IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GREG JACOBSON, a California Citizen, Plaintiff, v. DRYSON ACCEPTANCE CORP., a Delaware Corporation, and MICHAEL DRY, a Texas Citizen, Defendants.	)	C.A. No. 17684

MEMORANDUM OPINION AND ORDER

Submitted: September 18, 2002
Decided: November 1, 2002

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LAMB, Vice Chancellor.

I.

The plaintiff sued claiming an entitlement to 20% of the shares of stock in a Delaware corporation for which he worked between 1998 and 1999. His complaint also claims that the corporation failed to repay him moneys advanced by him during the term of his employment. By memorandum opinion and order dated January 9, 2002, the court granted, in part, and denied, in part, the defendants' motion for summary judgment. The court denied summary judgment as to those counts of the complaint that alleged an entitlement to stock ownership, as well as to certain other counts that depended on a conclusion that plaintiff was a stockholder. Summary judgment was granted as to the remaining claims, including the claims for moneys owed. The court later granted reargument as to a portion of these latter claims relating to two mortgage notes totaling $240,000 that were either pledged to the plaintiff (according to him) or sold to him (according to the defendants).

In denying summary judgment, the court recognized that the evidence then of record "substantially negate[d] the existence of any understanding that [the plaintiff] would be a stockholder." Nevertheless, the court accepted the plaintiffs argument that it needed to hear the parties' live testimony before reaching any final conclusions about the facts. Similarly, the court granted the motion for reargument because certain documents not found in the summary judgment record raised

triable issues of fact about the nature of the transactions between the plaintiff and the corporation. Accordingly, trial was held May 1 through 3, 2002.

Surprisingly, at trial, the plaintiff failed to testify during direct examination about the alleged agreement to issue shares to him. He also failed to testify about the circumstances surrounding the two transactions that were the subject of the motion for reargument—instead limiting his testimony relative to those transactions to a confusing and incomplete review of the accounting treatment of the transactions on the corporation's general ledger. These striking omissions cast substantial doubt on the veracity of all of the plaintiffs claims. Moreover, on cross-examination, the plaintiff was shown to have testified falsely at his deposition as to a material issue of fact and was generally shown to be lacking in credibility. Due to this near total failure of proof at trial, the court now concludes that the plaintiff was unable to carry his burden of proof on all remaining claims.

II.

Greg Jacobson brought this action against Michael Dry, his former friend and business associate, and Dryson Acceptance Corp. ("DAC" or the "Company"), a Delaware corporation with its principal place of business in Texas. DAC was formed in early January 1998 and did business as a mortgage warehousing facility, financing the origination of mortgage loans to sell to the secondary mortgage market. Dry and Jacobson were both officers and directors of DAC from the time

of its formation, but Dry was the sole stockholder of record. Dry and Jacobson had previously been involved together in other business ventures.

A. Dry And Jacobson's Early Businesses

Dry and Jacobson formed Arlington Mortgage Investors, Inc. ("Arlington") in 1991 as a Texas corporation. The shares of Arlington's capital stock were owned equally by Dry and Jacobson. As a part of its business, Arlington bought higher interest, lower quality mortgage loans, known as "B" or "C" loans, as opposed to lower interest, lower risk "A" loans. [1] Arlington stopped buying mortgages altogether after a short while, and, thereafter, did nothing other than service the portfolio of loans it owned and collect payments on them. Arlington was a successful venture. Arlington continues to exist today and is owned 100% by Dry.

After the active phase of Arlington's existence was over, Jacobson moved to Monte Carlo, France. Dry stayed in Texas and began making investments in rental property. Dry, a former NFL football player, also purchased a sports insurance company and invested in a 30,000 square foot office building called Country Day Place. After Jacobson returned from France, he and Dry jointly formed a

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[1] Like bonds, the letter designation on a mortgage loan indicates the level of risk associated with it based on credit and property standards. "A" loans are low risk and have a lower rate of interest, while "B" and "C" loans have a higher risk of default and consequently a higher interest rate. <http://www.lenderscompete.com/faq028.htm> (Visited 8/6/02).

corporation called Athletic Marketing which, through a contract with the NFL, sold Super Bowl programs to high schools and colleges. It was Athletic Marketing which Barbara Collyar, later the office manager of DAC, joined as a secretary in 1995.

B. Alternative Mortgage

Jacobson wanted Arlington to resume the business of buying and selling "B" and "C" mortgages. Dry did not want to participate in this business due to the risks associated with it. To accommodate Jacobson's wish, Arlington and Jacobson engaged in a tax free reorganization in February 1996, the result of which was the split off to Jacobson of a newly created subsidiary corporation, named Alternative Mortgage Investments Corp., in exchange for all of Jacobson's shares in Arlington. Alternative Mortgage was capitalized by Arlington's contribution of $50,000 cash and property. As a result of this reorganization, Jacobson became the sole stockholder of Alternative Mortgage and Dry became the sole stockholder of Arlington.

c. DMFC

Jacobson and Dry re-entered the mortgage warehouse lending business together in 1997 when they formed Dryson **Mortgage Finance Corporation** ("DMFC"). Mortgage warehouse lenders fund or "warehouse" loans for the short period between the time the mortgage banker or broker originates the loan with a

customer-borrower and the time a "takeout investor" purchases the loan. DMFC was formed to participate in a 50-50 joint venture with Life Savings Bank ("Life Savings"), which was interested in developing a presence in the "B" and "C" loan business. DMFC was itself owned 50-50 by Dry and Jacobson through one or more partnerships. Under the terms of the joint venture agreement, Life Savings and DMFC split equally the profits and losses.

Jacobson approached Dry about joining him in forming DMFC, offering Dry a 50% interest in the business in exchange for paying half the modest start-up expenses. Since Life Savings was going to provide all of the needed capital, neither Jacobson nor Dry needed to fund the venture beyond the start-up costs. Jacobson and Dry formed DMFC in or around April of 1997. DMFC shared office space with Alternative. Jacobson's goal was to grow DMFC to a size where it could be sold to a larger mortgage institution willing to pay for DFMC's client base. As it happened, before DMFC had any substantial opportunity to develop its business, Life Savings notified DMFC that it would terminate the commitment to serve as DMFC's master lender by the end of 1997, in accordance with the terms of the joint venture agreement. At the peak of its success, DMFC had only $14 million in outstanding loans.

D. The Decision To Form DAC

The impending end of the joint venture with Life Savings presented a complex set of problems if DMFC was to continue in the mortgage warehouse business. It would need to identify both a substitute lender and a new source of capital, negotiate all necessary agreements, and have the new structure up and running by the end of the year. That date was significant because DMFC did not immediately notify its own customers (i.e. the mortgage brokers) about the Life Savings termination notice. In order to avoid potential lender liability to those customers, DMFC needed either to find another source of funding to allow its business to continue uninterrupted, or provide them adequate notice of its inability to do so.

Jacobson and Dry began searching for a new lender and soon began discussions with Deutsche Morgan Grenfell ("Deutsche Bank"). In or about December 1997, Deutsche Bank, through its affiliate German American Capital Corporation ("GACC"), tentatively agreed to provide a $50 million credit facility to a warehouse mortgage business to be operated by Jacobson and Dry. GACC would not agree to provide funding to DMFC but, rather, required that a new entity be formed to serve as the borrower. Ultimately, DAC was formed for this purpose. GACC also was not interested in a joint venture in which it would provide the

capital but, rather, required that the borrower deposit $1 million to $1.5 million in a custodial account to secure the lending facility.

Finding new capital was more difficult. Jacobson led Dry to believe that he had investors who were interested in providing capital for the new operation or that he could provide a substantial amount of funding himself. Sometime in December, Dry confronted Jacobson on this point, and Jacobson admitted that he was unable to front or raise any significant amount of money to fund the costs of forming DAC. Jacobson also told Dry that he had incurred a substantial amount of legal and other fees and that, if they went forward with GACC, there would be substantial additional fees to pay, including a non-usage fee payable to GACC on the unused portion of $50 million and the costs of audited financial statements. Dry testified that, in response to this news, he told Jacobson that he was prepared to walk away rather than fund the deal and take all of the risk himself.

Nevertheless, discussions continued and, by the end of December 1997, GACC agreed to do the deal if only $1 million of collateral was put up to start the business. GACC also agreed that a portion of that amount could consist of mortgages. Dry, who was confronting some serious health issues at the time, remained reluctant to commit the **necessary capital to the new venture. At trial,** Dry testified that Jacobson agreed to pay him $100,000 to defray the costs and expenses of the new arrangement as an inducement for him to provide the

necessary capital. Jacobson also reportedly assured Dry that they could sell the new company within nine months to a year. Dry described the decision to proceed, as follows:

> [Dry]: I guess I had a talk with my father and I talked it over with Greg [Jacobson]. And he said he thought he could get me out of the thing within nine months. And the lender liability issue would go to rest. He assured me that with Deutsche Bank behind us that he was confident that he could sell the company. And if I would do it, he would pay the up-front fees that he had already committed to and that I could be out of this thing in possibly less than a year.[2]

Dry's testimony is clear that Jacobson's agreement to pay the $100,000 was not part of any understanding that he would be a stockholder in the to-be-formed corporation. As he testified:

> Q. Did you ever discuss with Mr. Jacobson before the deal closed the concept that you were going to be the sole stockholder of DAC?
>
> A. He knew it. I mean, we talked about it extensively.[3]

Dry's understanding was that Jacobson would be entitled to a substantial salary and be paid additional consideration if the new corporation was sold. As Dry testified:

> Q: So what was [Jacobson's] ultimate incentive in terms of contributing cash to DAC if he wasn't going to receive stock?
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> [Dry]: He knew I wouldn't do the deal. There is no way I would commit – I mean, a million dollars [was] most of my net worth. I had

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[2] Trial Trans., Vol. II, p. 184.

[3] Trial Trans., Vol. II, p. 186.

been putting my assets in reoccurring income type vehicles, like rent houses, because of my health. My estate lawyers had told me or advised me to go along and do these type of investments. And so that's kind of what I was pursuing at the time. Then all of a sudden to take these assets, what little liquidity and mortgages I had and throw them in this deal when you could get, you know, possibly defrauded in one night was just a tough hurdle for me internally. Greg knew it . . . .

Q: Did Mr. Jacobson ever express to you that he perceived himself to have an upside if he were to come into this business and run it pursuant to the agreements you were making?

[Dry]: He just said, if the company was sold, he would want some sort of consideration for working and paying these up-front fees.

Q: And did you agree that if the company was sold he would get some sort of consideration?

[Dry]: Yes.[4]

E. DAC Is Formed With Dry As The Sole Stockholder

The Certificate of Incorporation for DAC was filed with the Delaware Secretary of State on January 2, 1998. Dry was named President, Secretary and Treasurer. Jacobson was named Vice President. The corporation was authorized to issue up to 1,000 shares of stock. That same day, the board of directors, by a unanimous written consent in lieu of meeting, authorized the issuance to Dry of 500 shares of common stock. All directors, including Jacobson, signed this document. A certificate representing 1,000 shares, dated January 2, 1998, was

[4] Trial Trans., Vol. II, pp. 187-88.

issued in the name of Michael D. Dry. The record does not contain an explanation for this discrepancy, and there is no evidence that the board of directors ever authorized the issuance **of** any additional shares to anyone.

This unanimous consent appears as an attachment to a secretary's certificate that is found among the closing documents for the transaction between DAC and GACC. That closing took place on January 5, 1998 and was attended telephonically by both Jacobson and Dry. Jacobson admits seeing the closing documents before January 5, and, his signature appears on many of them in his capacity as Vice President for both DAC and DMFC. In fact, Jacobson was the one who took the lead in dealing with the lawyers who were drafting all of the documents and agreements.

Also among the closing documents is the Contribution Agreement between Dry and DAC. According to this agreement, Dry was to transfer to DAC mortgage loans having a value in excess of $650,000 together with $350,000 in cash. In exchange, Dry was to receive all of the stock of DAC. Jacobson understood the terms of this contract at the time it was performed and did not protest that he had a right to receive stock in DAC. Indeed, Jacobson testified that he had seen the documents granting Dry 100% of DAC's stock before the closing:

> Q: [The Contribution Agreement] represents that "Concurrently with the delivery of the property, [DAC] shall deliver to transferor 100 percent of the shares of [DAC]"; correct?

[Jacobson]: Yes, sir.

Q: And the transferor is defined as Mr. Dry; correct?

[Jacobson]: Yes, sir.

Q: You saw those documents prior to the time of closing, did you not, sir?

[Jacobson]: Yes, sir.[5]

It is also clear, even from Jacobson's testimony, that he neither told the lawyers to revise the documents to reflect an agreement to issue shares to him nor registered any protest or objection to Dry's status as sole stockholder at the time of closing.

In the face of this substantial body of evidence, Jacobson asks the court to believe that he and Dry agreed that he should receive 10% of the common stock of DAC in return for the payment of $100,000. But there is simply no credible evidence to support such a conclusion. [6] Apart from his own insubstantial and uncorroborated testimony, Jacobson introduced two witnesses and one document

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[5] Trial Trans., Vol. I, pp. 92-93.

[6] The parties have stipulated in the Joint Pretrial Order that Jacobson wire transferred the $100,000 to DAC on January 5, 1998 and that Dry wired $250,000. Thus, the record is clear that of the initial $350,000 cash used to fund DAC's custodial account, $100,000 came from Jacobson. These facts alone, however, are not sufficient to support an inference or conclusion that the funds from Jacobson were intended as a contribution of capital by him. Instead, based on the complete trial record, the court is now satisfied that Jacobson's wire transfer is consistent with his agreement to pay Dry in order to induce Dry to capitalize DAC.

to support his claim. The document proves nothing.' The witnesses' testimony does not begin to satisfy Jacobson's burden of proof.

Jacobson's first witness was Walter Jones, a mortgage broker who did business with DAC. Jones met Dry and Jacobson for coffee at a conference in Chicago in January 1998 and understood them to be "partners." Jones did not, however, testify that he was ever given the impression that Jacobson owned any equity in DAC. It is unsurprising that Dry and Jacobson should refer to themselves as "partners" since they had been involved in numerous business ventures together over a number of years, including one or more partnerships.

The next witness was Stephen Andrews, Jacobson's long-time friend to whom Dry was once introduced at a hockey game as Jacobson's "business partner." Andrews also testified that Jacobson told him on more than one occasion in early 1998 that he was entitled to equity in DAC. Jacobson did not raise this topic with Dry in Andrews's presence. On balance, while there is no reason to doubt Andrews's veracity, his testimony consists of hearsay statements by

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[7] Plaintiff's Trial Exhibit 13 is the engagement letter dated, January 29, 1999, from Weaver and Tidwell, DAC's certified public accountants, relating to the work they were proposing to do in connection with the 1998 year-end audit. On the first page of the letter, Jacobson crossed through the words "partner's capital," hand wrote "shareholders equity" and initialed the change. Jacobson testified that, apart from making this change, he did nothing to draw the auditors' attention to what he now says is his claim to share ownership. There is also no evidence that the auditors ever took note of the change or understood it to signify anything more than the simple fact that DAC is a corporation, not a partnership. Finally, the letter is signed for DAC by Jacobson and there is no evidence that Dry ever saw the letter or the change.

Jacobson that lack credence due to Jacobson's failure to make the same statements to others such as the lawyers who drafted DAC's corporate documents or his fellow directors of that corporation.

Aside from Andrews's and Jones's testimony, Jacobson offered only his own incomplete version of events to support his claim to shares in DAC. As previously noted, Jacobson's direct testimony on the subject of his entitlement to shares of stock-the central issue of inquiry at trial-is weirdly truncated and incomplete. To begin with, he completely failed to discuss the terms of his supposed agreement with Dry and DAC. There is not a line of testimony about any meeting, discussion or understanding he had with Dry before DAC was incorporated or about why the directors, including Jacobson, resolved to issue shares only to Dry. He did not testify concerning his role in the preparation of the draft documents or explain his signature on them—including, most significantly, the unanimous board consent. Instead, his direct testimony on the subject was limited to a wildly implausible story about an insignificant change he made in an engagement letter he signed hiring outside auditors for DAC.[8]

On rebuttal, at the close of the trial, Jacobson did testify, without supplying any useful details, that he often spoke to Dry throughout 1998 and into 1999 of his

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[8] ***See,*** note ***7, supra.***

entitlement to stock in DAC. But when asked if he ever made such a demand in writing, he answered, as follows:

> A. No. I felt that would be damaging to our relationship. [Dry] did not take very kindly to requests in writing.
>
> Q: Did you ever advise anyone that was employed by [DAC] that you were entitled to stock certificates but hadn't received them?
>
> [Jacobson]: I don't think so. I wouldn't do something like that to [Dry].[9]

The lack of credibility of this testimony is heightened by the fact that it was given in rebuttal to Dry, who testified thoroughly and credibly about the meetings and conversations leading up to the formation of DAC. Dry denied that Jacobson ever mentioned any entitlement to shares before he left the employ of DAC:

> Q: From the time DAC was formed until the time Mr. Jacobson left DAC, did he ever ask you for stock or to issue a stock certificate?
>
> [Dry]: No.
>
> Q: And so at his deposition, if Mr. Jacobson said that he asked you almost on a daily basis, you disagree with that?
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> [Dry]: Totally."

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[9] Jacobson Dep., pp. 176.

[10] Trial Trans., Vol. II, p. 195. The fact that Collyar never heard Jacobson express his entitlement to stock is particularly noteworthy for the fact that, during most of the relevant period of time, DAC's office was housed in a single, small room in which she was able to hear all that was said by anyone.

Dry's testimony in this regard is also buttressed by that of Collyar. Collyar was present daily in DAC's offices and stated positively that Jacobson never, in her presence, asked Dry to issue stock certificates to him:

> Q: During the period that you were at DAC while Mr. Jacobson was still employed there, did you ever hear Mr. Jacobson ask Mr. Dry to issue him a stock certificate, or otherwise claim entitlement to stock in DAC?
>
> [Collyar]: No."

Sirnilarly, Ronald Sipes, DAC's comptroller, testified that in April 1999 he met with Jacobson to review the 1998 accounting for moneys received from or due to him and that Jacobson failed to mention any claim to DAC stock. Sipes testified as follows:

> Q: Did Mr. Jacobson ever contend that there should be reflected on here a $100,000 payment for capital stock that should have been issued to him?
>
> [Sipes]: He did not.
>
> Q: Did he assert in any way in that meeting that he was entitled to stock in DAC?
>
> [Sipes]: He did not.'*

Jacobson, on rebuttal, contradicted Sipes but offered no concrete evidence to support his claim:

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[11] Trial Trans., Vol. II, p. 404.

[12] Trial Trans., Vol. III, pp. 475-76.

> [Jacobson]: No such meeting occurred. I've never waived my claims. That's why we're here today or here this week. I've always believed that I've had equity. I wired the money in. I felt it was for 10 percent of the equity of DAC.[13]

Testimony that Jacobson "believed" he had equity or "felt" his payment of $100,000 was for 10% of the stock, does not begin to meet his burden of proof.

The most that can be said of Jacobson's "investment" in DAC is that, going into the transaction, he and Dry had an understanding that Jacobson would make between $200,00 and $250,000 per year in salary and bonus and would get paid a "certain percentage" if the business was sold. Dry testified to such an understanding in both his deposition and at trial.[14]

F. Country Day Place

While Jacobson was living abroad, Dry invested in a 30,000 square foot office building in Fort Worth, Texas called Country Day Place, acquiring a 67% interest in the building with a partner and an additional 22% interest individually. These interests represented the ownership of different office suites in the building. In August of 1996, Jacobson purchased half of Dry's 22% interest in the building for $75,000 in cash and began receiving one-half of the net rental income relative to that interest. Early in 1998, Jacobson surrendered that interest for reasons that

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[13] Trial Trans., Vol. II, pp. 187-88.

[14] Dry Dep., p. 165; Trial Trans., Vol. II, p. 281.

are in dispute. In his complaint, Jacobson claims that he turned that interest over to DAC in return for an additional 10% equity interest in that corporation. The defendants deny that there is any connection between Jacobson's surrender of his interest in County Day Place and the issuance of equity to him.

Surprisingly, Jacobson's direct trial testimony failed to touch on this subject. Thus, most significantly, the court was deprived of the opportunity to hear Jacobson's testimony about the oral agreement his complaint claims existed or to assess the truthfulness of that testimony. Similarly, Jacobson failed to introduce any documents reflecting either his initial purchase of the interest in Country Day Place or his later relinquishment of it. He also failed to adduce any evidence of the value of that interest either at the time he bought it or when he surrendered it. Similarly, the record contains no schedule of rents or expenses relative to Jacobson's interest.

In contrast to Jacobson, Dry did testify about his dealings with Jacobson relating to Country Day Place. According to Dry, toward the end on 1997, he learned from his accountant that the money Jacobson had used to pay for his share of Country Day Place came from a retirement account that was jointly owned by Jacobson and Dry and that, as a result, Jacobson had been receiving twice as much income from the investment as he should have. According to Dry, when he approached Jacobson about the mix-up, Jacobson asked him to deduct the money

from the portion of the rent from the building due to Jacobson over the next three years because Jacobson could not afford to pay it all back at that time.

Dry also testified that he and his partner in the 68% ownership interest sold that property to a third party investor in 1997 and that, as a result of management changes instituted by the new majority owner, monthly expenses associated with the building increased substantially, diminishing the net rental income. Dry went on to testify that, in early 1998, a few months after DAC was formed, a compressor needed to be replaced at Country Day Place and when he approached Jacobson about contributing to pay for it, Jacobson simply relinquished his stake in Country Day Place. According to Dry, Jacobson said: "Why don't you just keep it, Mike, and give me some consideration when DAC [is sold].'" There is no dispute that, since early 1998, Dry received all of the rent and paid all of the expenses relating to the 22% interest in Country Day Place.

Jacobson's only testimony relevant to the subject came in rebuttal, when he testified that he was unaware of the alleged mix-up regarding the retirement account money:

> [Jacobson]: The money came from my individual IRA rollover account.
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> . . .

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[15] Trial Trans., Vol. II, pp. 150-51.

> Q: When was the first time you heard the assertion that you bought your interest in Country Day Place with half of [Dry's] money?
>
> [Jacobson]: When Mr. Dry testified.[16]

Jacobson went on to testify that his "deal" in early 1998 relating to this property was with DAC, not with Dry personally, and that it was his express understanding that the transfer of this property to DAC entitled him to a further 10% interest in the equity of DAC:

> [Jacobson]: [T]he deal was that I would turn over my half of the building and I started receiving 20 percent of the profits shortly thereafter. I mean, the deal was, the company would pay me profits and I would get the equity straightened out when we sat down and straightened out the equity about my $1 00,000.[17]

Jacobson's claim that he contributed his one-half interest to DAC in exchange for a further 10% of DAC's equity lacks critical support in the record. Even if the court were to ignore Jacobson's failure to testify to the circumstances of this understanding, the fact remains that he cannot prove that he transferred his Country Day Place interest to DAC rather than to Dry. The only supportive evidence is found in Jacobson's rebuttal testimony where, in response to a leading question from his lawyer, he answered "correct" when asked if the "deal for the property was with DAC and not with Mr. Dry?"'* Dry's testimony is strongly and

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[16] Trial Trans., Vol. III, p. 477.

[17] Trial Trans., Vol. III, p. 478.

[18] Trial Trans., Vol. III, p. 477.

credibly to the contrary, and there is no written evidence of any kind that DAC ever held an interest in the property. Among other things, DAC's books and records fail to reflect any transaction relating to Country Day Place. Notwithstanding this lack of evidence, Jacobson's opening post-trial brief blithely asserts that "[i]t is undisputed that . . . Jacobson gave up his 50% interest in Country Day Place to DAC." The record citation given for that proposition is to Dry's trial testimony that Jacobson gave the property back to him and that, since then, Dry has received all of the rental income from it. The same assertion is repeated in the plaintiffs reply brief-this time with no citation at all. In fact, the defendants strongly dispute this assertion and there is no credible evidence on which the court could rely to conclude otherwise.

G. **Other Moneys Jacobson Alleges Are Owed Him**

In his complaint, Jacobson alleges that, between January 1998 and April 1998, he made loans to DAC totaling approximately $210,000 which have not been repaid "despite his repeated requests that DAC do so." In the Joint Pretrial Order, Jacobson listed a number of contested "issues of fact" relating to these alleged loans. In summary, he contended that he advanced DAC $240,000 through deposits to its account dated March 18, 1998 and April 20, 1998, that these advances were secured by the pledge of mortgage loans, and that DAC never repaid Jacobson these amounts. Jacobson's portion of the Joint Pretrial Order also

listed as issues of fact to be proven at trial that "[n]one of Jacobson's advances to DAC was used to purchase loans from DAC," that "Jacobson's advances were extended to DAC as a hospital line and were secured by pledges of loans (the 'Pledged Loans')," and that "DAC retained a financial interest in the Pledged Loans, or some of them."

It is undisputed that Jacobson maintained a line of credit in his own name at First Savings Bank, FSB of Arlington, Texas." It is also undisputed that a total of $240,000 was wire transferred by First Savings Bank to DAC on March 18, 1998 ($85,000) and April 20,1998 ($155,000) and that those sums represented draws on Jacobson's line of credit. These transfers were made with respect to three groups of loans referred to as Johnson, Weatherby and Camp. A customer of DAC known as N.I. Pacifica originated the Johnson and Camp group of loans. The Weatherby loans were originated by First Beneficial, another DAC customer.

The defendants' position is that the transactions at issue were not financing transactions between DAC and Jacobson, but instances in which Jacobson acquired all of DAC's interest in loans that, for one reason or another, were no longer

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[19] The record is clear that neither DAC nor Dry is party to any written agreement or guarantee with First Savings Bank. For example, Defendants' Trial Exhibit 30 is a copy of the Agreement between First Savings Bank and Jacobson, and a review of it confirms that Jacobson is the only party liable. Other documents relating to the First Savings Bank loan show that it was extended by the bank in order that Jacobson might "purchase assets on a personal basis only" (Defendants' Trial Exhibit 168) or "to allow Jacobson to purchase sub-performing notes at a discount and resell them at a profit." Defendants' Trial Exhibit 165.

permitted to "dwell" in its portfolio under the terms of DAC's arrangements with Deutsche Bank and GACC. According to the defendants, when Jacobson bought these loans, he took all of the interest in the loans held by DAC and DAC retained no liability on them to Jacobson or First Savings Bank. This position was confirmed by Collyar's testimony. She stated that the loans were transferred to Jacobson because "Greg wanted them."[20] Collyar went on to testify as follows:

> A. [Greg] wanted -- especially Weatherby. He talked about that a lot, because James McLean had a big building and a construction company and he wanted to-he thought that he could get that loan, and he wanted that loan.
>
> Q. Were you present at any conversation wherein Mr. Jacobson specifically requested of Mr. Dry that he be able to acquire any of those loans?
>
> A. Yes. That's how I knew that he wanted that one, specifically. He wanted NI Pacifica loans because Nicolas Radisay was a good guy and he thought those loans would run through his line, too.
>
> Q. And again, you were present in the office when those conversations occurred?
>
> H. Yes, sir.[21]

According to Collyar, DAC had no further interest in the notes involved in the transactions and undertook no further efforts to collect them.[22] This testimony is

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[20] Trial Trans., Vol. II, p. 401.

[21] Trial Trans., Vol. II, pp. 402-03.

[22] *Id.*

further supported by the fact DAC's financial records show the loans in question being removed from DAC's inventory of loans and do not reflect any obligation relating to those loans to either Jacobson or First Savings Bank. Jacobson did not rebut this testimony. Collyar also testified, without contradiction, that she thought it was Jacobson who handled the paperwork involved in transferring these loans from DAC to First Savings Bank and that she did not recall having any involvement in it.[23]

As was the case in connection with Country Day Place, there is a near total absence of any contemporaneous documentation of these transactions. The only documentary "proof' Jacobson can offer is evidence of the wire transfers, which merely shows that funds were sent and received. Specifically, Jacobson did not offer any evidence from First Savings Bank to support his position that the

[23] Trial Trans., Vol. II, p. 414. On rebuttal, Jacobson was asked by his own counsel: "When you would advance moneys in through your line-your hospital line-what paper did you get back from Barbara Collyar or whoever at DAC that might be responding with the corresponding take-out package . . ..?" He replied, as follows: "I didn't get any paper at all. I know First Savings Bank was forwarded the note, the assignments, certified copy of the mortgage, a copy of the preliminary title policy. But oftentimes that happened with or without my knowledge. I had previously authorized other people in the office to be able to send documents to them." It is unclear who Jacobson refers to as "other people." Moreover, this equivocal statement is hardly a denial of Collyar's testimony that Jacobson himself took care of documenting the transactions involving First Savings Bank. *Id.* at 484.

transactions were really loans to DAC.[24] Notwithstanding this absence of written evidence, Jacobson again failed to testify at trial about the fundamental elements of the alleged agreement between DAC and him relating to these transactions. There is not a line of testimony about any communication or understanding he had with Dry, Collyar or anyone else representing DAC about these "loans." Instead, he limited his testimony at trial on this claim to criticism of the way the transactions are reported on DAC's financial statements, records Sipes created long after the fact in reliance on information provided to him by, among others, Jacobson.

This approach to satisfying his burden of proof was more than a little surprising. In March and April of 1998, when the two wire transfers at issue took place, Jacobson was DAC's chief operating officer. He obviously was both in a position, and charged with a duty, to ensure that these transactions were properly documented and accounted for by DAC. Thus, the court reasonably expected to hear from Jacobson's own mouth about the circumstances surrounding these

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[24] Jacobson does point to and place substantial weight on an audit confirmation request dated May 20, 1999 from N.I. Pacifica (the originator of the Johnson, Rasmussen, and Camp loans) to DMFC. In that document, N.I. Pacifica states that its records show the existence of a contingent obligation on its part to repurchase the loans from DFMC. No response from DMFC is in the record. Jacobson argues that this document proves that he never acquired these three loans from DAC.

This and similar anecdotal evidence adduced by Jacobson at trial completely fails to satisfy his burden of proof on this issue. What is missing is direct evidence of his dealings and understandings with either DAC or his own lender, First Savings Bank.

I. The End Of Dry And Jacobson's Business Relationship

In or around December of 1998, Deutsche Bank told DAC that it would not renew its lending commitment when it expired in February 1999. In searching for a new lender for DAC, Jacobson came into contact with a California-based company that offered him a job. Jacobson told Dry about this job offer in March of 1999. Jacobson accepted the job offer and moved to California, resigning from DAC in April 1999.

Jacobson was removed as a director of DAC at a meeting of shareholders held on May 21, 1999. The DAC board then removed him as an officer of the corporation. DAC stopped funding loans in or about July or August of 1999 when the GACC line finally terminated. The last of DAC's loans were paid off in late 1999. DAC repaid all the amounts it owed Deutsche Bank, which in turn released the custodial funds it had been holding. DAC is no longer conducting business.

J. Jacobson's Credibility

At his deposition, taken before the documents evidencing the Arlington/Alternative split-off transaction were produced in discovery, Jacobson testified that the split-off never took place. While he remembered that documents to accomplish that transaction were in draft form, he was "very very certain" that

transactions and the reasons why they were not properly documented to reflect what he now contends were DAC's obligations to him.

Similarly, although Jacobson claims to have loaned this money in the first four months of 1998, it was not until July 1999, several months after he left DAC's employ, that he first suggested that DAC owed him money on account of the 1998 transactions. Given the lack of any written evidence that DAC treated these transactions as loans, Jacobson's failure to explain in court his long silence is troubling. This is especially so since there is no evidence that Jacobson ever told Sipes that the two wire transfers in question should be treated as loans, rather than sales.

Sipes testified that in April of 1999 he met with Jacobson to review schedules of advances to DAC from Jacobson and Dry. These schedules appear at Defendants' Trial Exhibit 78. The schedule of advances from Jacobson used as the basis for the discussion at this meeting has a handwritten zero, in Sipes's writing, at the bottom of the page:

> Q: The zero at the bottom of the page, that you hand wrote in, indicates what?
>
> [Sipes]: That we had repaid to [Jacobson] every amount that he had advanced in to DAC.
>
> Q: In that meeting, did you specifically confirm with Mr. Jacobson that that is correct?

> [Sipes]: I did. I asked, "Is this everything? Is there anything I missed?" And nothing was mentioned.
>
> Q: Did Mr. Jacobson in that meeting ever raise or say that he was owed money with respect to certain loans that had been. , . transferred to First Savings Bank?
>
> [Sipes]: He did not.[25]

On rebuttal, Jacobson denied that such a meeting occurred, but he did not specifically deny having seen the schedules or having reviewed them with Sipes. Jacobson also did not deny that he never raised with Sipes the issue of the First Savings Bank loans.

There is one other troubling aspect of Jacobson's claim relating to the Johnson, Weatherby and Camp loans. Although the issue was not well developed at trial, if Jacobson's $240,000 in wire transfers represented loans to DAC, then the obligation to repay those loans should have been reflected on DAC's balance sheet. Deutsche Bank and GACC were entitled to rely on DAC's disclosure of its liabilities to accurately reflect DAC's financial condition. Jacobson's claim, if true, would mean that DAC had material undisclosed liabilities. While the record reflects that GACC has since been repaid in full, the court will not lightly conclude that Jacobson and Dry engaged in transactions that could have operated as a fraud on DAC's principal creditor.

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[25] **Trial Trans., Vol. II,** p. **329.**

they had never been signed.[26] This testimony was material because it buttressed Jacobson's claim to an ownership interest in DAC since Dry used Arlington's assets to capitalize DAC. If, as Jacobson testified, the split-off never occurred, he would have had a 50% equity interest in those assets. By contrast, if the split-off had taken place, Jacobson would have had no continuing interest in Arlington's assets and, thus, could have gained no interest in DAC by the contribution of those assets to DAC.

At trial, the defendants proved that the split-off had taken place in 1996.[27] Remarkably, Jacobson did not contest that he had received all of the consideration recited in that agreement or that he and Dry had taken control of the respective assets. Instead, when asked if this evidence caused him to change his testimony, he tried to explain the misstatements in his deposition as due to a mere lack of information about whether or not Dry had fully executed the reorganization documents.

Having had the opportunity to observe Jacobson at trial and also to review his testimony on this subject, the court concludes that Jacobson's deposition

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[26] Jacobson Dep., p. 47.

[27] Defendants' Trial Exhibit 7 is a fully executed copy of the Agreement and Plan of Reorganization, by which this transaction was accomplished. Related documents, such as Jacobson's executed Stock Power and Assignment transferring his shares in Arlington back to that corporation, are identified as Defendants' Trial Exhibits 8-11.

testimony was false, probably by design, and that his trial testimony on the same subject was neither honest nor forthright. Rather than concede that his deposition testimony was wrong, either by design or by mistake, at trial Jacobson engaged in the sort of semantic games that create the strong impression of practiced mendacity.

Furthermore, as has been mentioned elsewhere in this opinion, the substance and structure of Jacobson's trial testimony are strongly suggestive of a consciousness that many of the claims advanced by him in this litigation are fabrications. There is no other apparent explanation for Jacobson's complete failure to testify about any of the oral agreements he claimed to have reached with Dry. By contrast, Dry testified about both the circumstances leading to the formation of DAC and the particulars of Jacobson's investment in Country Day Place.

Finally, on cross-examination, Jacobson conceded that he habitually uses more than one Social Security number and offered no credible explanation for this conduct. Documents in evidence show that he uses no fewer than two and as many as four different Social Security numbers. Furthermore, in this litigation, Jacobson produced a signed copy of his 1997 federal income tax return on which no Social Security number appears at all. Jacobson's explanation for this improbable

omission did not dispel the suggestion that he effaced the number before producing the document, in order to avoid revealing it.

K. Jacobson Demands Payment And Files Suit

Jacobson's complaint alleges that around July of 1999 he demanded payment from Dry for the amounts he claims are due to him. There followed a series of demands on Jacobson's part-including two letters to Dry in September 1999 and a third dated November 15, 1999—for an accounting from DAC and payment of the moneys he believed were owed to him.

On December 17, 1999, Jacobson filed this complaint, naming Dry and DAC as defendants.[28] The principal forms of relief sought in the complaint were the issuance of stock certificates representing 20% of DAC's common stock, the recovery of sums allegedly advanced to DAC, and unpaid salary. On February 11, 2000, Dry and DAC answered and counterclaimed against Jacobson for breach of fiduciary duty, fraud, breach of contract, negligence, and bad faith prosecution of this action.

[28] The complaint was in eight counts: Count I (Specific Performance against DAC); Count II (Accounting against DAC): Count III (Books and Records Demand against DAC); Count IV (Breach of Fiduciary Duty against Dry); Count V (Collection against DAC); Count VI (Conversion against DAC); Count VII (Conversion against Dry); Count VIII (Breach of Contract against DAC).

As a result of the summary judgment proceedings, Counts III, VI and VII were dismissed. In the Joint Pretrial Order, plaintiff was permitted to amend his complaint to assert a claim for rescission as an alternative to the demand for specific performance of the alleged contract to issue stock. In addition, at trial and in their post-trial briefs, the defendants abandoned all of their counterclaims except their claim of entitlement to recovery of their attorneys' fees and costs due to plaintiffs allegedly bad faith prosecution of this case.

III.

A. The Claim For Specific Performance Fails

The centerpiece of Jacobson's case is his claim that he and Dry orally agreed to two issuances of DAC shares, the first before DAC was incorporated when the two allegedly agreed to split the equity of DAC 90% for Dry and 10% for Jacobson, and the second several months later when the two allegedly agreed that Jacobson should receive another 10% in exchange for his interest in Country Day Place. Based on these alleged oral agreements, Jacobson seeks an order requiring DAC to issue to him 20% of its common stock.

These two alleged agreements confront the same legal obstacle. As a rule, oral contracts for the issuance of shares by a Delaware corporation are not enforceable by either party to the contract. This principle was recently examined

and reaffirmed by the Delaware Supreme Court in *Grimes v. Alteon Inc.*,[29] where that court stated the following:

> As this Court has stated in requiring strict adherence to statutory formality in matters relating to the issuance of capital stock, the "issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters." Delaware's statutory structure implements these policies through a "clear and easily followed legal roadmap" of statutory provisions. *This statutory scheme consistently requires board approval and a writing.*[30]

Thus, even if Jacobson had proven the existence of the oral agreements at issue, under *Grimes* he would still have no right to enforce those contracts against DAC because there were no written agreements and no board approval. For these reasons, the court will enter judgment in favor of the defendants on the Count I claim for specific enforcement.

B. Rescission Is Not Available

Although, Jacobson cannot succeed on his claim for common stock in DAC, the fact remains that he did transfer property (i.e., the $100,000 he wire transferred to DAC on January 5, 1998 and whatever interest he held in Country Day Place when that transfer occurred). If the court found that Jacobson transferred either

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[29] 804 A.2d 256 (Del. 2002).

[30] *Id.* at 260 (quoting *STAAR Surgical Co. v. Waggoner, 588* A.2d 1130, 1136 (Del. 1991) and citing *Kalageorgi v. Victor Kamkin, Inc., 750* A.2d 531, 538 (Del. Ch. 1999), *aff'd, 748* A.2d 913 (Del. 2000)) (emphasis added).

that money or that property interest in connection with an unenforceable agreement relating to the issuance of common stock by DAC, the court could award Jacobson the equitable remedy of rescission and order that DAC (or Dry) return Jacobson's property to him. As a remedy, equitable rescission seeks to "unmake" an agreement in order to return the parties to the positions they occupied before the agreement was created. [31] Certainly, rescission would be an appropriate remedy if Jacobson had paid consideration pursuant to an unenforceable contract.[32]

Rescission is not available here, however, because the evidence adduced at trial completely fails to support a finding that Dry or DAC ever agreed to issue shares of common stock to Jacobson. The two claims for shares are, in some respects, analytically different. Jacobson made the $100,000 transfer in conjunction with the thoroughly documented formation of DAC. His assertion that he was entitled to receive stock is flatly inconsistent with a variety of written

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[31] *See E.Z. Du Pont de Nemours & Co. v. HEM Research, Inc.,* 1989 WL 122053, at *3 (Del. Ch. Oct. 13, 1989) ("the remedy of equitable rescission typically requires that the court cause an instrument, document, obligation or other matter affecting plaintiff's rights to be set aside and annulled, thus restoring plaintiff to his original position and reestablishing title or recovering possession of property." (citing 3 J. Pomeroy, *Pomeroy's Equity Jurisprudence* (5th ed. 1941) § 872 at 419-20); *see also Norton v. Poplos, 443* A.2d 1 (Del. 1982); *Obara v. Moseley*, 1997 WL 70652, at *1 (Del. Jan 31, 1997); *In re MAXXAM, Inc., 659* A.2d 760 (Del. Ch. 1995); see *generally* 1 Dan B. Dobbs, *Law of Remedies,* § 4.3(7) at 618 (2d ed. 1993).

[32] For example, a court may "rescind a contract-that is, declare it invalid-and 'enter an order restoring plaintiff to his original condition by awarding money or other property of which he ha[s] been deprived."' Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery,* § 12-4[a] at 12-45 (2001) (quoting *E.Z. DuPont de Nemours & Co.,* 1989 WL 122053, at *3).

agreements and resolutions known to him at that time, all of which reflect Dry's exclusive ownership. In the circumstances, the court construes this aspect of Jacobson's claim as one seeking, first, reformation of the written contracts to reflect the alleged oral agreement, followed by rescission of the reformed contract to the extent it relates to the unenforceable agreement to issue shares to him. [33] In theory, Jacobson's second claim does not depend on the reformation of any written agreements. In fact, there are no writings at all relating to either the transfer of Jacobson's interest in Country Day Place or the alleged agreement to issue shares in exchange therefor. Thus, the second claim turns only on Jacobson's ability to prove the existence of the alleged oral agreement.[34] Notwithstanding this difference between the claims, they both fail for the same reason-none of the terms of either alleged contract was established at the trial. For this reason, rescission is unwarranted and unavailable.

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[33] Jacobson's burden at trial on this issue was subject to the clear and convincing evidence standard of proof. *Cerberus Znt 'l, Ltd. v. Apollo Mgmt., L.P., 794* A.2d 1141, 1150 (Del. 2002). ("[E]ach of the elements of a claim of reformation must be proven by clear and convincing evidence . . ."). The clear and convincing evidentiary standard is higher than mere preponderance, but lower than proof beyond a reasonable doubt. *Id.* at 115 1. To meet this burden, the evidence must produce in the mind of the fact-finder a firm belief or conviction that the allegations in question are true. See *id.*

[34] The court assumes that the burden of proof on this second aspect of Jacobson's claim was the normal preponderance of the evidence standard.

C. The Agreement

Although, there is not enough credible evidence to support a finding that Jacobson ever contracted with Dry and DAC to obtain any part of DAC's equity, the parties did nonetheless strike some bargain. Why else would Jacobson have wire transferred $100,000 to DAC? If Jacobson and Dry formed a contract whereby he would pay $100,000 to DAC in exchange for some benefit, but Jacobson did not receive the benefit he bargained for, the court could order the return of Jacobson's $100,000 based on a theory of unjust enrichment or restitution.[35]

Restitution is used to rectify an unjust enrichment.[36] Therefore, in circumstances such as these, a finding of unjust enrichment would support court-ordered restitutionary relief.[37] Unjust enrichment has been defined as "the unjust

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[35] See 1 Dan B. Dobbs, *Law of Remedies*, § 4.1(2) at 557 (2d ed. 1993) ("The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to plaintiff. Restitution rectifies unjust enrichment by forcing restoration to the plaintiff.").

[36] *See Chrysler Corp. v. Airtemp Corp., 426* A.2d 845,855 (Del. Super. 1980) (Restitution requires "a person who has been unjustly enriched at the expense of another to compensate the other party for the substance of the enrichment.") (citing Restatement of Restitution § 1 cmt. a (1937)); Restatement of Restitution § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

[37] See *Schock* v. *Nash, 732* A.2d 217,232 (Del. 1998) ("For a court to order restitution it must first find the defendant was unjustly enriched at the expense of the plaintiff'); ***Topps*** *Chewing Gum, Inc.* v. *Fleer Corp.*, 1983 WL 102621, at *2 (Del. Ch. Sept. 1, 1983) (unjust enrichment "is merely a necessary element for the doctrine of restitution and is not a separate ground for relief.").

retention of a benefit to the loss of another, or the retention of money or property of another against fundamental principles of justice or equity or good conscience."[38] Therefore, to determine if Dry or DAC was unjustly enriched at Jacobson's expense, the court must determine the substance of the bargain these parties actually struck, and whether each party performed his obligations.

Based on all of the evidence, the court concludes that the following contract was formed: In exchange for a payment of $100,000, Jacobson would be given a job at DAC earning between $200,000 and $250,000 per year in salary and bonus, and would get paid a "certain percentage" if DAC was sold while Jacobson still worked there. Clearly, Jacobson performed his part of the bargain. It is undisputed that he paid $100,000 to DAC.[39] However, it seems equally apparent that Dry and DAC performed their obligations as well. Jacobson's contribution procured Dry's provision of the necessary funding to establish DAC. Jacobson was gainfully employed by DAC for over fifteen months, until he left the Company for other employment. Jacobson was paid approximately $346,000 in compensation during his employment.[40] Finally, DAC was never sold during Jacobson's tenure, and, when he quit, he was no longer entitled to a "certain

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[38] ***Fleer Corp. v. Topps Chewing Gum, Inc., 539*** A.2d 1060, 1062 (Del. 1988) (quoting 66 Am. Jur.2d, ***Restitution and Implied Contracts*** § ***3*** (1973)).

[39] ***See*** note ***6, supra.***

[40] Def. Post Trial Br., p. 35.

percentage" of the sale price. Therefore, the bargained-for agreement between DAC and Jacobson was fully performed by both parties.[41] Thus, restitution would be inappropriate in the circumstances.

D. The Loans

Jacobson also claims that he made loans to DAC totaling $240,000, $210,000 of which has never been repaid. Jacobson has not satisfied his burden of proof with respect to this claim. Rather, the evidence, taken as a whole, leads the court to conclude that Jacobson purchased the loans from DAC and obtained all of DAC's rights in the relevant loans.

Jacobson claims DAC was obligated to repurchase these loans from him, but there is no evidence in DAC's books and records that it had any obligation to do so. In fact, DAC's financial records show the loans in question were removed from DAC's inventory of loans and do not reflect any obligation to Jacobson relating to those loans. Furthermore, if Jacobson really did make loans to DAC,

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[41] The evidence also shows that Dry performed his part of the bargain struck when Jacobson transferred his interest in Country Day Place. Jacobson was relieved of his obligation to pay increased expenses associated with Country Day Place and also of his obligation to pay increased real estate taxes. In addition, Jacobson owed Dry money for having received one-half of the rents while only having paid for one-quarter of the interest in the building, an obligation that was extinguished when Jacobson surrendered to Dry his interest in Country Day Place. Finally, Dry also agreed to pay Jacobson additional compensation should he succeed in selling DAC. But Jacobson left DAC without having found a buyer for it. Therefore, the court concludes that both parties fully performed their bargained-for obligations with respect to Country Day Place, and that Jacobson is not entitled to any additional restitutionary relief in connection with this claim.

then some liability reflecting this debt would have to appear on DAC's balance sheet. But none does.

Jacobson responds that DAC's books and records are sloppy and inaccurate, and therefore cannot be trusted. This argument comes with particular ill grace, however, since Jacobson was DAC's chief operating officer during the time period in which these loans were purportedly made. Thus, he was in a position, and had a duty, to assure that DAC's financial records were accurate. If, as Jacobson now argues, DAC's books and records were not properly maintained, he bears the lion's share of responsibility for that circumstance.

There is no doubt that DAC's books and records were, and are, in less than ideal condition. In his testimony at trial, Jacobson pointed out several examples of incomplete or odd ledger entries. Nevertheless, much of the confusion is due to the fact that, when Sipes started at DAC in June 1998, there were no financial accounting records for DAC beyond bank account statements and loan documentation. Indeed, there do not appear to have been any reliable financial reports available for DMFC either. Thus, Sipes had to review and understand over a year's worth of transactions in order to create proper financial records to account for those activities, while simultaneously keeping up with the day-to-day record keeping. According to Sipes, when he reviewed with Jacobson the status of

various transactions between DAC and him, Jacobson specifically told him that DAC had repaid all amounts owed to Jacobson. Sipes thereafter accounted for the transactions in accordance with Jacobson's representations. For these reasons, the court concludes that to the extent DAC's books and records are incomplete or ambiguous in regard to a transaction involving Jacobson, it would be error to draw any inferences therefrom in Jacobson's favor.

There also is no evidence that Jacobson ever told anybody during his employment at DAC that any of the transactions at issue during the trial were loans to DAC rather than purchases of loans from DAC by him. Jacobson had ample opportunity to testify at trial about the circumstances of these transactions and any agreement he had with anyone about their nature or treatment, yet he failed to do so, instead limiting his testimony to criticism of DAC's financial records.[42]

Based on the utter lack of evidence to support Jacobson's claim that he loaned money to DAC, the court finds that he has failed to satisfy his burden of proof on this issue.

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[42] Another example of Jacobson's failure to satisfy his burden of proof is that he failed to establish the amount of his damages from the "loans" at issue. In his brief, Jacobson claims that $210,000 remains outstanding on the $240,000 in "loans" he made to DAC. PI. Opening Post Trial Br., p. 30. The trial record, however, does not reveal how Jacobson determined that amount.

F. Defendants Are Not Entitled To Attorneys' Fees

Delaware courts, and this court specifically, follow the traditional "American Rule" by which each party bears its own fees and costs.[43] Attorneys' fees may be awarded, nevertheless, in situations where litigation is brought in bad faith or a party's bad faith conduct increased the costs of litigation.[44] For this purpose, there is no single definition for bad faith giving rise to an award of attorneys' fees. Rather, bad faith turns on the special facts of the particular case.[45] For example, it may be appropriate where a party misleads the court, alters his testimony or changes his position.[46] Similarly, if a party has "some evidence" to support his claims, may still be found to have acted in bad faith where that evidence is trivial in comparison to the evidence against him.[47]

Although a somewhat close question, the court is satisfied that the facts of this case do not merit an award of attorneys' fees. To support their argument for an award, defendants argue that all of Jacobson's claims are premised solely on alleged oral agreements. While this is true, it does not account for the fact that

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[43] *See, e.g., Div of Child Support Enforcement v. Smallwood, 526* A.2d 1353, 1355-57 (Del. Ch. 1987).

[44] *See Arbitrium v. Johnston, 705* A.2d 225,231 (Del. Ch. 1997).

[45] *See Cantor Fitzgerald L.P. v. Cantor,* 2001 WL 536911 at *4 (Del. Ch. May 11, 2001).

[46] *See Arbitrium, 705* A.2d at 235.

[47] *Id.*

there were flows of money and property transfers between Jacobson and defendants that underlie each one of Jacobson's claims.

In his first claim, Jacobson alleges he paid $100,000 in exchange for 10% of DAC's equity. There is no doubt that Jacobson transferred $100,000 to DAC. There is also no doubt that DAC eventually accounted for this transfer as if it had been made by Dry. While the court has concluded that the transfer was not made in exchange for an actual interest in stock, the absence of any written contract between Jacobson and anyone else relating to this transfer certainly gives rise to some uncertainty about why Jacobson sent the money at all. Even after trial, the court is unable to say with certainty what either Jacobson or Dry agreed to or what they thought they were agreeing to.

Next, Jacobson argued that he exchanged his interest in Country Day Place for another 10% equity stake in DAC. There is no dispute that Jacobson actually relinquished his rights in Country Day Place, although there was, once again, no writing evidencing or accompanying that transfer. Although the court finds that Jacobson transferred his property to Dry, not to DAC, there is enough ambiguity in the totality of evidence presented on this matter to conclude that Jacobson did not make a bad faith claim with respect to Country Day Place. As is true of the first claim, although no actual contract to acquire DAC stock was shown to have been

made, Dry acknowledged that he promised Jacobson some sort of shadow equity interest in DAC in return for the transfer of this property.

Specifically, Dry conceded that as part of the consideration Jacobson received for giving up his rights in Country Day Place, he would be entitled to receive "additional compensation on the sale of DAC."[48] Although this information falls far short of proving that Jacobson became entitled to an additional 10% of DAC's equity, it does show that his relinquishment of rights in Country Day Place had some connection to DAC. Thus, to say that Jacobson brought his claim with respect to Country Day Place in bad faith would be an oversimplification.

Finally, Jacobson claimed that he loaned money to DAC and that the loans have never been repaid. Again, there is a trail of money flowing from Jacobson to DAC related to these transactions and it is undisputed that Jacobson provided $240,000 to DAC. The transactions at issue were complicated financial transactions, and the contemporaneous record keeping for them was inadequate. While it is true that Jacobson was responsible for maintaining DAC's books and records during this time, the lack of any adequate documentation makes it difficult for anybody, including this court, to ascertain with assurance the actual nature of

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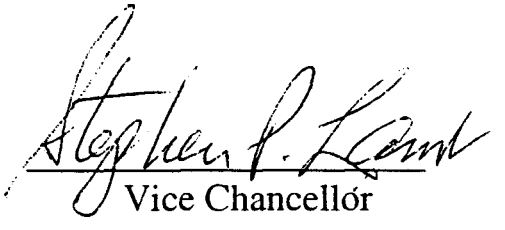
[48] Pl. Answering Post Trial Br., p. 10.

the transactions at issue. Thus, while Jacobson failed to prove his claim in regard to these transactions, the court is unable to conclude that there were not good faith grounds on which to litigate the claims he made.

For these reasons, the court will deny the defendants' request for attorneys' fees in this case.

IV.

For all the foregoing reasons, judgment will be entered in favor of the defendants and against the plaintiff. The costs of the proceeding shall be assessed against the plaintiff. **IT IS SO ORDERED.**



Vice Chancellor