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

CHRISTOPHER KOSACHUK, Plaintiff, v. HENRY E. HARPER, VIOLY McCAUSLAND, and CONTRASENA, S.A., Defendants, and LATINADVISOR.COM, INC., a Delaware Corporation, Nominal Defendant.	)	C.A. No. 17928
HENRY E. HARPER and LATINADVISOR.COM, INC., , Counterclaim-plaintiffs, v. CHRISTOPHER KOSACHUK, Counterclaimdefendant.	)	

MEMORANDUM OPINION

Submitted: February 26,2002
Decided: July 25, 2002

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LAMB, Vice Chancellor.

I. INTRODUCTION

This is an action relating to a dispute between the plaintiff Christopher Kosachuk ("Kosachuk") and the defendants Henry E. Harper ("Harper") and Violy McCausland ("McCausland")[1] regarding Kosachuk's equity percentage of the nominal defendant LatinAdvisor Holdings, Inc. ("LatinAdvisor"), which was previously named LatinAdvisor .com, Inc. Kosachuk alleges that, among other things, Harper breached his fiduciary duty by fraudulently inducing him to sign a Stockholders Agreement which was later used to purchase 95 % of Kosachuk's shares (the "Settlement Agreement").[2] Kosachuk further alleges that McCausland also breached her fiduciary duty and participated in the fraud with respect to the signing of the Stockholders Agreement.

In addition to the above claims, Kosachuk maintains that Harper is liable for expenditures, such as laptop computer leases and charge card purchases, that were personally guaranteed by Kosachuk, as well as any personal loans made to Harper by Kosachuk. Kosachuk also seeks an

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[1] McCausland is Harper's mother.

[2] Kosachuk's shares were eventually returned to him, but by then his ownership had been diluted to practically nothing.

award of his legal fees and expenses. The defendants counterclaim that Kosachuk used LatinAdvisor's funds for personal expenses and that Kosachuk forged Harper's signature on checks to withdraw funds from Harper's personal checking account.

The court concludes, after trial and post-trial briefing, that Harper was not acting as a fiduciary when he obtained Kosachuk's signature on the Stockholders Agreement and, thus, could not breach any fiduciary duty in that connection. With respect to the claim of fraud, regardless of Harper's alleged misrepresentations regarding the Stockholders Agreement, Kosachuk has not succeeded in demonstrating either justifiable reliance or actual harm, and, thus, his claim fails. Similarly, his claims for breach of duty and fraud against McCausland also fail.

In addition, the court finds that Harper's actions did not rise to a level that warrants the award of any legal fees, but it does find that Harper is responsible for all personal charges which he made using Kosachuk's American Express account, as well as any personal loans made to him by Kosachuk. Finally, with regard to Harper's counterclaims, the court finds that Kosachuk may have abused his financial responsibilities at LatinAdvisor, but his behavior is not legally actionable.

il. FACTUAL BACKGROUND

A. Founding of LatinAdvisor

On or about October 1, 1999, Harper asked Kosachuk to join him as a partner in a new intemet business. Kosachuk accepted the offer and the two agreed to co-found LatinAdvisor. Immediately thereafter, Harper and Kosachuk began work on a formal business plan, which included developing a financial model for their business and creating presentations for potential investors. During October, they also traveled to Miami, where they leased a house which functioned both as their residence and their office space.

LatinAdvisor was incorporated in the State of Delaware on November 1, 1999, and the initial directors were Harper, Kosachuk, and McCausland. Harper and Kosachuk then entered into an agreement with Tradelink, Inc. ("Tradelink") to develop LatinAdvisor's website in exchange for transferring 4% of the equity of LatinAdvisor, as well as cash payments, to Contrasena S.A. ("Contrasena").[3] The certificate of

[3] Tradelink and Contrasena are related companies which are both controlled by Rodolfo Moseres ('Moseres"), who is Harper's uncle. Contrasena is the company that became a stockholder of LatinAdvisor.

incorporation authorized 1,000 shares of common stock and the board of directors issued 100 shares, with the ownership structure of LatinAdvisor as follows:

Henry Harper	48 shares
Christopher Kosachuk	48 shares
Contrasena	4 shares

Harper and Kosachuk then worked to sell a series of LatinAdvisor subordinated convertible promissory notes in a round of "angel" investing.[4] The investors included company employees, investment bankers, and money managers, as well as friends and family. Depending on whether LatinAdvisor could raise $2,000,000 in equity financing by selling Series A Preferred Stock to venture capitalists by June 1, 2000, the notes were convertible on favorable terms either into its Series A Preferred Stock if it did or its Common Stock if it did not. LatinAdvisor succeeded in raising more than $5,800,000 by selling notes to more than 100 people, but it never closed on the contemplated Series A Preferred equity financing.[5]

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[4] Tr. at 32, 323.

[5] Tr. at 83, 370.

Harper and Kosachuk first talked about an agreement to restrict their stock in the fall of 1999, but neglected to have a draft prepared at that time.[6] In early February 2000, McCausland told Harper that LatinAdvisor should have such an agreement. She spoke to Harper because Pedro Luis Durán Gomez ("Durán"), a member of the board of advisors of McCausland's investment bank, had told her that, without a stockholder agreement, LatinAdvisor would have difficulty getting venture capitalists to invest. Harper, who had harbored concerns about Kosachuk's work ethic since they moved to Miami,[7] asked Wachtell, Lipton, Rosen & Katz ("WLRK"), McCausland's attorneys, to prepare a stockholders' agreement containing customary restrictions.[8] Harper did not tell Kosachuk that he was working with WLRK on such an agreement.

Harper told WLRK that he needed the agreement quickly and it was completed within four days.[9] In one e-mail, dated Friday, February 4,

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[6] Tr. at 140-l.

[7] Harper testified to various general misgivings regarding Kosachuk's job performance, including lack of motivation, constant need of supervision, and too much socializing. Tr. at 330. Harper also testified that current and prospective investors were concerned about Kosachuk's level of responsibility and his unsuccessful sales pitches. Tr. at 334-6.

[8] Tr. at 147-8.

[9] Tr. at 166. Although Harper asked WLRK to rush the Stockholders Agreement, he did not give it to Kosachuk for almost a month.

2000, Harper expressed his urgency by asking that the agreement be completed on Saturday night or 6:00 a.m. Sunday. In the same e-mail, he refers to "CK leaving" [10] and describes the equity as going "back to the company." [11] Harper also writes that he alone would make any decisions about disbursing any equity for LatinAdvisor.

On March 2, 2000, in Miami, Harper presented Kosachuk with the Stockholders Agreement for the first time. Kosachuk went to his room to review the document for at least a few minutes. [12] Harper then entered Kosachuk's room and expressed an urgent need for the agreement to be signed immediately because he needed to give it to Moseres, who was leaving for South America. Kosachuk signed it and gave it to Harper. In his testimony, Kosachuk asserts that he does not know whether or not he read the critical paragraph, [13] which is the first paragraph on page one of the Stockholders Agreement and reads as follows:

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[10] Harper admits in his testimony that "CK" stands for Chris Kosachuk. Tr. at 167.

[11] *Id.*

[12] There is a disagreement between Harper and Kosachuk regarding the length of time that Kosachuk reviewed the agreement. Kosachuk says he spent only two minutes reviewing it, while Harper says that he spent approximately twenty minutes. The discrepancy regarding the length of time is not a factor in the court's decision.

[13] Tr. at 89.

> 1. The Employees agree that upon termination of employment of either of the Employees with the Company for any reason whatsoever (including without limitation, resignation, termination by the Company with or without cause, death or disability), the other Employee whose employment has not been terminated shall have the right exercisable within 30 days of such termination to elect to purchase, all or a portion of the Callable Shares (as defined below) of the Employee whose employment has been terminated (the "Terminated Employee") at a price of $10 per share . . . .[14]

Kosachuk also testified that he trusted Harper because Harper was his business partner.[15] Kosachuk did not testify about any of Harper's statements except the phrase that "you need to sign it."[16] In contrast, Harper testified that Kosachuk expressed some concern about the amount

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[14] Stockholder Agreement ¶ 1. ("The "Callable Shares" shall mean a number of shares of Common Stock and other securities of the Company equal to the percentage of all shares of Common Stock and other securities of the Company owned by the Terminated Employee on the date of termination of his employment and corresponding to the number of full calendar months of employment of the Terminated Employee with the Company prior to his termination (the "Employment Term") as set forth below[.]"). The Stockholder Agreement also includes a table detailing the pro rata percentage of the Terminated Employee's Common Stock which the other Employee may purchase. Id. If the employee was terminated within three months, the percentage allowed was 95 %. *Id.* This percentage declined every three months until twenty-four months, at which time the other Employee would have no right to purchase the shares. *Id.*

[15] Tr. at 87.

[16] Tr. at 51, 88. In comparison to his testimony, Kosachuk alleged in his complaint that Harper told hi "just sign it now and don't worry about it." Complaint at 9. Also, in his post-trial brief, Kosachuk does not cite his own testimony, instead relying on Harper's testimony that he, Kosachuk, had "nothing to be concerned about." Plaintiffs Post-Trial Brief at 8.

of leverage that the Stockholders Agreement would create and that he, Harper, replied that "[a]s long as we're doing what we need to do, we'll be fine.""

After Kosachuk signed the Stockholders Agreement, Harper went on a three-day vacation to Disney World and then traveled to New York with other employees. On both trips, Harper used a corporate American Express card to charge items that were of a personal nature, including $276 for clothes in Florida'* and $1320 for luggage in New York." This corporate card, along with other employees' corporate cards, had been personally guaranteed by Kosachuk because he had good credit and LatinAdvisor did not. Although he knew that Kosachuk had guaranteed the cards, Harper viewed them as corporate cards that would be reimbursed by LatinAdvisor.[20] He never considered them Kosachuk's personal cards .[21]

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[17] Tr. at 176.

[18] Tr. at 184.

[19] Tr. at 186. See ***also*** Exhibit 142.

[20] Tr. at 187. Kosachuk managed the office for LatinAdvisor. He was in charge of the bookkeeping and expense reports. While Kosachuk was employed at LatinAdvisor, Harper was not responsible for reimbursements.

[21] Harper admits that he used Kosachuk's American Express account to buy personal items, and he also admits that neither he nor LatinAdvisor paid Kosachuk back. Tr. at 135.

Kosachuk also personally guaranteed LatinAdvisor's leases on eight Dell laptop computers. In addition, he had lent Harper money for various personal expenses, including the purchase of a Jet-Ski? The total amount that Kosachuk claims he is owed is approximately $150,000, which includes $104,490.93 for his American Express account, $33,300.03 for the eight laptops, and $11,072.38 that he personally loaned to Harper.[23]

B. The Dispute

Kosachuk traveled to New York on March 14, 2000, expecting to meet with Harper and Durán regarding Durán's possible investment in LatinAdvisor. When he arrived, he was instead brought into a meeting with Harper and several of Harper's friends at which Harper told him that it was best for the shareholders that he be terminated. Harper then handed Kosachuk a package of documents that included a stockholders' consent and a directors' consent, giving effect to his termination. The stockholders' consent, which was signed by Harper and a Contrasena

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[22] Harper's Jet-Ski was later stolen. In his post-trial brief, Harper implies that Kosachuk was responsible, calling the disappearance of the Jet-Ski the "[p]laintiff's self-help remedy." Defendants' Post-Trial Brief at 13.

[23] Kosachuk often refers to the American Express bill and the personal loan together, claiming that Harper owes hi a total of approximately $116,000 for all expenditures excluding the laptop computers. Additionally, the $7,257.16 for the Jet-Ski is included in the $11,072.38 personal loan. Tr. at 120.

representative, removed Kosachuk as a director. The directors' consent, which was signed by Harper and McCausland, removed Kosachuk from att positions as an officer and an employee. Pursuant to the Stockholders Agreement, Harper then had the right to purchase 95% of Kosachuk's shares within the next thirty days for $10 per share, or a total of $456.

The package of documents given to Kosachuk also included a Termination Agreement and a General Release. The Termination Agreement provided that Kosachuk would resign from LatinAdvisor, transfer all of his shares to the company, and sign the General Release. In return, LatinAdvisor would pay Kosachuk $50,000 within fifteen days of his resignation and an additional $50,000 within four months. Kosachuk did not sign the Termination Agreement. On March 23, 2000, Harper proceeded to enforce the Stockholders Agreement by delivering a written notice to Kosachuk regarding the purchase of 95% of Kosachuk's shares and causing $456 to be deposited into Kosachuk's bank account.[24] Kosachuk returned the money and initiated this action on March 27, 2000.

[24] Kosachuk's shares were eventually returned to hi on July 27, 2000, but by that time, his ownership interest had already been diluted.

Harper, on behalf' of LatinAdvisor, continued trying to complete the Series A financing before the June 1 conversion deadline. Although he managed **to** sell more notes, he was unable to sell any equity with the deadline fast approaching. On May 3 1, 2000, to accommodate the conversion feature of the notes, LatinAdvisor increased the number of authorized shares of Common Stock from 1,000 to 80,000,000 and also authorized 20,000,000 shares of Preferred Stock. LatinAdvisor did not close on the required equity financing by the June 1 deadline and a large number of the notes were converted into Common Stock at $ SO per share, causing massive dilution of the existing common equity. As a result, Kosachuk's purported ownership interest was reduced from 48% to .001 % .

III. ANALYSIS

A. Breach of Fiduciary Duty

Kosachuk argues that Harper owed him a duty in connection with the preparation and execution of the Stockholders Agreement because they were "co-venturers" and "[t]he relationship of joint adventurers is fiduciary in character. "[25] But such joint venturers must have a contractual

[25] *J. Leo Johnson, Inc. v. Carmer*, 156 A.2d 499, 502 (Del. 1959).

relationship.[26] "State law claims of . . . breach of fiduciary relationship must subsist on the actuality of a specific legal relationship, not in its potential. "[27] Here, Kosachuk and Harper had no contractual relationship and were therefore not joint venturers. They were originally co-founders, but for the purposes of signing the Stockholders Agreement, they were simply shareholders, each owning 48% of the common equity. When acting as stockholders, they owed each other no fiduciary duty.

An alternative claim of fiduciary duty raised by Kosachuk is based on Harper's supposed control of LatinAdvisor. "[A] shareholder owes a fiduciary duty only if it owns a majority interest in or ***exercises control*** over the business affairs of the corporation."[28] Harper owned only 48% of LatinAdvisor and therefore was not a majority shareholder. Kosachuk would, however, be able to claim that Harper owed him a fiduciary duty if he could prove that Harper had control over LatinAdvisor and, in fact, used such control to obtain Kosachuk's signature on the agreement.

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[26] *Id.*

[27] *Gilbert v. El Paso Co.*, *490* A.2d 1050, 1056 (Del. Ch. 1984), *aff'd*, *575* A.2d 1131 (Del. 1990).

[28] *Kahn v. Lynch Communication Sys., Inc.*, *638* A.2d 1110, 1113 (Del. 1994) (emphasis in original).

Whether or not Harper might be regarded as a controlling stockholder, [29] nothing in the record demonstrates that Harper exercised control over the corporation to gain Kosachuk's signature on the Stockholders Agreement. Moreover, Kosachuk has not denied reading the paragraph at issue[30] and he admits to having enough time, by himself, to read enough of the contract to understand the seriousness of its nature.[31] Kosachuk had the burden to prove that Harper exercised that control in order to pressure him to sign the agreement, but Kosachuk, has not met this burden.

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[29] Although Harper, by himself, did not have explicit control over LatinAdvisor, his family connections raise two concerns for the court. The first concern is that Harper and his mother constitute a controlling two-thirds majority of the board of directors. "[M]ost parents would find it highly difficult, if not impossible, to maintain a completely neutral, disinterested position on an issue, where his or her own child would benefit substantially if the parent decides the issue in a certain way." *Chaffin* v. GNI Group, *Inc.*, C.A. No. 16211-NC, 1999 WL 721569 at *5, Jacobs, V.C. (Del. Ch. Sept. 3, 1999). The second concern is that Harper's uncle, Moseres, controls Contrasena, which owns 4% of LatinAdvisor and could align itself with Harper to constitute a majority. Based on his family connections, therefore, Harper could possibly exercise control over both the board of directors and the company itself.

[30] His testimony is simply that he cannot remember if he read it or not. He makes no explicit denial. Tr. at 89.

[31] The court has found that, as a matter of fact, two minutes would have been enough for someone with Kosachuk's experience to appreciate the seriousness of the agreement. Kosachuk's testimony that he was pressured or under duress is not credible and is explicitly rejected.

Finally, the fact that Harper and Kosachuk were both directors does not imply that Harper was acting as a fiduciary when he met with Kosachuk in Miami and obtained Kosachuk's signature on the Stockholders Agreement. "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[32] "Moreover, one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy."[33] The Stockholders Agreement, however, is just what its title suggests-an agreement among stockholders. Although Harper may have simultaneously been a director of LatinAdvisor when he signed the Stockholders Agreement, he signed it as a stockholder. Similarly, he was acting as a stockholder when he obtained Kosachuk's signature.

Harper and Kosachuk were not joint venturers. They were merely minority stockholders with equal equity. Harper's family connections with the board of directors of LatinAdvisor and the owners of Contrasena may be evidence of his (or their) ability to control LatinAdvisor, but Kosachuk

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[32] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

[33] Id. at 711.

has not shown that Harper (or anyone else) exercised any such control in securing his signature on the Stockholders Agreement. Additionally, with respect to the preparation and execution the Stockholders Agreement, Harper was not acting as a director. For all these reasons, the record does not support the conclusion that Harper was acting as Kosachuk's fiduciary in signing or obtaining Kosachuk's signature on the Stockholders Agreement.

B. Fraud

Kosachuk argues, alternatively, that Harper fraudulently induced him to sign the Stockholders Agreement, and, as a result, he suffered damages. Kosachuk contends that Harper's fraudulent actions consisted of a three-step process, as follows: first, Harper misrepresented the true purpose of the Stockholders Agreement, which was to dilute Kosachuk's equity; second, Harper made false statements to Kosachuk regarding the Stockholders Agreement, knowing them to be false, or with reckless indifference to the truth; and third, Harper intended to (and did) induce Kosachuk to sign the Stockholders Agreement in reliance on those statements.

In order to succeed in an allegation of' common law fraud, a plaintiff must demonstrate material misrepresentation, justifiable reliance, and actual damages. [34] Representations are only actionable under common law fraud if they are false at the time made.[35] The record clearly shows that Harper contemplated terminating Kosachuk before March 2, but the record contains no proof that Harper had determined to do so. Harper had the Stockholders Agreement drawn up without Kosachuk's knowledge. And he caused that agreement to contain a three-month vesting provision,% which is suggestive of an intent to fire Kosachuk before June 1 .[37] A further indication of Harper's intent is found in the e-mail sent to his lawyer in which he refers to "CK leaving" as if it were a certainty. The combination of these factors are enough to prove that Harper was seriously contemplating firing Kosachuk all along. Nevertheless, the record does not prove that Harper or LatinAdvisor had made a final decision to do so

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[34] ***Sanders v. Devine,*** C.A. No. 14679, 1997 WL 599539, *7 n. 10, Lamb, V.C. (Del. Ch. Sept. 24, 1997).

[35] ***Berdel, Inc. v. Berman Real Estate Mgmt., Inc.,*** C.A. No. 13579, 1997 WL 793088, *8-9, Jacobs, V.C. (Del. Ch. Dec. 15, 1997).

[36] Stockholders Agreement ¶ 1.

[37] Since there were only two employees who owned stock, Harper and Kosachuk, and Harper had the agreement drawn up, the presumption is that Kosachuk would be the one fired by June 1.

before March 2. On the contrary, Harper testified that he continued to look for an alternate solution up to the last minute.

During the trial, Kosachuk did not testify that Harper made any representations whatsoever during the signing of the Stockholders Agreement. Kosachuk testified simply that "[Harper] was [his] business partner and [he] trusted him."[38] The only statement that Kosachuk testified to hearing was Harper's request, which may have been insistent, that Kosachuk sign the agreement. Kosachuk never testified that he heard Harper's statement that "[a]s long as we are doing what we need to do, we'll be fine."

Evidence of Harper's statement was elicited during Harper's testimony. Kosachuk testified that he simply relied on the fact that Harper handed him the agreement-not that he heard and relied on Harper's reassurances. [39] Based on the absence of testimony by Kosachuk that Harper made ***any*** representations regarding Kosachuk's future employment at LatinAdvisor, and the equivocal nature of the statement that Harper says

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[38] Tr. at 87.

[39] Tr. at 90. Kosachuk's only allegation that Harper reassured him was in his complaint. Complaint at 9.

he made, the court is unable to determine whether such alleged representations could be categorized as material misrepresentations.

Nevertheless, even if he had heard Harper's bland reassurances, Kosachuk has not proven reasonable reliance on them. One of Kosachuk's main job functions was to execute contracts for LatinAdvisor. He had signed numerous contracts for LatinAdvisor, many without the advice of counsel. Kosachuk testified that it was his practice to read and understand these contracts before executing them. Regardless of whether Kosachuk had two or twenty minutes to read the agreement, if he read it at all, he must have read the first paragraph. 'Given that the substance of the claim pertains to the *first* paragraph of the Stockholders Agreement, any reasonable person would have immediately comprehended the seriousness of the agreement. No doubt Kosachuk did, as well? Moreover, Kosachuk had an obligation to read and understand the Stockholders

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[40] Although not alleged in hi complaint, Kosachuk suggests in his testimony that he signed the Stockholder Agreement under duress. This assertion that he was somehow pressured into signing the agreement before properly reviewing is not credible. Kosachuk's testimony that he simply signed the agreement because he trusted Harper is directly at odds with his assertions that, contemporaneously, Harper was insistent and that Kosachuk felt under duress. Any reasonable person with Kosachuk's experience would question the need to immediately sign such an important document without reading it. If Kosachuk had trusted Harper, the circumstances which he describes would seriously call that trust into question.

Agreement. He cannot justify its avoidance by claiming that he did not read it. "[A] party's failure to read a contract [cannot] justify its avoidance."[41] Similarly, the claim that he simply trusted Harper cannot constitute reasonable reliance for someone in Kosachuk's position.

Finally, Kosachuk has not proven damages resulting from Harper's alleged fraud in obtaining Kosachuk's signature on the Stockholders Agreement. To state the matter simply, Kosachuk failed to prove that his forty-eight shares of LatinAdvisor common stock had *any* value either at the time he was fired, or at the time Harper purported to acquire those shares pursuant to the Stockholders Agreement, or since. Kosachuk suggests various methods for valuing his shares,[42] but none of them provide any reasonable basis to conclude that Kosachuk's shares had any substantial value. Instead, the record fully supports that conclusion that no

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[41] ***Graham v. State Farm Mut.*** *Auto. Ins. Co.*, *565* A.2d 908,913 (Del. 1989).

[42] Kosachuk offers three possible valuation methods, with values ranging from $100,000 to $2,435,364, in his post-trial brief. First, he valued his equity based on the Termination Agreement. Kosachuk maintains the offer was either a) $100,000 for his forty-eight shares or b) $100,000 for 5 % of his forty-eight shares, which would be a total valuation of $2,000,000. Second, he valued his equity based on a fully diluted basis after conversion. Since LatinAdvisor issued shares worth $1,082,464 at the time of conversion, Kosachuk claims that hi 48% would be worth $5 19,583. Thii, he valued his equity based on LatinAdvisor's negotiations with Durán. By offering Durán 1,014,735 shares of common stock at $.25 per share, Kosachuk argues, the defendants valued the entire company at $5,073,675 and therefore Kosachuk's 48 % would be worth approximately $2,435,364. Plaintiffs Post-Trial Brief at 12-13.

reasonable person would have been willing to pay Kosachuk more than a nominal amount to buy those shares at the time he was fired, or at any time thereafter. Among other reasons, this is so because Kosachuk's forty-eight shares represented a minority position in a corporation with no customers, no revenue and no operating website. In addition, the shares were unregistered and ineligible for trading on any market. Finally, as of the time Kosachuk was fired, the company had no reasonable prospects for raising the substantial equity financing needed to prevent the massive dilution of the common stock anticipated to occur on June 1, 2000.

The court recognizes that, in March of 2000, the parties to this dispute all acted as if Kosachuk's shares were valuable. It is also doubtless true that financial markets in March of 2000 placed value-often at levels that soon thereafter appeared ridiculous-on shares in similar enterprises that had succeeded in developing a public trading market for their shares. Nevertheless, neither of these "facts" suffices to prove that Kosachuk was injured or the amount of such injury. However valuable Kosachuk and Harper may have thought their shares were going to be, the inescapable facts are that LatinAdvisor was living on borrowed time and borrowed money and that a minority position in its common equity was more or less

worthless. Taken as a whole. the evidence strongly suggests that, if Kosachuk had never signed the Stockholders Agreement, he would have been unable to sell his stock between March 2000 and June 2000 and, instead, would have suffered massive dilution and, eventually, would have lost everything along with every other investor in LatinAdvisor.[43] The only credible harm that occurred to Kosachuk is the loss of the $100,000 offer, but he brought that on himself? He could have accepted that offer in March 2000. Any harm that occurred due to Kosachuk's refusal of the $100,000 offer was not caused by Harper.

For. all these reasons, the court concludes that, regardless of Harper's actual statements to him, Kosachuk understood the nature of the document he was asked to sign and did not rely on any actionable misstatements of fact before signing it. Additionally, the complete absence

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[43] Actually, an argument could be made that this scenario is what actually happened because Kosachuk did return LatinAdvisor's $456 payment and his stock was eventually returned to hi in July 2000. Although Kosachuk testified that hi stock remains "very valuable," the only value that the court could ascertain is the value in allowing him to continue thii lawsuit. As an investment, the stock is worthless. At the time of Kosachuk's termination, LatinAdvisor had no customers, no revenue, no website, and no investors.

[44] Although he originally turned down LatinAdvisor's offer, Kosachuk testified at trial that he would accept $100,000 plus interest for hi stock today. Tr. at 371.

of proof' regarding the actual harm suffered by Kosachuk is fatal to his claim of fraud.

c. McCausland

Based on the above analysis, Kosachuk's claims against McCausland for breach of fiduciary duty and fraud must also fail. McCausland owed no fiduciary duty to Kosachuk with regard to the Stockholders Agreement because the agreement was, in relevant parts, between Harper, Kosachuk, and Contrasena, all acting in their capacity as stockholders. With respect to the claim of fraud, McCausland is similarly not implicated because she was not present at the signing of the Stockholders Agreement and was not shown to have had any involvement in the matter.

D. Attorneys' Fees and Expenses

An award to Kosachuk of any legal fees or expenses is not warranted. "Although this Court has discretion to award attorneys' and expert witness fees, tinder the 'American Rule' courts do not award attorneys' fees to a prevailing party absent some special circumstance. "[45] One of the four recognized special circumstances is referred to as the "bad

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[45] *Arbitrium (Cayman Islands) Handels A. G. v. Johnston, 705* A.2d 225.23 1 (Del. Ch. 1997), *aff'd, 720* A.2d 542 (Del. 1998).

faith exception."[46] "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims."[47] Such a finding of bad faith is subject to a clear evidence standard.[48] However, "[t]he bad faith exception does not apply to conduct that gives rise to the substantive claim itself."[49]

Kosachuk has not proven that the defendants' behavior in this litigation rises to the level of bad faith. In fact, Kosachuk's allegations are focused on actions which have no relevance to the expenditure of legal fees. As purported evidence of bad faith, Kosachuk cites Harper's use of the American Express corporate card, LatinAdvisor's continued operating expenditures, and the unproven allegation that Harper "allowed" employees to walk off with the laptop computers. These actions all relate to the substantive claim, not the litigation. Kosachuk has failed to demonstrate any bad faith on the defendants' part with regard to the litigation itself.

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[46] *Id.*

[47] *Johnston v. Arbitrium (Cayman Islands) Handels A.G.*, *720* A.2d 542,546 (Del. 1998).

[48] *Arbitrium*, *705* A.2d at 232.

Indeed, the court pointedly asked Kosachuk to consider the viability of litigation after if became apparent that LatinAdvisor had failed, resulting in a complete loss for all investors. Rather than withdraw the case or narrow the issues to ones having some viability, Kosachuk persisted in litigating his complaint, and his counsel went so far as to inform the defendants that "[Kosachuk] would just assume [sic] proceed with the litigation'against the individual defendants, even if it presents little hope of any significant recovery. "[50] This stubborn persistence in litigating worthless claims is simply not stuff of which a fee award is made.

The record contains no proof that the defendants engaged in bad faith in this litigation. Therefore, the court finds no reason to award any attorney's fees or expenses to Kosachuk?[51]

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[49] *Johnston, 720* A.2d at 546.

[50] Letter from Peter J. Walsh Jr., Esq., Potter Anderson & Corroon, to Eric M. Roth, Esq., Wachtell, Lipton, Rosen & Katz (September 18, 2000).

[51] In the Joint Pretrial Order, the defendants sought a similar award for attorneys' fees and costs, but they sensibly did not pursue the award during the trial or in their post-trial brief, thereby waiving their claim.

IL Personal Charges & Loans

Harper should reimburse Kosachuk for any non-company purchases charged by him to Kosachuk's American Express account, as well as other expenditures for which Kosachuk personally loaned him the money. Harper admits that he used the card (and loans from Kosachuk) to purchase personal items that were unrelated to the company business. These items include the Jet-Ski ($7,257.16), clothing ($256), and luggage ($1,320). Although he testified that he thought of the corporate cards as not belonging to Kosachuk, Harper knew that Kosachuk had personally guaranteed them.

However, any expenses that are related to the operation of LatinAdvisor, like the laptop leases, are not Harper's responsibility personally. The fact that certain employees may have taken the laptops, along with desks and chairs and other tangible company property does not obligate Harper to Kosachuk. For those expenditures, Kosachuk must pursue LatinAdvisor or the other employees. Therefore, Harper is liable

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to Kosachuk for any personal expenses, regardless of whether he paid for them with the corporate card or a personal loan.[52]

F. Counterclaims

I now turn to the counterclaims asserted by defendants against plaintiff. Harper alleges that Kosachuk cheated on his expense reports and signed Harper's personal checks without permission. These claims appear to the court to be mere differences of opinion which would not have been pursued in a separate litigation if Kosachuk had not sued Harper. Kosachuk does not deny the actual events.[53] He admits to recording groceries as office supplies,[54] he admits to billing LatinAdvisor for the purchase of pool furniture,[55] and he admits to signing Harper's personal checks? But Kosachuk maintains that he was acting with Harper's implicit authorization and in furtherance of LatinAdvisor's business.

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[52] The court has reviewed Exhibits 18 and 142 and finds the following: Kosachuk's personal loans to Harper amount to $11,072.38 and Harper's personal charges on the corporate cards amount to $11,153.74. Unless Kosachuk can point to other evidence, the total amount owed by Harper to Kosachuk, before interest and late fees, is $22,226.12.

[53] Tr. at 112-9. However, Kosachuk never admits to the conversion of the Jet-Ski and Harper has offered no evidence that Kosachuk was responsible for its theft. The fact that it was stolen while Kosachuk was at home is not proof that he took it.

[54] Tr. at 113.

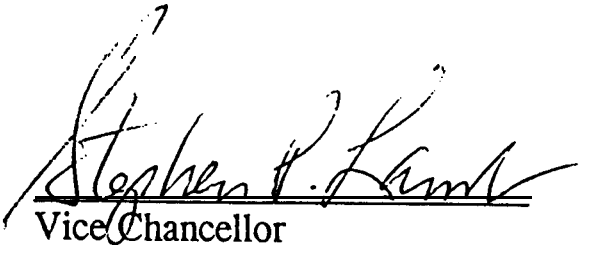
[55] *Id.*

[56] Tr. at 118.

Harper may not have specifically approved Kosachuk's actions, but he did give Kosachuk the authority to handle LatinAdvisor's expenses. In the circumstances, the counterclaim will be dismissed.

IV. CONCLUSION

For all the foregoing reasons, judgment will be entered in favor of the defendants on Counts I, II, and VIII of the Complaint. Judgment will be entered in favor of the plaintiff on Count IX for all personal charges on the corporate American Express card as well as any personal loans from Kosachuk to Harper, plus prejudgment interest at the legal rate and any late fees that may have been incurred. The counterclaim will be dismissed. Counsel are directed to confer and submit an appropriate form of order by August 9, 2002.



Vice Chancellor