. This arrangement continued until the mid-1990's. By 1996, although CDC had approximately 70 FCC licenses at nine separate sites and hundreds of customers, the relationship between Auerbach and Klein had begun to deteriorate. According to Klein, Auerbach was advancing his own business at the expense of CDC. In 1996, Auerbach (through CRCC) was designated as an authorized Nextel representative. Nextel was a competitor of CDC. Klein claimed that Auerbach promoted the sale of Nextel's services rather than those of CDC, thereby competing with CDC, because Auerbach was paid for placing and keeping customers on Nextel's radio communications network. At that time, the parties discussed a buy-out, but could not agree on terms. In 1999, they sold most of CDC's assets, which primarily consisted of FCC radio licenses, to Nextel.

In 1998, Klein commenced an action pursuant to Business Corporation Law § 720 against Auerbach, CRCC, and CDC alleging, inter alia, breach of fiduciary duty, unjust enrichment, tortious interference with contract, and tortious interference with prospective economic advantage. In their answer, Auerbach, CRCC, and CDC asserted 18 counterclaims for breach of fiduciary duty, conversion, and unjust enrichment, among other things. The motions by Klein and the defendants Auerbach and CRCC for summary judgment in that action were decided by orders dated February

5, 2008.

Also in 1998, Klein commenced a proceeding for the judicial dissolution of CDC and for the appointment of a receiver. Auerbach moved to dismiss the petition or, alternatively, for an order staying the dissolution and appointing a temporary receiver. By an order dated August 13, 1999, this court (Klein, J.) stayed the dissolution proceeding pending the outcome of the aforementioned action and appointed then Senator James J. Lack as a temporary receiver. By the time Senator Lack assumed his duties in November 1999, the sale to Nextel had been completed. Klein then moved to renew his application to dissolve CDC. By an order dated July 9, 2001 (Klein, J.), CDC was judicially dissolved, and C. Stephen Hackeling was appointed as the receiver to complete the dissolution and to wind up the business affairs of CDC. Hackling served as CDC's receiver from August 20, 2001, until May 1, 2002, when he was relieved by court order. Although a new receiver was not appointed, the receiver's counsel, John Calcagni, Esq., continued his services to CDC as a manager, facilitator, and mediator at the request of the parties until either a new receiver was appointed or the liquidation was completed.

After the sale to Nextel, CDC remained the record holder of four FCC licenses: two atop the Empire State Building (hereinafter "the ESB licenses") and two in Noyack, New York (hereinafter "the Noyack licenses"). In January 2002, Nextel advised CDC's regulatory counsel, Elizabeth Sachs, Esq., that it was interested in purchasing the two ESB licenses for $350,000 each. On February 15, 2002, Nextel sent a proposed contract to Sachs, who forwarded it to Calcagni, Hackeling, and CDC's principals, Auerbach and Klein.

FCC regulations require that a licensed station be placed in operation (i.e., constructed) within 12 months of the date of the granting of the license and that, once it is constructed, the station not be taken out of operation (i.e., deconstructed) for any period of 12 consecutive months (*see*, 47 CFR 90.155 & 90.157). Licensed stations that are not constructed within the requisite 12-month period are automatically cancelled and must be returned to the FCC (*see*, 47 CFR 90.155). Likewise, licensed stations that have not operated for one year or more are automatically cancelled (*see*, 47 CFR 90.157), and the licensee is required to notify the FCC of the discontinuance of operations (*see*, 47 CFR 1.955[a][3]).

At some point (it is unclear exactly when), Auerbach and Klein became aware that CDC's remaining equipment atop the Empire State Building had been taken down on or about April 10, 2001, and never reinstalled. It seems that, after Nextel acquired CDC's stations in 1999, it hired a contractor to remove and replace the ESB repeaters that it had acquired from CDC. The contractor removed both Nextel's and CDC's repeaters, thereby deconstructing CDC's two remaining stations at the Empire State Building site. The repeaters were not reinstalled because they could not be found. Early in 2002, Sachs tried to convince Nextel to reconstruct CDC's ESB repeaters and asked Nextel to search its records for evidence concerning their construction and operation after November 1999, when the sale to Nextel closed. In an e-mail dated March 18, 2002, Sachs advised Calcagni that Nextel had no information whatsoever about the construction/operational status of CDC's two ESB channels and suggested that he discuss with Klein and Auerbach whether they were prepared to reconstruct the stations themselves since Nextel was not willing to do it. Calcagni subsequently discussed with Klein, Auerbach, their attorneys the

issues raised by the deconstruction of the ESB stations and its effect on the validity of the ESB licenses. In a memorandum to Klein, Auerbach, and their attorneys dated March 28, 2008, Calcagni summarized those discussions as follows:

> As I discussed with each of you I believe it is in the best interests of the parties to immediately reconnect the ESB channels that Nextel is considering purchasing for $700,000. As I understand it, there are two periods to be considered when determining the validity of the ESB licenses: the first is the 12 month period beginning at approximately April 10, 2001, when we have reason to believe the channels were taken out of service, and the second is the several days between today's date and April 10, 2002.
>
> By reinstalling the repeaters, we would be, in effect, "buying" time to investigate whether the licenses were being used during the above two periods.
>
> Mr. Auerbach believes there is a possibility the repeaters were being used between March 28, 2001 and April 10, 2001. However, in order to investigate further, records at CDC's offices as to who has been historically using these channels would need to be reviewed. Once the identity of the users is determined, the intent is to contact them to determine whether they were using the channels during the relevant time period between March and April 10, 2001.
>
> By putting the channels back into operation at this time, we would prevent the lapse of both of the relevant time periods. Mr. Auerbach is willing to pay the full cost (approximately $400 to $500) to reconnect the repeaters. As time is of the essence in this matter, please advise.

By an e-mail dated April 9, 2002, Sachs advised Klein, Auerbach and their attorneys that the ESB repeaters had been reinstalled. She also advised them that, assuming the ESB stations were operational until April 10, 2001, they would be operational again if CDC's employees or agents actually transmitted on them by the end of the day on April 10, 2002. However, in a subsequent e-mail dated April 12, 2002, Sachs expressed concern about the validity of the ESB licenses:

> The more critical issue is whether CDC...[is] in a position to represent to the FCC that the authorizations for these stations remain valid and, therefore, assignable. I assume Nextel's concern is simply to ensure that it is indemnified in the event any problem arises with the licenses so that it doesn't end up out of pocket. However, as I have explained in previous correspondence, it is my opinion that any application for assignment constitutes an implicit, affirmative

> representation to the FCC that the applicant has a good faith basis for believing the license it is assigning is valid. Specifically, that means that the station was timely constructed and has not been out of operation for twelve consecutive months. Since the stations were physically reconstructed on Monday, and I assume operations commenced shortly thereafter, the question is whether the principals can make a good faith representation that the stations had been in operation as of April 9th or 10th of 2001 which would mean they had not been out of operation for a year. Just a reminder -- the issue is not simply whether the transmitters were constructed, plugged in and capable of operation. The FCC rules require that the stations be operational, which means they had to be in use with transmissions between users on them.

By a memorandum dated April 12, 2002, Calcagni advised Auerbach, Klein and their attorneys that Nextel had imposed a deadline of April 16, 2002, regarding a signed contract for the ESB licenses. In light of the deadline, Sachs arranged a conference call with Auerbach, Klein, their attorneys, and Calcagni for the purpose of determining whether CDC could make the requisite representations to Nextel and the FCC. Klein had previously sought a written statement from Auberbach regarding the basis for his belief that the ESB channels were, in fact, valid. Following that call, Auerbach sent the following letter[1] dated April 15, 2002, to Sachs:

> This letter is designed to give you a greater level with the pending deal with Nextel and pursuant to your request, I wish to advise you that on April 9, 2002, and while in my Ford pickup truck, I communicated with another mobile and the base using [the ESB] frequencies...in order to meet the requirements of the Federal Communications Commission, thereby keeping these licenses valid after the sites were disabled and then recently enabled again by Nextel.
>
> Also, please be advised that I have transmitted in the manner stated above, on these frequencies multiple times within the period from November 1999 when Nextel took over the sites up until April 10, 2001, when I discovered that Nextel had dismantled our equipment in error.
>
> These licenses are valid and have been maintained and are in compliance with the requirements of the FCC.

In an e-mail to Auerbach, Klein, their attorneys, and Calcagni dated April 16, 2002, Sachs expressed the following legal opinion regarding the ESB licenses:

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[1] The court notes that this letter is not in affidavit form.

> After our discussions yesterday and having given the matter considerable thought since then, my recommendation is that CDC...not pursue assignment of these two channels to Nextel at this time. I believe the very difficult circumstances during the critical time period of April 8 - 10, 2001, make it essentially impossible for the [company] or [its] shareholders to make the affirmative representation regarding the validity of the licenses required both by the Nextel contract and by the FCC's licensing processes. I make this recommendation recognizing that it is possible that the stations were operational at that period. Unfortunately, in my opinion, there is not sufficient certainty as to the time of use to support an assignment of the licenses.
>
> As an alternative, the shareholders may wish to consider an agreement whereby each would attempt to relicense one of these channels. I believe each independently has business activities that would support an application for 900 MHZ spectrum, although it is likely that neither has sufficient activities to justify exclusive use of a channel. Under this approach, each would file an application with a frequency coordinator specifically identifying the targeted license/frequency and would simultaneously file cancellation notification for the existing licenses with the FCC. The coordinator can submit the application to the FCC as soon as the cancellation appears in ULS,[2] and perhaps even earlier based on a recent FCC decision, and, upon grant, the shareholder will have a year in which to place the new authorization in operation.
>
> There clearly are risks associated with this approach. First, it is possible, although not likely, that a third party's application would be ahead of those filed by the shareholders and would be coordinated for one or both of the channels once they become available. That risk is relatively remote unless someone else has targeted these same licenses since the lack of spectrum in NY means that few, if any, speculative applications are filed. The more difficult problem is justifying exclusive use of the channels, but both shareholders are familiar with the FCC's requirements and may be able to identify entities that collectively could meet the loading requirement. Finally, it is always possible that the value of the channels will diminish over time, although that has not generally been the case.

In a subsequent e-mail to Auerbach, Klein, their attorneys, and Calcagni dated April 18, 2002, Sachs advised them as follows:

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[2] ULS is the FCC's electronic database.

> I received a message from Nextel this afternoon asking where CDC was on the proposed transaction. Unless I hear otherwise from someone by noon tomorrow, I intend to notify Nextel that CDC...[does] not intend to proceed with the transaction and that the negotiations are being terminated.
>
> We will then need to cancel the two call signs involved...as well as...[the] 900 MHZ licenses in Noyack licensed to CDC....The two latter stations had been identified as potential sale properties on the earlier license inventory, but I believe they have the same construction/operational issues as the other two stations. Nextel declined to make an offer on them in any event.
>
> * * *
>
> Again, absent a timely objection, I intend to notify Nextel tomorrow that there will be no transaction relating to these licenses.

It is unclear from the record exactly when the transaction with Nextel for the sale of CDC's two remaining ESB licenses was terminated. In e-mails to Auerbach, Klein, their attorneys, and Calcagni dated May 28 and 31, 2002, Sachs suggested that they might consider cancelling the licenses "in favor of a Nextel designee, with payment predicated on their designees getting licenses for exclusive use of the channels." According to Sachs, this arrangement would avoid the regulatory issue of the assignability of the licenses.[3]

In April 2002, Klein and Auerbach discussed the possibility of Auerbach purchasing Klein's interest in CDC as a way of settling the 1998 litigation. To that end, they entered into a so-called standstill agreement, which was memorialized by a letter dated April 26, 2002, from Auerbach's attorney to Klein's attorney and provided, in pertinent part, as follows:

> Pursuant to our telephone conference this morning, this letter confirms that neither Sam Klein nor Steve Auerbach shall take any action with respect to the FCC licenses and the frequencies owned of record or beneficially by CDC and its affiliates and associates, including but not limited to, any steps to cancel such licenses and/or the frequencies while settlement discussions continue, provided

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[3] In this arrangement, which is known as a "surrender and get," a party, prior to cancelling a license, arranges for another party to submit a new application for the frequency when it becomes available after cancellation in exchange for compensation. The advance knowledge of the impending cancellation enables the new licensee to submit an application with a frequency coordinator for the soon-to-be available frequency before anyone else knows about it and, thus, to be the first in line for the frequency when it is cancelled.

> either party may terminate settlement discussions by written notice to opposite counsel, at any time.

By a subsequent letter dated April 29, 2002, Klein's attorney advised Auerbach's attorney as follows:

> [O]ur negotiations with respect to reaching at least an agreement in principal on the proposed buy-out must be concluded before the close of business (5:00 PM) tomorrow, April 30, 2002. Those negotiations shall be deemed abrogated, and of no continuing force and effect, if we do not have a written memorandum between us evidencing an agreement in principal at that time, without any further notice or advice of any kind from this office. Thus, the absence of such a writing will also abrogate the continuing validity and effect of [the] letter agreement...dated April 26, 2002.

Auerbach's attorney responded by a letter dated April 29, 2002, setting forth the terms upon which Auerbach was willing to settle and advising Klein's attorney that Auerbach's offer would expire on Tuesday, April 30, 2002, at 4:00 p.m. Although Klein and Auerbach reached an agreement in principle prior to April 30, 2002, subsequent attempts to reduce it to writing failed. On June 4 and 6, 2002, respectively, Klein electronically filed the requisite FCC forms to cancel CDC's ESB and Noyack licenses, which resulted in those frequencies "falling off" the FCC database. When a frequency "falls off" the FCC database, it becomes available to the first person to apply to the FCC to acquire it.

Four months earlier, the defendant Richard Krants had filed applications with ITA, a frequency coordinator,[4] to monitor the CDC licenses in order to acquire them if and when they "fell off" the FCC database. Krants was a principal of the defendant Spectrum Initiatives, Inc. (hereinafter "Spectrum'), a spectrum acquisition company is in the business of finding available frequencies to be used by people or entities that need two-way radio service. In the fall of 2001, Krants was contacted by John Bos of the defendant Telecom Communications, Inc. (hereinafter "Telecom"). Telecom had a customer, the defendant Risk Investigations, Inc. (hereinafter "Risk"),[5] who needed to upgrade its communication system. Krants agreed to try to find frequencies that would satisfy Risk's requirements. When he later became a principal of the defendant HRK Associates, LLC (hereinafter "HRK"), HRK took over and completed the frequency acquisitions for Risk. Krants was aware of CDC's regulatory problems and pending dissolution. In fact, Spectrum had made an offer to purchase one of CDC's ESB frequencies in March 2000. In June 2002, ITA acted on the notices of cancellation filed by Klein and filed applications with the FCC

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[4] Frequency coordinators act as intermediaries between the public and the FCC in a variety of ways. For example, they monitor the FCC database to determine when licenses become available and then file applications on behalf of their customers to acquire such licenses.

[5] Risk and Telecom were third-parties that were unrelated to CDC or any of its principals.

for CDC's licenses on behalf of Risk and Telecom. Although others, including Nextel, were "perched to file" applications to acquire CDC's licenses, ITA was the first to file. Accordingly, the FCC granted Risk's applications for the two ESB licenses and one of the Noyack licenses on August 5 and 7, 2002, respectively. The FCC granted Telecom's application for the other Noyack license on August 7, 2002. Risk eventually sold the two ESB licenses and the Noyack license to Nextel in September 2006. The remaining Noyack license is still held by Telecom.

Shortly after Klein cancelled CDC's ESB and Noyack licenses in June 2002, Auerbach commenced an action against Klein, Telecom, and Risk pursuant to Business Corporation Law §§ 720 and 626. The first cause of action alleges that, by cancelling the ESB and Noyack licenses, Klein breached the standstill agreement, breached his fiduciary duty to CDC, wasted CDC's corporate assets, and diverted a corporate opportunity to his personal friends at Risk and Telecom. The second cause of action alleges that Risk and Telecom intentionally induced Klein to breach the standstill agreement and tortiously interfered with the prospective economic advantage of CDC. The third cause of action alleges that the plaintiff is entitled to a constructive trust on the licenses acquired by Risk and Telecom and any profits realized therefrom.

In 2005, Auerbach commenced a second action pursuant to Business Corporation Law §§ 720 and 626 against Krants, HRK, Spectrum, and Klein. The first cause of action alleges Klein and Krants conspired to transfer the ESB and Noyack licenses, which were valuable assests of CDC, to Krants or his nominees in breach of Klein's fiduciary duty to CDC. The second cause of action alleges that Krants intentionally induced Klein to breach the standstill agreement. The third cause of action alleges that Klein and Krants conspired to deprive CDC of other valuable assets and to divert opportunities from CDC to Krants and his nominees, including HRK and Spectrum, in breach of Klein's fiduciary duty to CDC. The third cause of action further alleges, inter alia, that Klein knowingly permitted valuable applications for FCC licenses to lapse; cancelled otherwise valid licenses and arranged for Krants and others to acquire them; colluded with Krants to transfer CDC licenses to Krants or his nominees, including Spectrum and HRK; provided Krants with confidential information; and transferred other things of value to Krants, entities that Krants controlled, or entities with which Krants was affiliated. The third cause of action also contains vague allegations of fraud and embezzlement and seeks an accounting. Finally, the fourth cause of action alleges that the plaintiff is entitled to a constructive trust on "any cancelled or abandoned licenses" and on any funds derived from the sale thereof.

In response to a demand for a bill of particulars by Krants, Spectrum, and HRK, Auerbach identified the licenses to which his third cause of action referred as licenses in Philadelphia, Selden, and the Baltimore-Washington D.C. area. He also specified that the confidential information to which his third cause of action referred was, inter alia, "information regarding the Airborne bidding process."

By an order of this court dated February 7, 2006, the 2002 and 2005 actions were consolidated. All parties have moved for summary judgment.

In support of his motion for partial summary judgment and in opposition to the defendants' motions, Auerbach argues that Klein, Krants, and others conspired to divest CDC of

the ESB and Noyack licenses, which were valuable CDC assets. Auerbach contends that Klein deliberately delayed reconstructing the ESB licenses in order to coordinate their transfer to Risk and Telecom. Auerbach provides the court with the following time-line, which he contends establishes the conspiracy:

> On January 10, 2002, Klein received an e-mail from Sachs advising of Nextel's interest in purchasing the ESB licenses.
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> On January 15, 2002, Klein received an e-mail confirming that Nextel had offered $350,000 for each of the two ESB licenses.
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> Between January 14 and 24, 2002, there were numerous telephone calls between Klein and Krants.
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> On January 28, 2002, Klein telephoned the frequency coordinator ITA.
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> On February 12, 2002, Risk's ITA applications for CDC's two ESB licenses were formally logged in.
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> On February 15, 2002, the first draft of the Nextel contract was received from Sachs.
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> On March 5, 2002, Klein telephoned Krants, and Krants telephoned Klein and Bos of Telecom.
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> On March 6, 2002, ITA received Telecom's application for one of CDC's Noyack licenses.
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> On April 16, 2002, Sachs suggested a "surrender and get." Klein telephoned SiteSafe and AMTA/UTC.[6] Klein telephoned Krants shortly thereafter.
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> On April 18, 2002, Klein telephoned Risk, transmitted two faxes to UTC/AMTA, and telephoned UTC/AMTA 12 times. Moreover, there were multiple telephone calls between Krants and Klein, and UTC received applications for CDC's two ESB licenses from Risk.
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> On April 19, 2002, Klein telephoned UTC/SiteSafe in the morning.
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> On April 23, 2002, Risk's UTC applications for CDC's two ESB licenses were formally logged in.

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[6] SiteSafe performed coordination services for UTC and AMTA, two frequency coordinators. Risk filed applications with both UTC and ITA for CDC's ESB licenses.

On April 30, 2002, Klein's attorney sent an e-mail to Sachs inquiring whether the FCC would honor a notice of cancellation signed by Klein alone.

On May 28, 2002, Sachs advised Klein that time was running out with Nextel and again suggested a "surrender and get."

On June 3, 2002, Klein telephoned AMTA/UTC in the evening and telephoned Krants 10 minutes later.

On June 4, 2002, Klein telephoned Krants in the morning, cancelled CDC's two ESB licenses, and telephoned Bos of Telecom. Moreover, the Risk applications were coordinated by UTC/AMTA.

On June 5, 2002, ITA filed an application for one of CDC's Noyack licenses on behalf of Risk, and there were several telephone calls between Klein, Bos, and Krants.

On June 6, 2002, Klein telephoned Krants at 7:28 a.m. and 7:29 a..m., canceled CDC's Noyack licenses at 7:34 a.m. and 7:37 a.m.; Krants telephoned Bos at 7:55 a.m., then Klein and Bos; Klein telephoned Krants, and Krants telephoned Risk.

On June 22, 2002, Klein paid UTC for Risk's applications and filing fees.

On June 25, 2002, Auerbach commenced this action against Klein, Risk, and Telecom. There were a flurry of telephone calls between Krants, Bos, and Klein.

On June 26, 2002, UTC posts Klein's payment.

On July 16, 2002, the attorney for Risk and Telcom appeared in court in opposition to Auerbach's application for a temporary restraining order and represented that his clients intended to use the licenses for their business and did not intend to "flip" or sell them.

On July 19, 2002, Krants received the first draft of the Nextel-HRK purchase agreement for the two ESB frequencies.

On August 5, 2002, the FCC granted the ESB licenses to Risk.

On August 6, 2002, there were a flurry of telephone calls between Krants, Bos, and Klein.

On August 7, 2002, the FCC granted the Noyack licenses to Risk and Telecom.

On September 13, 2002, Krants received an e-mail from Nextel confirming that it was not purchasing Risk's ESB licenses from HRK. Krants telephoned Klein.[7]

Preliminarily, the court notes that Auerbach's time-line contains several inaccuracies. For example, Sach's e-mail dated April 16, 2002, does not suggest a "surrender and get," which is defined by Auerbach as "a procedure whereby a party, prior to cancelling a license, arranges for another party to submit a new application for the frequency when it becomes available after cancellation in exchange for compensation." What Sachs suggested in her April 16, 2002, e-mail was that Klein and Auerbach each attempt to relicense one of the ESB channels. The ITA application for one of CDC's Noyack licenses was not filed on June 5, 2002, one day before the Noyack licenses were cancelled, but on June 7, 2002, the day after the Noyack licenses were cancelled. The documentary evidence upon which Auerbach relies (Auerbach affidavit, exhibit R) does not indicate that the Noyack licenses were cancelled at 7:34 a.m. and 7:37 a.m., respectively, on June 6, 2002. Exhibit R annexed to the Auerbach affidavit is a copy of ITA's application for one of CDC's Noyack licenses, which was submitted to the FCC on June 7, 2002. It contains no reference as to when any of the licenses were cancelled. Likewise, the documentary and testamentary evidence upon which Auerbach relies does not indicate that Klein paid UTC for Risk's applications and filing fees (Powell affidavit, exhibits N & O) on June 22, 2002. Rather, it indicates that Robert Collen of Risk Investigations paid for Risk's applications and filing fees. Moreover, the payment was made to SiteSafe, not UTC. The "SiteSafe Transaction Detail" (exhibit O) upon which Auerbach relies contains a heading entitled "Client Information," under which appears the names "Robert Collen" and "Risk Investigations." Peter Nordby of SiteSafe testified that the Risk applications and fees were charged to a credit card whose "number matched this entity's information." Although Klein's telephone number and e-mail address appear after "Risk Investigations," Nordby testified that such contact information was provided by the frequency coordinator, not the client, and he did not know who provided it to the frequency coordinator.

Auerbach's time-line also contains editorial comments on the evidence for which there is no support in the record. For example, Auerbach states, "Klein calls Krants for the first time in many weeks on January 14, [2002] and numerous calls are exchanged to figure out how to deprive CDC of its assets." The record reveals that Klein telephoned Krants twice in December 2001 on December 6 and 10, respectively. Thus, the January 14, 2002, telephone call was not "the first in many weeks." Moreover, there is no evidence in the record as to what Klein and Krants spoke about on that day or any other day. Auerbach states that, on January 28, 2002, "ITA records show that critical information relating to Risk's applications was received and noted into ITA's system files on the same day that Klein called ITA." However, the evidence to which Auerbach refers is same evidence upon which he relies in support of his proposition that Klein paid UTC for

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[7] The ESB licenses and one of the Noyack licenses were eventually sold to Nextel in September 2006.

Risk's applications and filing fees in June 2002. Such evidence has nothing to do with the applications that Risk filed with ITA.

Auerbach comments liberally about the content of telephone calls between Klein, Krants, and others. For example, on April 18, 2002, Klein telephoned Risk. Auerbach states, "Klein calls Risk to discuss UTC/AMTA applications." Likewise, on April 19, 2002, Klein telephoned UTC/SiteSafe. Auerbach states, "Klein calls to confirm receipt of Risk's applications he had filed the prior day." Auerbach also comments liberally about Klein's state of mind and motives. For example, on April 16, 2002, Klein telephoned SiteSafe, AMTA/UTC and Krants after receiving Sach's e-mail suggesting a "surrender and get,"[8] . Auerbach states, "When Klein learns of Sach's suggestion, he fears that Auerbach may effect the sale of the licenses to Nextel unilaterally and interfere with his scheme. He makes plans to insure the success of his scheme by making a back-up set of duplicate applications for the ESB frequencies with UTC/AMTA." On May 28, 2002, Sachs again suggested a "surrender and get," stating that time was running out with Nextel. Auerbach states, "Sach's e-mail makes the conspirators nervous that Nextel will back out and seek licenses elsewhere precipitating the need for Klein to cancel the licenses as soon as possible." These comments find no support in the record. There is no evidence in the record as to the content of any of the telephone calls between Klein, Krants, and others. Moreover, Auerbach's comments about Klein's state of mind and motives are sheer speculation.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Centry-Fox Film Corp.**, 3 NY2d 395, 404). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Center**, *supra*). In view of the foregoing, the court finds that the plaintiff has failed to meet his burden of establishing his entitlement to judgment as a matter of law on any of the causes of action contained in the complaints, including the constructive trust causes of action. Accordingly, the plaintiff's motion for partial summary judgment is denied.

Breach of Fiduciary Duty & Business Judgment Rule

The directors and majority shareholders of a corporation are the guardians of the corporate welfare (*see*, **Alpert v 28 Williams St. Corp.** 63 NY2d 557, 568). As such, they must undertake corporate action in good faith (**Id.** at 568). Generally, the actions of directors and majority shareholders are protected by the business judgment rule, which bars judicial inquiry into the actions of corporate directors taken in good faith, in the exercise of honest judgment, and in the lawful and legitimate furtherance of corporate purposes (*see*, **Auerbach v Bennett**, 47 NY2d 619, 629). Thus, the business judgment rule is necessary to avoid judicial second-guessing of corporate decisions and provides protection to directors when a decision is made in good faith and after reasonable investigation (*see*, **Lippman v Shaffer**, 15 Misc 3d 705, 711; **Shapiro v Rockville**

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[8] As previously noted, Sachs did not actually suggest a "surrender and get" on April 16, 2002.

Country Club, 2 Misc 3d 1002[A], *citing* **Auerbach v Bennett**, supra). Thus, absent a showing of breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though the results show that what the directors did was unwise or inexpedient (*see*, **Jones v Surrey Coop. Apts.**, 263 AD2d 33, 36).

Inquiry into claims of fraud and self-dealing are permitted only when a factual basis exists to support such claims (**Id.** at 36). It is the plaintiff who bears the burden of making the requisite showing that the directors breached their fiduciary duties (**Id.** at 36-37). A plaintiff may overcome the presumption of the business judgment rule by demonstrating that no person of ordinary sound business judgment would say that the corporation received fair benefit (*see*, **Aronoff v Albanese**, 85 AD2d 3, 5). If ordinary businessmen may differ on the sufficiency of consideration received by the corporation, the court will uphold the transaction (**Id.** at 5-6).

The business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen to make the corporate decision on its behalf. Indeed, the rule shields such directors only if they possess a disinterested independence and do not have dual relations that prevent an unprejudicial exercise of judgment (*see*, **Auerbach v Bennett**, *supra* at 631; **Shapiro v Rockville Country Club**, *supra* at *10). A director is interested (1) if he is an officer or director of another corporation involved in the challenged or questioned transaction, (2) if he receives a direct financial benefit from the questioned transaction that is different from the benefit received generally by all shareholders, and (3) even though he has no personal interest in the questioned transaction, he is controlled by a director who has an interest in the transaction (*see*, **Shapiro v Rockville Country Club**, *supra* at *10 [and cases cited therein]). A director is considered to have lost his independence when he is dominated or otherwise controlled by an individual or entity interested in the transaction at issue (*see*, **Higgins v NY Stock Exch., Inc.,** 10 Misc 3d 257, 278).

The court finds that Klein's decision to cancel CDC's ESB and Noyack licenses is protected by the business judgment rule. That decision was made after months of investigation by Klein and others (including Auerbach, Sachs, and Calcagni) into the question of whether or not the licenses were still valid and could be assigned to Nextel. The fact that Auerbach disagreed with Klein on the issue of the validity of the licenses is not enough to overcome the presumption of the business judgment rule. Even Sachs, the CDC's regulatory counsel, had serious doubts as to the validity of the licenses and recommended that they not be assigned to Nextel. When, as here, a director acts in reliance on the advice of counsel, his actions are shielded by the business judgment rule (*see*, Business Corporation Law § 717(a)(2); **Spinale v 10 West 66th Street Corp.**, 291 AD2d 234, 235; **Allen v Murray House Owners Corp.**, 174 AD2d 400, 404-405). The fact that Klein did not pursue other alternatives, such as a "surrender and get," does not warrant a contrary result, even if it was unwise or inexpedient not to pursue such alternatives. Moreover, there is evidence in the record that Nextel was not even interested in purchasing the Noyack licenses from CDC at that time.

The court also finds that Klein was not an interested director. There is no evidence in the record that Klein benefitted in any way from the cancellation of the ESB and Noyack licenses or that he was a director or officer of any of the defendant corporations. Moreover, Klein clearly

was not controlled by an interested director since Auerbach was the only other director of CDC. Auerbach, in effect, argues that Klein lost his independence when he conspired with Krants and the other defendants, who had an interest in acquiring the ESB and Noyack licenses. However, the court finds that the plaintiff's allegations of fraud, bad faith, and self-dealing are insufficient to overcome the presumption of the business judgment rule. As previously discussed, they suffer from evidentiary deficiencies that render them essentially speculative and conjectural. Accordingly, the court finds that the plaintiff has failed to meet his burden of showing that Klein breached his fiduciary duty to CDC.

In view of the foregoing, the plaintiff's claim that Krants, HRK, and Spectrum conspired with Klein to breach his fiduciary duty must also fail. A claim for aiding and abetting a breach of fiduciary duty first requires a breach by a fiduciary of obligations to another (*see*, **Kaufman v Cohen**, 307 AD2d 113, 125; **Higgins v NY Stock Exch., Inc.**, *supra* at 287).

The Standstill Agreement

Auerbach contends that, by cancelling the ESB and Noyack licenses, Klein breached the April 26, 2002, standstill agreement. The elements of a breach of contract cause of action are an agreement, a breach of the agreement, and damages (*see*, **Samide v Roman Catholic Diocese of Brooklyn**, 194 Misc 2d 561, 573; **Gelbman v Valleycrest Prods.**, 189 Misc 2d 403, 405). The court finds that the plaintiff cannot establish either a breach of the standstill agreement or damages.

By an order dated June 25, 2003, this court denied Klein's motion to dismiss the complaint in the 2002 action. In reaching that determination, this court stated in dicta that the April 29, 2002, letter from Klein's attorney was, at best, a conditional termination of the standstill agreement and that the record indicated the parties continued to negotiate after the deadline. Thus, the court concluded that the letter from Klein's attorney did not establish termination of the standstill agreement as a matter of law. Auerbach argues that this determination is the law of the case. However, the doctrine of law of the case does not preclude a court from reconsidering its prior decision (*see*, **Liberty Mutual Ins. Co. v Aetna Casualty & Surety Co.**, 235 AD2d 523, 525, *citing* **Foley v Roche**, 86 AD2d 887; *see also*, **Matter of Seltzer v New York State Democratic Committee**, 293 AD2d 172, 174). This court's prior determination was based on an incomplete record. The record is now fully developed, as are the parties arguments. New evidence or evidence that, although included in the prior record, was not made clear to the court demonstrates that Auerbach and Klein reached an agreement in principle prior to the deadline, but that their agreement was not reduced to writing. The letter from Klein's attorney dated April 29, 2002, clearly provided that the absence of a written agreement by the close of business on April 30, 2002, abrogated the continuing validity and effect of the standstill agreement. Under these circumstances, the court finds that the standstill agreement was terminated as a matter of law on April 30, 2002. Accordingly, Klein did not breach the standstill agreement when he cancelled the ESB and Noyack licenses on June 4 and 6, 2002, respectively.

In view of the questionable validity of the ESB and Noyack licenses, the court finds that they were of little or no value to CDC. There is evidence in the record that Nextel was not interested in acquiring the ESB licenses from CDC unless they were assignable. In the opinion of

CDC's regulatory counsel, there was insufficient certainty as to the time of their use to support their assignment. Moreover, although Auerbach seeks damages for Klein's cancellation of the Noyack licenses, there is no evidence of their value in the record. Unlike the ESB licenses, Nextel was not interested in acquiring the Noyack licenses from CDC at that time. Since the ESB and Noyack licenses were of questionable value to CDC when they were cancelled on June 4 and 6, 2002, the court finds that the plaintiff cannot establish damages with any certainty.

The plaintiff's claims that Krants, Risk and Telecom intentionally induced Klein to breach the standstill agreement fails for the same reasons and for the additional reason that there is no evidence in the record that Krants, Risk, or Telecom had any knowledge of the standstill agreement (*see*, **American Preferred Prescription v Health Mgt.**, 252 AD2d 414, 415). Moreover, agreements that are terminable at will are classified as only prospective contractual relations and cannot support a claim for tortious interference with an existing contract (**Id.** at 417, *citing* **Guard-Life Corp. v Parker Hardware Mfg. Corp.**, 50 NY2d 183, 191-192). The standstill agreement was terminable at will by either party upon written notice.

Improper interference with a contract terminable at will is actionable under the theory of tortious interference with prospective business relations (*see*, **Guard-Life Corp. v Parker Hardware Mfg. Corp.**, *supra* at 190-191; **American Preferred Prescription v Health Mgt.**, *supra* at 418; *see also*, **Mansour v Abrams**, 120 AD2d 933, 934). The plaintiff claims that Risk and Telecom tortiously interfered with CDC's prospective economic advantage. When, as here, the party claiming injury and the party charged with interference are business competitors and the interference is intended, at least in part, to advance the competing interest of the interferer, the plaintiff must demonstrate that the interferer used "wrongful means." "Wrongful means" is defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. It does not include persuasion alone, even if knowingly directed at interference with the contract (*see*, **Guard-Life Corp. v Parker Hardware Mfg. Corp.**, *supra* at 190-191). The record does not support a finding that Risk or Telecom used wrongful means to induce Klein to breach the standstill agreement, which the court has already found was not breached. Accordingly, the plaintiff's claim of tortious interference with prospective economic advantage must fail.

The Philadelphia, Selden, and Baltimore-Washington D.C. Licenses

Auerbach contends that Klein breached his fiduciary duty to CDC by failing to maintain the Selden license, by allowing it to lapse, and by effecting its transfer to a third party without compensation to CDC. Auberbach also contends that Klein breached his fiduciary duty to CDC by failing to complete applications for 19 licenses in the Baltimore-Washington D.C. area. Auerbach further contends that Klein wasted corporate assets by permitting three licenses in Philadelphia to be cancelled and acquired by Krants and others. In support thereof, Auerbach relies on the same speculation and innuendo on which he relied in support of his other claims, and his evidence suffers from the same deficiencies. For example, Auerbach argues that the timing of telephone calls between Klein, Krants, and others (without any evidence of the content of those calls) establishes that they collaborated to waste or divert corporate assets. As previously discussed, such evidence is insufficient to overcome the presumption of the business judgment

rule. Moreover, the record reflects that the Selden license was cancelled by the receiver, that the Philadelphia licenses were cancelled by Sachs when CDC was still in receivership, and that the decision not to pursue the Baltimore-Washington D.C. area licenses was also made while CDC was still in receivership.

The Airborne Transaction

The court finds that Auerbach's claims regarding this transaction, which dates back to 1997 or 1998, are time barred (*see*, CPLR 213[7]). In any event, they are the subject of one of Auerbach's counterclaims in the 1998 action, which has survived Klein's motion for summary judgment.

Conclusion

In view of the foregoing, the plaintiff cannot establish his remaining claims for waste, diversion of corporate opportunities, and a constructive trust, among other things. Accordingly, the defendants' motions are granted, and the complaint is dismissed.

HON. ELIZABETH HAZLITT EMERSON

DATED: February 15, 2008

J. S.C.